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## *United States v. Windsor*, Marriage, and the Dangers of Discernment

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In June 2013, the U.S. Supreme Court held unconstitutional section 3 of the so-called Defense of Marriage Act (“DOMA”) in the landmark case *United States v. Windsor*.<sup>1</sup> Section 3 restricted recognition of marriages for federal law purposes to those between a man and a woman, regardless of whether a same-sex couple was lawfully married by a state or other jurisdiction.<sup>2</sup> By a vote of five to four, Justice Kennedy’s opinion for the Court in *Windsor*, joined by the more “liberal” (to use an imprecise term) Justices Ginsburg, Breyer, Kagan, and Sotomayor, concluded that section 3 violated the constitutional guarantee of equal protection of the laws.<sup>3</sup> The federal appeals court had held in *Windsor* that sexual orientation discrimination should receive heightened equal protection scrutiny,<sup>4</sup> and the briefs in the Supreme Court addressed that issue extensively.<sup>5</sup> Yet the Court did not analyze

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\* Copyright © 2014 David B. Cruz. Professor of Law, University of Southern California Gould School of Law. This Essay was originally presented on a panel at the UC Davis Law Review’s *Not Equal Yet* Symposium on February 7, 2014. I am grateful to my co-presenters and the symposium audience, as well as to Steve Greene, for helpful comments and questions. I have tried to retain some of the informal tone of that presentation in the written Essay.

<sup>1</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>2</sup> Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419-20 (1996) (codified at 1 U.S.C. § 7 (2000)), *invalidated by Windsor*, 133 S. Ct. 2675.

<sup>3</sup> *See Windsor*, 133 S. Ct. at 2682 (affirming judgment holding DOMA section 3 violative of equal protection); *id.* at 2693 (“DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government.”).

<sup>4</sup> *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

<sup>5</sup> *See, e.g.*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 24-28, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 267026 (discussing whether heightened equal protection scrutiny applies to sexual orientation discrimination); Brief on the Merits for Respondent Edith Schlain Windsor at 17-32, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 701228 (addressing whether heightened equal protection scrutiny applies to sexual orientation discrimination).

the factors it has treated as pertinent to choice of scrutiny, nor did it even identify any level of scrutiny it might have been applying.<sup>6</sup> In the end, the Supreme Court majority concluded, somewhat vaguely as it had in past lesbigay rights cases,<sup>7</sup> that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>8</sup> This doctrinal diffidence is regrettable, leaving lower courts to have to figure out what the Court *did* in light of the Court’s failure to say what it was doing.<sup>9</sup>

Chief Justice Roberts, Justice Scalia, and Justice Thomas dourly dissented. They believed there was no dispute properly before the Court, in light of the President’s agreement with Edie Windsor that section 3 was unconstitutional.<sup>10</sup> Justice Alito, however, agreed with the majority on the case’s justiciability, but not on the merits.<sup>11</sup> To Alito,

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<sup>6</sup> See *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below . . .”).

<sup>7</sup> Cf. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The Texas statute furthers no legitimate state interest *which can justify* its intrusion into the personal and private life of the individual.” (emphasis added)); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (“Amendment 2 confounds this normal process of judicial review.”).

<sup>8</sup> *Windsor*, 133 S. Ct. at 2696.

<sup>9</sup> That is the approach that the U.S. Court of Appeals for the Ninth Circuit took in *SmithKline Beecham Corp. v. Abbott Laboratories*, ultimately holding that sexual orientation discrimination gets heightened scrutiny under the Equal Protection Clause. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014) (“When the Supreme Court has refrained from identifying its method of analysis, we have analyzed the Supreme Court precedent by considering what the Court actually did, rather than by dissecting isolated pieces of text.” (internal quotation marks omitted)); see also *id.* at 483 (analyzing what *Windsor* did regarding level of scrutiny).

<sup>10</sup> *Windsor*, 133 S. Ct. at 2700 (Scalia, J., dissenting) (“Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.”); *id.* at 2705 (“For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal.”).

<sup>11</sup> *Id.* at 2714 (Alito, J., dissenting) (“[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.”); *id.* at 2711 (“I would . . . hold that Congress did not violate Windsor’s constitutional rights by enacting § 3 of the Defense of Marriage Act . . .”).

joined by Thomas on this point, DOMA represented not a violation of equality principles, but a constitutionally unobjectionable choice by a political majority between two visions of marriage, neither of which was in his view required by the Constitution.<sup>12</sup> It is Justice Alito's dissent, particularly its analyses and presuppositions, that this Essay addresses.

This examination of Alito's *Windsor* opinion is not an idle academic exercise. True, the dissent lacks any binding legal force and is not dispositive in any of the at least eighty-four suits seeking marriage equality in every state plus Puerto Rico.<sup>13</sup> But that does not mean that Alito's opinion has no rhetorical power. Even though its claims were insufficient to command a majority in *Windsor* — only Justice Thomas joined in Justice Alito's equal protection discussion — it is not inconceivable, even if unlikely, that they could move Justice Kennedy in a case challenging a *state* marriage law. Such a suit would not present the same federalism concerns that *Windsor* did,<sup>14</sup> where, unusually, the federal government categorically disregarded an entire class of state-sanctioned marriages. The vision Justice Alito's dissent embraces, articulated more fully in amicus briefs in *Windsor*,<sup>15</sup> is still being pressed

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<sup>12</sup> *Id.* at 2711 (Alito, J., dissenting) (“Respondent Edith Windsor, supported by the United States . . . seeks . . . a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels.”); *id.* at 2718 (“By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.”); *id.* at 2718-19 (developing argument that section 3 of DOMA does not violate constitutional equality guarantees but only implicated constitutional choice between visions of marriage).

<sup>13</sup> See, e.g., *Pending Marriage Equality Cases*, LAMBDA LEGAL, <http://www.lambdalegal.org/pending-marriage-equality-cases> (last updated Nov. 3, 2014) (“84 lawsuits involving the right of same-sex couples to marry or have their out-of-state marriages respected are pending in 29 states (AL, AK, AZ, AR, FL, GA, ID, IN, KS, KY, LA, MI, MS, MO, MT, NE, NV, NC, ND, OH, OR, PA, SC, SD, TN, TX, VA, WV, WY) and Puerto Rico. . . . Marriage equality lawsuits are pending in all states that do not currently allow same-sex couples to marry.”); *id.* (“Marriage equality currently exists in 32 states and DC.”). Those thirty-two states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Idaho, Illinois, Indiana, Massachusetts, Maryland, Maine, Minnesota, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia, and Wyoming.

<sup>14</sup> See *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (“The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments. . . . But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor . . .”).

<sup>15</sup> See, e.g., Amici Curiae Brief of Robert P. George, Sherif Girgis, and Ryan T. Anderson in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing

in defense of laws denying marriage or marriage recognition to same-sex couples. For example, Utah cited Alito's dissent in its successful Supreme Court petition for a stay of the district court's order enjoining enforcement of the state's laws denying marriage to same-sex couples.<sup>16</sup> Judge Paul J. Kelly, Jr. subsequently quoted Justice Alito's *Windsor* dissent in the opening of his dissent in *Kitchen v. Herbert*, where the U.S. Court of Appeals for the Tenth Circuit affirmed that Utah's marriage exclusion was unconstitutional.<sup>17</sup> A second judicial Paul dissented from the second Court of Appeals marriage equality ruling, *Bostic v. Schaefer*.<sup>18</sup> In disagreeing with the U.S. Court of Appeals for the Fourth Circuit majority's holding that Virginia's marriage exclusions were unconstitutional, Judge Paul V. Niemeyer averred that, "[a]t bottom, I agree with Justice Alito's reasoning . . . ."<sup>19</sup> So, Alito's dissent should hold some interest for people who care about the present and future contours of marriage laws in the United States.

The constitutionality of one particular state's ban on marriage for same-sex couples — California's Proposition 8 — was presented to, but not resolved by, the Supreme Court in *Hollingsworth v. Perry*, decided on the same day as *Windsor*.<sup>20</sup> At oral argument in *Perry*, Justice Kennedy expressed some hesitance concerning the proper way to analyze marriage exclusions under equal protection doctrine. "Do you believe this can be treated as a gender-based classification?" he asked the attorney defending Prop 8. "It's a difficult question that I've been

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the Merits and Supporting Reversal at 1-14, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 390984 (explicating their view of "marriage as a conjugal union" and its ostensible ramifications); see also Amicus Curiae Brief of Coalition for the Protection of Marriage in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 4-7, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 1780812 (summarizing "the man-woman marriage institution").

<sup>16</sup> See Application to Stay Judgment Pending Appeal at 10, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (No. 13A687) (citing *Windsor*, 133 S. Ct. at 2715-16 (Alito, J., dissenting)), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/13A687-Herbert-v-Kitchen-Application.pdf>; *id.* at 14 (citing *Windsor*, 133 S. Ct. at 2715 & n.6).

<sup>17</sup> *Kitchen v. Herbert*, 755 F.3d 1193, 1230-31 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part).

<sup>18</sup> See *Bostic v. Schaefer*, 760 F.3d 352, 397-98 (4th Cir. 2014) (Niemeyer, J., dissenting).

<sup>19</sup> *Id.* at 398.

<sup>20</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (dismissing, for lack of standing, an appeal of the decision invalidating Proposition 8). Proposition 8 amended the state constitution to strip same-sex couples of the right to marry, something that the California Supreme Court held was a fundamental right under the state constitution. *Id.* at 2659.

trying to wrestle with . . .”<sup>21</sup> Not so for Justice Alito, whose dissent in *Windsor* denies any difficulty or complexity where DOMA’s exclusionary definition of marriage was at issue: “Same-sex marriage presents a highly emotional and important question of public policy — but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.”<sup>22</sup> Thus, one is left to conclude that Edie Windsor, joined by the Solicitor General of the United States, was pressing an argument that, while perhaps not sanctionably frivolous, did not even raise a hard question. Justice Alito is that sure of himself — contrary to his assertion in *Windsor* that “judges have cause” to approach marriage litigation with “humility.”<sup>23</sup>

Whether same-sex couples may legally marry is to Justice Alito “a question so fundamental [that it] should be made by the people through their elected officials.”<sup>24</sup> Happily for Alito, who echoes Scalia’s dissent in *Romer v. Evans*,<sup>25</sup> as well as numerous dissents in reproductive rights cases,<sup>26</sup> the people are free to make that decision because “the Constitution simply does not speak to the issue of same-sex marriage.”<sup>27</sup> Of course, Alito’s argument that “the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition”<sup>28</sup> is dictum since

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<sup>21</sup> Transcript of Oral Argument at 13, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 6908183.

<sup>22</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2714 (Alito, J., dissenting).

<sup>23</sup> *Id.* at 2715.

<sup>24</sup> *Id.* at 2716.

<sup>25</sup> See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“Since the Constitution of the United States says nothing about this subject, [i.e., the constitutionality vel non of a legal ban on laws and government policies barring anti-lesbigay discrimination] it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions.”).

<sup>26</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (“If only for the sake of its own preservation, the Court should return this matter [i.e., regulation of abortion] to the people — where the Constitution, by its silence on the subject, left it — and let *them* decide, State by State, whether this practice should be allowed.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (“The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”); cf. *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (“I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution.” (citation omitted)).

<sup>27</sup> *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting).

<sup>28</sup> *Id.* at 2715.

Edie Windsor *did not make* a fundamental right to marry argument. Rather, as Alito admits, “Windsor and the United States argue that § 3 of DOMA violates the equal protection principles *that the Court has found* in the Fifth Amendment’s Due Process Clause.”<sup>29</sup> Even this wording — “that the Court has found” — signals his skepticism toward that approach to equal protection principles, though I strongly suspect that he would have no problem finding such principles binding on the federal government if the issue were the constitutionality of race-based affirmative action.

In *Windsor*, Justice Alito refuses to situate sexual orientation discrimination within the tiers of scrutiny called for by the Supreme Court’s equal protection jurisprudence.<sup>30</sup> In the abstract, that is not *necessarily* a demerit to his opinion. Some judges and many scholars have criticized the Court’s tiered equal protection doctrine,<sup>31</sup> and the critiques have been manifold. A decade ago, Suzanne Goldberg, one of

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<sup>29</sup> *Id.* at 2714 (emphasis added). He implies that this is not a principled view but a mere results-oriented choice: “Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States *couch their arguments* in equal protection terms.” *Id.* at 2716 (emphasis added).

<sup>30</sup> See *infra* text accompanying notes 35–37.

<sup>31</sup> See, e.g., Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (writing, before the Court’s articulation of intermediate scrutiny, to “once more voice my disagreement with the Court’s rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court’s decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause” (citations omitted)); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1076 (2011) (“[T]he Supreme Court devised the structure of modern equal protection analysis. Two structural choices were crucial: the development of the rigid tiers of scrutiny and the requirement for a discriminatory purpose. These developments profoundly limited the ability of the judiciary to use equal protection to remedy social inequalities.”); Randall P. Ewing, Jr., *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine?*, 82 ST. JOHN’S L. REV. 1409, 1410 (2008) (arguing that the “traditional tiered analysis contains inherent flaws impeding accomplishment of equal protection’s normative goals”); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484 (2004) (arguing “that the problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review, such as the single standard proposed here”).

many critics of current doctrine, wondered “whether we still need” tiered equal protection doctrine.<sup>32</sup> Professor Goldberg suggested that

the three tiers may be understood best in historical terms; that is, they may have served as a “training” tool for the Supreme Court and lower courts that lacked an inclination or ability to identify bias or outmoded stereotypes within familiar classifications, such as those based on race, sex, and nonmarital parentage that pervaded much long-standing legislation. At this point in the evolution of constitutional doctrine, however, I contend that the tiers may have outlived their role in streamlining judicial analysis of distinctions based on race, sex, and other traits that historically enjoyed wide acceptance as bases for differential treatment.<sup>33</sup>

Even if Professor Goldberg is correct that “in the 21st century . . . contemporary jurisprudence requires a more sophisticated and sensitive response to the complexities of a changed world,”<sup>34</sup> I doubt that she would consider Justice Alito’s alternative as practiced in his *Windsor* dissent a model of the sensitivity she desires.

For Justice Alito,

our equal protection framework, upon which *Windsor* and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on *what marriage is*.<sup>35</sup>

He glosses three-tiered scrutiny as merely “a heuristic to help judges determine when classifications have [a] ‘fair and substantial relation to the object of the legislation.’”<sup>36</sup> Note that this basically conflates all three tiers of scrutiny with a somewhat muscular articulation of rational basis review, sounding surprisingly like retired “liberal” Justice John Paul Stevens!<sup>37</sup>

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<sup>32</sup> Goldberg, *supra* note 31, at 482-83.

<sup>33</sup> *Id.* at 493-94.

<sup>34</sup> *Id.* at 582.

<sup>35</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) (emphasis added).

<sup>36</sup> *Id.* (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

<sup>37</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (“In my own approach to these cases, I have always asked

Alito rejects the arguments for heightened scrutiny of DOMA section 3 because he doubts that “the presence of two members of the opposite sex is as rationally [un]related to marriage as” race is to voting or sex is to estate administration.<sup>38</sup> He considers the idea that it is to be a “striking” proposition “and one that unelected judges should pause before granting.”<sup>39</sup> He does not expressly state that all forms of anti-lesbigay discrimination should always be subject to mere rationality review.<sup>40</sup> But that means he avoids making a choice of tier of equal protection scrutiny based on his intuitive assessment of the anti-lesbigay discrimination in this particular factual setting. This move is, alas, not wholly novel. When the New York Court of Appeals rejected a marriage equality claim under the state constitution in 2006, the four-to-two majority opinion in *Hernandez v. Robles* suggested that it might “apply heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships.”<sup>41</sup>

But no one should be misled: This is not how the Supreme Court *ordinarily* treats tiered equal protection doctrine. It does not say, “race can be relevant to the reasons for which universities adopt affirmative action programs and enroll diverse student bodies, so we should only apply rational basis review in that setting, even if we might think strict scrutiny applies to laws allocating rights and responsibilities on the basis of race in other domains.” Rather, the Court holds that all racial classifications are subject to strict scrutiny, regardless of the context.<sup>42</sup>

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myself whether I could find a ‘rational basis’ for the classification at issue.”); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”).

<sup>38</sup> *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

<sup>39</sup> *Id.* Alito seems here to track Judge Posner of seventeen years past. See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1587 (1997) (“The country is not ready for [William] Eskridge’s proposal [that courts should rule in favor of marriage equality on constitutional grounds], and this must give pause to any impulse within an unelected judiciary to impose it on the country in the name of the Constitution.”). Of course, Judge Posner of the present no longer is so reticent. See *Baskin v. Bogan*, 766 F.3d 648, 654-56 (7th Cir. 2014) (holding Indiana’s and Wisconsin’s marriage bans unconstitutional).

<sup>40</sup> See *Windsor*, 133 S. Ct. at 2716-18 (Alito, J., dissenting).

<sup>41</sup> *Hernandez v. Robles*, 7 N.Y.3d 338, 364 (N.Y. 2006).

<sup>42</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), *superseded by constitutional amendment*, MICH. CONST. art. 1, § 26 (reaffirming that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny” (emphasis added) (internal quotation marks omitted)).

Two highly regarded federal appellate judges considering the constitutionality of the use of race in the assignment of public school pupils in recent years expressly advocated a context-specific approach to the level of equal protection scrutiny. Concurring in a decision upholding one such pupil assignment plan, then-Chief Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit wrote:

The . . . plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks; nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes). By contrast to *Johnson v. California*, the plan does not segregate persons by race. Nor does it involve racial quotas.<sup>43</sup>

For this reason, Judge Boudin concluded that the challenged “plan is far from the original evils at which the Fourteenth Amendment was addressed.”<sup>44</sup>

Similarly, then Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit would have selected a level of equal protection scrutiny based on the context in a challenge to a Seattle pupil placement plan.<sup>45</sup> Quoting Boudin, Judge Kozinski observed that the plan,

certainly is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual’s aptitude or ability. The program does use race as a criterion, but only to

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<sup>43</sup> *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring) (citations omitted).

<sup>44</sup> *Id.* at 29.

<sup>45</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193-94 (9th Cir. 2005) (Kozinski, J., concurring) (canvassing “meaningful differences” between facts of current case and of Supreme Court precedents and concluding that “[b]ecause the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review”), *rev’d*, 551 U.S. 701 (2007).

ensure that the population of each public school roughly reflects the city's racial composition.

Because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review. By rational basis, I don't mean the standard applied to economic regulations, where courts shut their eyes to reality or even invent justifications for upholding government programs, but robust and realistic rational basis review, where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it.<sup>46</sup>

The Supreme Court, however, would have none of this. When it reviewed the decision upholding Seattle's plan along with one from the U.S. Court of Appeals for the Sixth Circuit upholding a Louisville pupil placement plan that also used race as a factor,<sup>47</sup> the majority insisted that it was "well established"<sup>48</sup> that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny."<sup>49</sup>

Likewise, the Court does not say, "mental disability discrimination is not rationally related to the reasons for which a city adopts special zoning procedures so we'll use heightened scrutiny to assess an equal protection challenge to such procedures even though the general relevance of mental disabilities might mean we'll use rational basis review in other settings." Instead, the Court subjects mental disability discrimination to rational basis review regardless of the context.<sup>50</sup> Indeed, the Supreme Court in *City of Cleburne v. Cleburne Living Center* explicitly ruled out Justice Alito's context-specific choice of level of scrutiny, avowing that in selecting a level of equal protection scrutiny it "should look to the likelihood that governmental action premised on

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<sup>46</sup> *Id.* at 1194 (citations omitted).

<sup>47</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (2007).

<sup>48</sup> *Id.* at 720.

<sup>49</sup> *Id.* at 741 (internal quotation marks omitted) (citing *Johnson v. California*, 543 U.S. 499, 505 (2005)).

<sup>50</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-48 (1985) (adopting rational basis review for discrimination based on "mental retardation" due to general significance of the trait to proper legislation, yet finding such discrimination in the city of Cleburne's zoning laws to fail that standard and thus violate equal protection).

a particular classification is valid as a general matter, not merely to the specifics of the case before us.”<sup>51</sup>

Alito’s *Windsor* dissent ignores *Cleburne*’s instruction to evaluate conventional equal protection factors, such as whether people’s sexual orientation generally is or is not relevant to their “ability to . . . contribute to society,”<sup>52</sup> and then apply the appropriate tier of scrutiny to the law challenged in the case before him. Instead, Alito focuses only on the facts of Edie Windsor’s case. He rejects the conventional approach presumably *because of its results* for the issue in a particular context — marriage laws (specifically here, DOMA)<sup>53</sup> — letting the application trump ordinary doctrinal structure. If he didn’t think heightened scrutiny would invalidate DOMA, why would he need to deviate from the Court’s established equal protection methodology? The Court often says it used heightened scrutiny to help determine whether particular kinds of discrimination are actually invidious.<sup>54</sup> Yet Alito casts off any enlightening, or disciplining, influence of equal protection’s tiered doctrinal structure and instead treats invidious discrimination as if it were obscenity in the late 1960s:<sup>55</sup> “I know it when I see it,” he effectively tells readers.

<sup>51</sup> *Id.* at 446.

<sup>52</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

<sup>53</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) (“Our equal protection framework . . . is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.”); *id.* at 2720 (“I would hold that § 3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.”).

<sup>54</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race . . . .”); see also *Johnson*, 543 U.S. at 506 (quoting *J.A. Croson Co.*, 488 U.S. at 493); *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (“[T]he very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is ‘benign.’”).

<sup>55</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e., ‘hard-core pornography,’ as the meaning of suppressible ‘obscenity’]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

Perhaps his flight from extant doctrine might be defended as a model of reflective equilibrium, though I think ultimately such a defense would fail. As articulated by John Rawls, reflective equilibrium is a philosophical process whereby one strives to reconcile one's intuitive sense of the in/justice of some situation or situations and the principles of justice one is inclined to embrace.<sup>56</sup> One should revisit the principles of justice one is inclined to embrace if one has a strong intuition about their application, modifying those principles as seems necessary to fit one's intuitions. Likewise, one should revisit one's intuitions about conclusions of justice in light of one's commitment to principles, modifying those outcome-intuitions. Then, one goes back and forth between these moves until one reaches a reflective equilibrium, a state in which one's particular conclusions of in/justice and one's more general principles about justice cohere.

Perhaps one might think Alito is taking a step toward reflective equilibrium in his *Windsor* dissent. The idea would be that he is revisiting his (and the Court's) principles about judicial enforcement of constitutional equality — the idea that a given classification ought to be judged by one level of review in all contexts (rational basis review, intermediate scrutiny, or strict scrutiny). He revisits that well-established doctrinal position and rejects it in *Windsor*, in order to conform his principles to his intuition about a particular application of that preexisting doctrine. His intuition here, strong enough to prompt a change of doctrinal approach, may be that constitutional equality is not violated by denial of civil marriage to same-sex couples. But, particularly because he does not say that this is what he is doing, it seems the taint of results-oriented reasoning could only be overcome in that manner if Alito were consistently to approach equal protection that way.<sup>57</sup> Yet he does not, as the analyses he joins in race-based equal protection cases suggests,<sup>58</sup> thus calling to mind Justice Douglas's

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<sup>56</sup> See JOHN RAWLS, A THEORY OF JUSTICE 20-21, 48-49 (1971) (naming and explaining process for reaching reflective equilibrium).

<sup>57</sup> He does not, for example, where race is concerned; thus, he fails to do what, in *Washington v. Glucksberg*, Justice Souter said the second Justice Harlan instructed: "examin[e] the concrete application of principles for fitness with their own ostensible justifications." *Washington v. Glucksberg*, 521 U.S. 702, 773 (1997) (Souter, J., concurring).

<sup>58</sup> See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (rejecting equal protection challenge to state constitutional ban on affirmative action and framing question as "whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 711-25, 733-37

quotation of Kant in his dissent in *Poe v. Ullman*: “It is absurd to expect to be enlightened by Reason, and at the same time to prescribe to her what side of the question she must adopt.”<sup>59</sup>

Justice Alito’s performance of “training wheel-free” pursuit of constitutional justice in *Windsor* ought not inspire confidence. It entirely depended on his discerning in laws like DOMA a benign vision of “conjugal marriage” that somehow could justify excluding same-sex couples from civil marriage: “By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, *Windsor* and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.”<sup>60</sup> “That debate is, at bottom, about the *nature* of the institution of marriage,” he writes,<sup>61</sup> for his view of marriage is an essentialized one, a natural law view of marriage, a symbol; hence, his reference to “the popular *understanding* of marriage.”<sup>62</sup> For Justice Alito, it is not just about a particular set of legal and societal arrangements, but also about a Platonic ideal. Thus to him, DOMA is not just a law providing eligibility criteria for “federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations,” but also a law “which *defines the meaning* of marriage under” such statutes.<sup>63</sup> To the extent he might take the litigation to be about a human institution, it is a transhistorical one: the “ancient and universal human institution” that is “[t]he family.”<sup>64</sup>

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(2007) (plurality opinion) (invalidating race-integrative pupil assignment plans under strict scrutiny).

<sup>59</sup> *Poe v. Ullman*, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting) (internal quotation marks omitted) (quoting IMMANUEL KANT, *THE CRITIQUE OF PURE REASON*, in 42 *ENCYCLOPEDIA BRITANNICA’S GREAT BOOKS OF THE WESTERN WORLD* 26, 221 (1952)).

<sup>60</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). There may, however, be a tension here in Alito’s argument. In one sense, he wants to treat DOMA as merely about disaggregated benefits and responsibilities. *See id.* at 2720 (“Assuming that Congress has the power under the Constitution to enact the laws affected by § 3, Congress has the power to define the category of persons to whom those laws apply.”). But at the same time, he wants to see the dispute as about the institution of marriage. *Id.* (“Congress used marital status as a way of defining this class — in part, I assume, because it viewed marriage as a valuable institution to be fostered . . .”); *see also id.* at 2711 (noting how *Windsor* is asking the Court to intervene in the national debate about the “nature of the institution of marriage”).

<sup>61</sup> *Id.* at 2711 (emphasis added).

<sup>62</sup> *Id.* at 2715 (emphasis added).

<sup>63</sup> *Id.* at 2711 (emphasis added).

<sup>64</sup> *Id.* at 2715 (emphasis added). At the end of his opinion his language is even more mixed, between a bundle-of-sticks view of marriage and an institutional one, though to be fair neither is quite the symbolic ideal suggested by the “meaning of marriage” language. *Id.* at 2720 (“All that § 3 does is to define a class of persons to whom federal

For Justice Alito, marriage equality litigation is a contest between two abstract ideals. The “view[] of marriage” that he thinks DOMA seeks to enforce Alito dubs “the ‘traditional’ or ‘conjugal’ view,” which “sees marriage as an *intrinsically* opposite-sex institution.”<sup>65</sup> He points to the widely shared history of limiting marriage to different-sex couples in “virtually every culture.”<sup>66</sup> Purporting merely to describe, he notes that some people refer to the historical development of marriage around procreation and childrearing, while others “explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.”<sup>67</sup> The people he cites for this conjugal view<sup>68</sup> are so-called “new” natural lawyers:<sup>69</sup> Princeton philosophy professor Robert George, his student Sherif Girgis, George’s former RA and now Heritage Foundation fellow Ryan Anderson, and Notre Dame law professor John Finnis.<sup>70</sup> Again, writing in his responsibility-ducking passive voice, Alito recounts that “marriage *has been viewed* as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.”<sup>71</sup>

Alito contrasts this with a “newer view” he christens “the ‘consent-based’ vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment — marked by strong emotional

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law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class — in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment.”).

<sup>65</sup> *Id.* at 2718 (emphasis added).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 272 (1995).

<sup>70</sup> *Windsor*, 133 S. Ct. at 2715, 2718 (Alito, J., dissenting) (citing SHERIF GIRGIS, RYAN ANDERSON & ROBERT GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 23-28 (2012), and John Finnis, *Marriage: A Basic and Exigent Good*, 91 MONIST 388, 398 (2008)). See generally Robert P. George @McCormickProf, TWITTER (June 8, 2014, 12:15 PM), <https://twitter.com/McCormickProf/status/475717733313564672> (“My students Sherif Girgis and Gabrielle Speach were made one in marriage at a wedding mass at Our Lady of Victory in Rochester. Bless them!”); Ryan T. Anderson, Ph.D., HERITAGE FOUND., <http://www.heritage.org/about/staff/a/ryan-anderson> (last visited Oct. 10, 2014) (“Anderson’s previous positions include . . . executive director of the Witherspoon Institute, where he was research assistant to Robert P. George . . .”).

<sup>71</sup> *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (emphasis added).

attachment and sexual attraction — between two persons.”<sup>72</sup> So, it seems that in Alito’s view same-sex couples aren’t concerned about childrearing, but only emotion and sex. This is both insulting and untrue, as federal trial judge Robert Shelby recognized when he held Utah’s exclusion of same-sex couples from marriage unconstitutional:

Like opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise. Same-sex couples are just as capable of providing support for future generations as opposite-sex couples, grandparents, or other caregivers. And there is no difference between same-sex couples who choose not to have children and those opposite-sex couples who exercise their constitutionally protected right not to procreate.<sup>73</sup>

Justice Alito concedes that “[a]t least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage.”<sup>74</sup>

But it is not just culture’s view, but also marriage *laws’* actual provisions, that show that marriage is not limited to those who reproduce without assistance from outside the couple. Whether or not Alito is right that “[t]he Constitution does not codify either of these views of marriage,”<sup>75</sup> current *state marriage laws do*, and it is not the conjugal view they reflect. Alito should be attentive to these laws; after all, he insists that “neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good *that they adopt* is not countermanded by the Constitution.”<sup>76</sup> Accordingly, he jumps to conclude, “both Congress and the States are entitled to

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<sup>72</sup> *Id.*

<sup>73</sup> *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014); cf. David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 944 n.86 (2001) (quoting marriage equality opponent who viewed same-sex couple’s wish to marry as “represent[ing] the pure pursuit of hedonistic and sexual pleasure”) (internal quotation marks omitted); *id.* at 943 (discussing David A.J. Richards’s analysis of “a dehumanizing obsession with homosexuality solely in terms of a rather bleakly impersonal interpretation of same-gender sex acts”).

<sup>74</sup> *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2719 (emphasis added).

enact laws recognizing either of the two understandings of marriage.”<sup>77</sup> Even assuming that were true, the vision actually adopted by a government through its laws should matter to the analysis. He tries to paint his approach as the course of judicial restraint: “Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.”<sup>78</sup> Yet, as I discussed, by abandoning ordinary equal protection doctrine for purposes of assessing this marriage law (and, clearly, others that may come before him), and by ignoring the actual features of the laws that govern marriage, Alito’s opinion shrouds itself in only the gauziest veil of faux neutrality.

This conjugality defense of discriminatory marriage laws is essentially recycled natural law stemming from Thomistic tradition.<sup>79</sup> Like much natural law reasoning, it requires acceptance of dubious, sectarian premises before it could be plausible as a defense of denying marriage to same-sex couples, as Andrew Koppelman has shown.<sup>80</sup> Since the

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2718-19; cf. *Romer v. Evans*, 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting).

<sup>79</sup> See, e.g., Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 70-77 (1997) (tracing new natural law argument against homosexuality to its “Thomistic roots”).

<sup>80</sup> See *id.* at 76-77 (“[T]he penis of a man who is sterile is still a reproductive organ. But the only aspect of reproductiveness that is relevant to the natural lawyers’ argument, namely the reproductive power of the organ, does not inhere in this organ. It is not a reproductive organ in the sense of power or potential, even if it is a reproductive organ in the taxonomic sense. And, once more, it remains mysterious why its being a reproductive organ, in either sense, should have the moral significance that the new natural lawyers want to assign to it.”); *id.* at 77 (“[T]he most sophisticated efforts to defend [laws treating marriage-like relationships of same-sex couples differently from (different-sex) “marriage”] . . . depend on [a defective] argument from natural teleology . . . .”); *id.* at 84 (“In sum, the disease conception [of homosexuality] reproduces the central flaws of Aquinas’s argument: it neither explains why the goods achievable through sexuality can be achieved only through heterosexual sex, nor shows that other forms of sexual expression are positively bad. The claim that homosexuality is wrong because it is unnatural cannot be salvaged by pointing to homosexuals’ painful and solitary lives, because many homosexuals do not lead such lives, and there is little reason to think that homosexuality per se, rather than societal intolerance, brings about such lives.”); *id.* at 88 (“[New natural lawyer Germaine] Grisez’s suspicion of bodily pleasures is curiously selective, holding sexual pleasure to a burden of justification that he does not place upon other kinds of pleasure.”); *id.* at 94-95 (“What neither [an elderly married couple with religious reasons for engaging in non-reproductive coitus] nor anyone else has a good reason to do is to get laws enacted on the basis of [the kind of] exceedingly contestible religious surmises [that are necessary to establish the religious value of their engaging in sex for reasons other than pleasure].”); *id.* at 95 (“The new natural lawyers

marriage laws actually enacted by states do not reflect any public-regarding functional view of marriage as limited by reference to procreative capacity between the two spouses, it is not clear that this view of marriage could even satisfy ordinary rational basis review that accepts hypothetical government purposes that *reasonably* could have been the purpose behind a law.<sup>81</sup> And Alito offers no reasoned arguments for why keeping same-sex couples from marrying serves any justifying public purposes.

I do not doubt that judgment is inevitable in constitutional adjudication. And people might well conclude that the exercise of discretionary judgment has been salutary in a variety of instances.<sup>82</sup> But in our secular constitutional democracy, judgment requires secular reasons, which defenders of the mixed-sex requirement for civil

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are more sophisticated than their predecessors, but they, too, appear to fall into the trap of imputing divine intentions to natural phenomena. Moreover, judged by the standards implicit in their own work, their arguments about homosexuality are not only mistaken, but positively destructive.”); see also Andrew Koppelman, *Careful with that Gun: Lee, George, Wax, and Geach on Gay Rights and Same-Sex Marriage* 1-2 (Nw. Univ. Sch. of Law Faculty Working Papers, Paper No. 30, 2010), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1029&context=facultyworkingpapers> (responding to attempts to rescue new natural law arguments against homosexuality, same-sex sex, and marriage for same-sex couples); *id.* at 2 (“[As for the] claim that such sex is wrong irrespective of consequences . . . [t]he coherence problems of [this] . . . view remain. Its deepest difficulty lies in its need to show that the intrinsic goodness of sex is at once (a) derived from its reproductive character and (b) present in the coitus of married couples who know themselves to be infertile, but not present in any sex act other than heterosexual marital coitus.”).

<sup>81</sup> See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (“[T]his Court’s review does require that a purpose may conceivably or ‘may reasonably have been the purpose and policy’ of the relevant governmental decisionmaker.” (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959))).

<sup>82</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (affirming a woman’s right to choose to terminate a pregnancy); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (finding due process right against law limiting family members who may cohabit); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (recognizing the right to choose to terminate pregnancy); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1197 (D. Utah 2013) (holding unconstitutional Utah’s laws excluding same-sex couples from civil marriage). In discussing due process and reasoned judgment, these opinions all quoted Justice Harlan’s dissent in *Poe v. Ullman* stating: “It [the liberty guaranteed by the Due Process Clause] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a *reasonable and sensitive judgment* must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added) (citations omitted); see *Casey*, 505 U.S. at 848; *Moore*, 431 U.S. at 502; *Roe*, 410 U.S. at 169; *Kitchen*, 961 F. Supp. 2d at 1197.

marriage do not truly offer. Richard Duncan, for example, one of the most resolutely anti-gay U.S. law professors, in arguing against then-future outcomes like that in *Windsor*, appeals to a sense of “moral discernment,”<sup>83</sup> “the ability to distinguish between right and wrong,”<sup>84</sup> “an attribute” that he insisted “continues to inform the *common sense* of the community.”<sup>85</sup> His “discernment” lets him appreciate, as he claims supporters of marriage equality supposedly fail to, that the mixed-sex requirement for civil marriage “is based upon the *inherent* sexual complementarity of husband and wife.”<sup>86</sup> Exclusionary marriage laws, presumably like Duncan himself, “*recognize*[] . . . the physical differences between men and women and their *obvious* sexual complementarity.”<sup>87</sup> They just *see* this supposed truth. They have moral discernment, “a *moral sense* that *discerns* the *true nature* of marriage.”<sup>88</sup>

This discernment and its judgments, at least when it comes to marriage and same-sex couples, are inescapably religious. Duncan agrees, for example, with David Orgon Coolidge that “marriage is a unique community defined by sexual complementarity — the reality that men and women are different from, yet *designed for* one another.”<sup>89</sup> “Designed” here can but mean what it means with respect to debates about evolution vs. creationism: designed by a divine Creator.<sup>90</sup> Thus, such premises are insufficient grounds for shaping our civil marriage laws in the United States.

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<sup>83</sup> Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 *BYU J. PUB. L.* 239, 239 (1998).

<sup>84</sup> *Id.* at 250.

<sup>85</sup> *Id.* at 239 (emphasis added).

<sup>86</sup> *Id.* at 250-51 (emphasis added).

<sup>87</sup> *Id.* at 251 (emphasis added).

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.* at 251 n.82 (emphasis added) (quoting David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 *S. TEX. L. REV.* 1, 29 (1997)) (internal quotation marks omitted).

<sup>90</sup> See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding school district policy teaching “intelligent design” to violate Establishment Clause); *id.* at 718 (“The concept of intelligent design (hereinafter ‘ID’), in its current form, came into existence after the *Edwards* case was decided in 1987. For the reasons that follow, we conclude that the religious nature of ID would be readily apparent to an objective observer, adult or child.”); *id.* (“ID’s ‘official position’ does not acknowledge that the designer is God. However, as Dr. Haught testified, anyone familiar with Western religious thought would immediately make the association that the tactically unnamed designer is God, as the description of the designer in *Of Pandas and People* . . . is a ‘master intellect,’ strongly suggesting a supernatural deity as opposed to any intelligent actor known to exist in the natural world.”).

Even supposedly secular efforts to raise natural law arguments against allowing same-sex couples to marry from the tomb to which the Establishment Clause has rightly consigned them fail. New natural law scholars such as John Finnis “believe” that “a number of explicit or implicit judgments about the proper role of law and the compelling interests of political communities, and about the evil of homosexual conduct” can “be defended by reflective, critical, publicly intelligible and rational arguments.”<sup>91</sup> But his arguments rely on his faulty discernment, on just knowing or seeing crucial discriminatory premises. For example, Finnis writes:

- (1) The commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage.
- (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural.
- (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act are manifestly unworthy of the human being and immoral.<sup>92</sup>

Note that his conclusion is framed in similar language of apparentness: “*manifestly* unworthy.”<sup>93</sup>

But Finnis’s very lack of discernment is manifest throughout his discriminatory marriage arguments. For example, it is on display in his acceptance, without any effort to limit his universal phrasing to a particular view that may or may not have been held by some individuals at particular historical moments, that “disparagement of women [is] implicit in homosexual ideology.”<sup>94</sup> It is manifest in his deeply offensive contention that

reality is known in judgment, not in emotion, and *in reality*, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure

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<sup>91</sup> John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1055 (1994).

<sup>92</sup> *Id.* at 1062-63.

<sup>93</sup> *Id.* at 1063 (emphasis added).

<sup>94</sup> *Id.* at 1064; see also *id.* at 1062 (noting “the ideology of homosexual love (with its accompanying devaluation of women)”). His article never defines what he means by the inflammatory and prejudiced phrase “homosexual ideology.”

in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling [sic] day on the assembly line.<sup>95</sup>

These “new natural lawyers,” such as Robert George and Gerard Bradley, are unabashed in their embrace of a non-rational “I know it when I see it” sense of discernment, at least when it comes to the value of marriage. They argue that “if the intrinsic value of marriage, knowledge, or any other basic human good is to be affirmed, it must be grasped in noninferential acts of understanding.”<sup>96</sup> The new natural law scholars do not say that those of us who believe that the Constitution, justice, or both require marriage equality lack the capacity of such discernment (let alone do they admit that their arguments require religious premises). Rather, in their convenient view, it is our current culture that “makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse.”<sup>97</sup> “In the end, [they] think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly.”<sup>98</sup> In contrast, other people easily perceive “the special value and significance of the genital intercourse of spouses, and see that this value and significance obtains even for spouses who are incapable of having children . . . .”<sup>99</sup> For those discerners, this is simply a matter of “common sense.”<sup>100</sup> Yet this, I submit, is a wholly inadequate basis for allocating marital rights based on sex and excluding same-sex couples from this highly significant legal institution.

Better to avoid naked moral discernment as a predicate for constitutional adjudication of marriage bans, and instead to apply established doctrine. Applying equal protection doctrine and/or right to marry doctrine, federal courts confronting challenges to marriage

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<sup>95</sup> *Id.* at 1067 (emphasis added). It is not, as one speaker who heard me give a presentation of this work might be understood to have suggested, a matter of indelicate phrasing; it is the substance of Finnis’s and other natural law scholars work that offends.

<sup>96</sup> Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L.J.* 301, 307 (1995).

<sup>97</sup> *Id.* (“The practical insight that marriage, for example, has its own intelligible point, and that marriage as a one-flesh communion of persons is consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood.”).

<sup>98</sup> *Id.* at 309.

<sup>99</sup> *Id.* at 310.

<sup>100</sup> *Id.*

exclusions in the wake of *United States v. Windsor* have almost unanimously ruled that the Constitution protects same-sex couples' equal freedom to marry.<sup>101</sup> Little wonder, then, that Justice Alito turned away from conventional equal protection doctrine in arguing that marriage non-recognition does not violate the Constitution. As between his faulty discernment in support of marriage discrimination on one hand and the astonishing concurrence of state and federal courts across the country that extant doctrine shows that such discrimination is incompatible with our Constitution, discernment emerges in this context as the less reliable guide to constitutional justice.

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<sup>101</sup> See Adam Polaski, *Federal Judge in Mississippi Rules Marriage Ban Unconstitutional*, FREEDOM TO MARRY (Nov. 27, 2014, 6:04 PM), <http://www.freedomtomarry.org/blog/entry/federal-judge-in-mississippi-rules-marriage-ban-unconstitutional> (“[The November 25, 2014, federal district court ruling holding Mississippi’s marriage ban unconstitutional was] the 56th court ruling since June 2013 in favor of the freedom to marry. Just four courts - most notably, the U.S. Court of Appeals for the 6th Circuit - upheld marriage discrimination. Plaintiffs from the 6th Circuit cases, out of Kentucky, Michigan, Ohio and Tennessee, are now seeking review from that out-of-step ruling from the United States Supreme Court. The plaintiffs in a case out of Louisiana, where a federal judge upheld marriage [discrimination] in September, are also seeking Supreme Court review.”); see also FREEDOM TO MARRY (Nov. 27, 2014, 6:08 PM), <http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts> (“There have been 56 victories for the freedom to marry since June 2013, when the U.S. Supreme Court struck down the core of the so-called Defense of Marriage Act in *Windsor v. United States*. Thirty-six pro-marriage rulings have been issued in federal court, fifteen have been issued in state court, and five have been issued by a federal appellate court. . . . In four cases, judges have upheld laws denying the freedom to marry to same-sex couples: The U.S. Court of Appeals for the 6th Circuit [upheld] bans in KY, MI, OH and TN; federal judges have upheld discrimination in Louisiana and Puerto Rico; and a Tennessee state court case denied respect for a couple’s marriage for the purpose of the marriage’s dissolution.” (emphasis and hyperlinks omitted)).