ONCE WE’RE DONE HONEYMOONING: MARRIAGE EQUALITY, INCREMENTALISM, AND ADVANCES FOR SEXUAL ORIENTATION ANTI-DISCRIMINATION

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Attention Law Review Editors: This article was written with the pending Supreme Court appeal regarding the Sixth Circuit’s split on same-sex marriages very much in mind. See, e.g., DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), cert. granted, 83 U.S.L.W. 3608 (Jan. 16, 2015) (No. 14-574). The decision in that case will be released by June 2015. Currently, my article alludes to the pending appeal, and it is my design for the article to incorporate significant discussion of this upcoming Supreme Court decision. I will draft this addition promptly when the opinion appears. This addition is highly relevant to my article because I discuss at length the federal district court cases in the Sixth Circuit that were subsequently struck down at the appellate level and are now combined in the appeal before the Supreme Court. Yet this subsequent incorporation will not ultimately disturb my normative thesis, nor the structure of the article in its current state. Whether or not the Supreme Court’s decision is favorable to marriage equality, my scholarly opinion remains that marriage equality advancements must help further the ends of sexual orientation antidiscrimination. If accepted for publication, this later inclusion of the Supreme Court’s pending same-sex marriage case will place your law review in the forefront of scholarly commentary on what might be one of the most important civil rights decisions in recent memory.

Abstract

Following the Supreme Court’s decision in U.S. v. Windsor, each recent victory in the federal courts has evidenced that the legal recognition of same-sex marriages in the U.S. is becoming increasingly secure. Yet, can marriage equality be the last stop in the pro-LGBT movement, or should we expect sexual minorities to advance in other legal arenas? Should we expect that the recent strides in marriage equality can somehow leverage broader protections of LGBT individuals beyond their marital relationships?

This article begins from the perspective that the marriage equality movement is an increment in the longer process for securing legal protections for sexual minorities. Although many of the judicial victories have been specifically effective toward recognizing the relationships of same-sex couples, there have also been some significant judicial post-Windsor strides that could be instrumental for furthering progress in areas of sexual orientation antidiscrimination. Currently advancements in that area have been less even, and once marriage equality is finally secured, progress for protecting sexual minorities should navigate toward reforms in federal antidiscrimination laws. This article discusses the post-Windsor judicial advances in suspect classification and heightened scrutiny and how they bolster autonomy rights in sexual identity that antidiscrimination laws, specifically Title VII, ought to protect, but currently do not.

I. INTRODUCTION

Despite reeling from the gravity of victory, this short advance toward marriage equality has been a period of enduring transition where social and legal norms about same-sex couples
are rapidly readjusting from a not-so-distant past where discrimination, exclusion, and inequality were all stagnantly commonplace. For guidance on pondering this moment normatively, a glimpse at history, toward other critical periods of transition, can prove helpful as a starting place to give us perspective on how to characterize the meaning of this particular time for sexual minorities and what we ought to consider for sexual orientation in the next incremental progression toward equality and recognition.

Borrowing from presidential campaign history, an interesting but unexpected example comes from Ronald Reagan’s road to re-election in 1984. Reagan’s campaign capitalized on the strengths of his first term in the White House with an effective metaphor that signified both his achievements and what ought to continue so long as his re-election was assured. Calling the moment “a morning” from the domestic turbulence of the 1970s and hitching on the notion that what Reagan brought to the country in the 1980s was a new age, this idea of a new dawn from the Reagan-Bush campaign crystallized into an ad titled, “Morning in America.” From the first few seconds of the ad, “Morning in America” wastes no time stoking an atmosphere of prosperity in the 1980s triumphant from a suggested economic and social darkness in the 1970s through tranquil images of dawn’s gilded early light shimmering across boats, piers, and tall buildings along a quiet harbor; of middle-class Americans suited up and earnestly going to work; of a family of four pulling up in their station-wagon to a new white-picket home and moving their belongings inside. Meanwhile, statistics carefully woven into a sobering voice-over message explained why it was exactly that moment, at the end of Reagan’s first term, that was politically and metaphorically “morning” again in America: “Today more men and women will go to work than ever before in our country’s history. With interest rates at about half the record highs of 1980, nearly 2,000 families today will buy new homes, more than at any time in the past four years.”

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1 See U.S. v. Windsor, 133 S.Ct. 2675, 2694 (2013) (“DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”).

2 See, e.g., U.S.C. 1738C (1996) (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage.”); 10 U.S.C. 644 (a)(13) (1993) *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, 124 Stat. 3515 (2010) (“The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.”); *Bowers v. Hardwick* 478 U.S. 186, 191 (1986) (“Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”).

3 See ROBERT E. DENTON, THE PRIMETIME PRESIDENCY OF RONALD REAGAN: THE ERA OF THE TELEVISION PRESIDENCY 64 (1988) (“By the reelection of 1984, the advertisers who had produced Pepsi commercials brought their skills to Reagan the product. The spots proclaimed that ‘It’s morning again in America’.”). 

4 See id.


6 Reagan-Bush ’84 supra note __.

7 Id.
Hard to ignore, from this article’s perspective, is the next set of images that marries both social and economic prosperity together by depicting a handsome, white, opposite-sex couple engaged in a classic church wedding celebration while we are told that “[t]his afternoon 6,500 young men and women will be married, and with inflation at less than half of what it was just four years ago, they can look forward with confidence to the future.”8 The juxtaposition of this scene after the initial exposition of a new morning and the ad’s use of this scene as one of its centerpiece observations both suggest the progression of norms that political conservatives at the time valued and found worth bolstering—or protecting—in a possible second Reagan term.9 The ad smartly proposes that this is the norm that our new morning should unapologetically have in store for the rest of this new ensuing day: back to a conventional family values rhetoric that might have been temporarily forgotten in the interim of the 1970s.10

It is not until the ad finally fixates over an image of a stately view of the Capitol Building at daybreak, stoically white and alabaster, do the statistics finally give way to who or what the ad was intended on selling: “[U]nder the leadership of President Reagan, our country is prouder and stronger and better. Why would we ever want to return to where we were less than four short years ago?”11 Beyond fulfilling campaign goals, the message embedded in the morning-after metaphor was also self-congratulatory. As the Reagan-Bush campaign portrayed, this morning in America represented not just mere progress from the late 1970s,12 but significant evisceration of some kind of shadowy, night-time turmoil left by the Carter administration and what the Democrats in this election cycle were meant to be signified.13 This new morning, within the age of social and political conservatism, had possibilities and norms symbolized by family station wagons and white heteronormative church weddings that could all be wrecked if Reagan’s streak was cut prematurely short—norms that, according to the ad, bore the possibility of bringing the nation relief and tranquility.14 This observation was the implicit promise in exchange for re-election.

As far as that morning was concerned, Reagan had substantive reasons for being able to manipulate the realities of prosperity to construct the ad’s narrative. The commercial’s messages and images reflected some of the social and economic realities of the day while it tried to associate positively such realities to romantic, updated notions of American middle-class values, patriotism, and tranquility.15 Simultaneously, Reagan was taking credit for the victories during

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8 Id.
9 See id.
10 See Ronald Reagan, Republican National Convention Acceptance Speech (Jul. 17, 1980) available at http://www.reagan.utexas.edu/archives/reference/7.17.80.html (“[W]ith the virtues that are our legacy as a free people and with the vigilance that sustains liberty, we still have time to use our renewed compact to overcome the injuries that have been done to America these past three-and-a half years”); see also National Family Week, Proclamation No. 4999 (Nov. 12, 1982) available at http://www.reagan.utexas.edu/archives/speeches/1982/111282b.htm.
11 Reagan-Bush ’84 supra note __.
12 See id. (”Why would we ever want to return to where we were less than four short years ago?”).
13 See GIL TROY, MORNING IN AMERICA: HOW REAGAN INVENTED THE 1980s 17 (2005) (“[Reagan is telling] the sad tale of America in the 1960s and 1970s, a country demoralized, wracked by inflation, strangled by big government, humiliated by Iranian fundamentalism, outmaneuvered by Soviet communists, betrayed by its best educated and most affluent youth.”).
14 See Reagan-Bush ’84, supra note __.
15 See id.
his first term and leveraging for the next step and setting up what that step could look like. Yet, 1984 was not without its troubles.\textsuperscript{16} The Cold War between the U.S. and then-Soviet Union was still being waged,\textsuperscript{17} and in 1986, two years after Reagan’s re-election, the Iran-Contra affair would break out.\textsuperscript{18} The American economy was only gradually correcting itself from what was then the worst recession since the Depression,\textsuperscript{19} and only three years later in October 1987 the stock market would crash.\textsuperscript{20} The treatment of AIDS was still at its early stages,\textsuperscript{21} and its associative stereotypes with the gay community were resonating loudly.\textsuperscript{22} And finally, not to forget, 1984 was only two years before the U.S. Supreme Court criminalized same-sex intimacy in \textit{Bowers v. Hardwick}.\textsuperscript{23}

Still there were enough substantive domestic achievements for Reagan to employ his morning-after metaphor for leveraging his ideas and agendas. Not slow to marry symbolic American iconography with conservative values, the ad ends with the image of flag-raising, allowing the campaign to appropriate Americanism with Reagan’s norms as the voice-over firmly declares, “It’s morning again in America,” with self-assurance and promise.\textsuperscript{24}

This period after \textit{U.S. v. Windsor}’s decision to find Section 3 of the Defense of Marriage Act unconstitutional can be conceived as a metaphorical morning for sexual minorities in the United States.\textsuperscript{25} Calling this moment such is likewise a self-congratulatory move—as self-congratulatory as Reagan’s with his idealized day of prosperity in 1984.\textsuperscript{26} Yet, the metaphor of the “morning after” also serves a critical and normative purpose beyond the laudatory; affixing this moniker both acknowledges and reifies that a sense of light is now cast upon what was a grave period of uncertainty for same-sex couples in the U.S.,\textsuperscript{27} and anticipates what is about to

\textsuperscript{16} See \textit{TROY}, supra note __, 15 (“This optimism and pro-Americanism forged a governing template useful to future presidents from both sides of the aisle …. Unfortunately the results of this alchemy with the American people were often mixed.”).

\textsuperscript{17} See \textit{JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY} 213–14 (2005) (“Reagan accelerated Carter’s increase in American military spending: by 1985 the Pentagon’s budget was almost twice what it had been in 1980.”).

\textsuperscript{18} See \textit{generally} Iran-Contra Investigation Report, S. Rep. No. 100-216, at 285 (1987) available at https://archive.org/stream/reportofcongress87unit/page/n5/mode/2up (“On [November 2, 1986], a Lebanese magazine, Al-Shiraa, reported that the United States had sold arms to Iran….”).


\textsuperscript{23} 478 U.S. 186 (1986).

\textsuperscript{24} Reagan-Bush ‘84 supra note __.


\textsuperscript{26} See Reagan-Bush ‘84, supra note __.

come. What will the rest of that day look like? In the year after *U.S. v. Windsor*, the movement behind sexual minority rights in the United States had reason to reflect upon its progress, vindication and triumph, relief, and the possibility of continuing progress for marriage equality for sexual minorities and sexual orientation anti-discrimination on the whole. President Obama echoed this sentiment in his statement following *Windsor* that a direction for gay rights that was achieved through triumph over adversity:

This ruling is a victory for couples who have long fought for equal treatment under the law; for children whose parents’ marriages will now be recognized, rightly, as legitimate; for families that, at long last, will get the respect and protection they deserve; and for friends and supporters who have wanted nothing more than to see their loved ones treated fairly and have worked hard to persuade their nation to change for the better.  

Since then, a new day has dawned for same-sex couples federally—and is subsequently dawning on various state levels. By January 2014, roughly six months after *Windsor*, six states had moved to legalize same-sex marriage. And then by the beginning of 2015, at the time of this writing, 37 states are now permitting same-sex couples to marry, compared to only ten states prior to *Windsor*. Normatively, the law is no doubt moving toward recognition of sexual minorities, their relationships, and their rights. What lies ahead in this new day certainly seems hopeful for now than ever before.

But like Reagan’s 1984 ad, this morning is not without its realities, and within the entirety of the LGBT rights movement, beyond the recent progress for same-sex marriage, there still is much to accomplish federally. Though gradually changing, the protections for sexual minorities are still not the same as those for other minority groups, expressly covered under federal laws such as Title VII of the Civil Rights Act of 1964. Sexual orientation is still not a classification recognized consistently and uniformly for protection under the highest

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31 See Reagan-Bush ’84 *supra* note ___.

constitutional scrutiny.\textsuperscript{33} And of course, the Supreme Court has yet to decide more profoundly on the recognition of same-sex couples in marriage.\textsuperscript{34}

And then there are what seem like set-backs. As the progress for the passage of the Employment Non-discrimination Act (ENDA)\textsuperscript{35} has been stalled first by the conflict caused by its religious exemption and then complicated possibly by the Supreme Court’s 2014 ruling in \textit{Burwell v. Hobby Lobby},\textsuperscript{36} it is significant to pause upon the recent new day for sexual orientation rights in the marriage cases via \textit{Windsor} and post-\textit{Windsor} and to study how possibly and normatively the advances in marriage equality should prove helpful for ENDA and the law’s conceptualization of sexual orientation as a protected category and within antidiscrimination law federally, such as Title VII. Specifically in the post-\textit{Windsor} cases for same-sex marriage, the narrative of marriage discrimination against sexual minorities has been refined not merely as a story of inequality but more so of indignity brought about through animus that the law now must rectify.\textsuperscript{37} This jurisprudential development here must continue in order to deem the set-backs small for future progress regarding how the law treats sexuality. In the wake of the many successes on the marriage equality front, we cannot forget that one of the original goals of marriage equality was the protection of sexual orientation and sexual minority identities.\textsuperscript{38} This morning after \textit{Windsor} is momentous for marriage recognition, but the moment is about LGBT rights ultimately. What must we do when we have surpassed marriage equality? When we are essentially done honeymooning? We must recognize the significance of this new dawn before us provided by \textit{Windsor} and see its incremental potential for eventual objectives and accomplishments beyond same-sex marriages and into sexual orientation antidiscrimination.

The article seeks to bring together the recent triumphs of the marriage equality movement post-\textit{Windsor} with the next possible moments for sexual orientation anti-discrimination. Beyond this Part I Introduction, Part II provides an incrementalist perspective on the developments in \textit{Windsor} that have then shaped further advances in post-\textit{Windsor} cases—exemplifying, in particular, the convergence of Justice Kennedy’s animus and dignity concepts into a mediating principle. Part III will then trace the role this mediating principle in post-\textit{Windsor} cases that have been helpful not just for marriage equality but also for finding sexual orientation worthy of heightened scrutiny and suspect classification under equal protection theory—especially how animus and dignity concepts have persuaded courts to view sexual orientation favorably as an

\begin{itemize}
\item \textsuperscript{33} See, e.g., \textit{Kitchen v. Herbert}, 961 FSupp.2d 1181, 1207 (D. Utah 2014) (declining to analyze equal protection claim by same-sex couples under heightened scrutiny because sexual orientation was not recognized by the Tenth Circuit as a suspect class.)
\item \textsuperscript{34} See \textit{DeBoer v. Snyder}, No. 14-1341, at 33 (6th Cir. 2014) (“A \textit{[Windsor]} decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago…”).
\item \textsuperscript{35} H.R 1755. 113th Cong. (2013).
\item \textsuperscript{36} \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S.Ct. 2751 (2014).
\item \textsuperscript{37} See Susannah W. Pollvogt, \textit{Windsor, Animus, and the Future of Marriage Equality}, 113 COLUM. L. REV. SIDEBAR 204, 206 (2013) (“[W]ith \textit{Windsor}, the Court declared that animus remains a relevant concept in the Court’s equal protection jurisprudence and confirmed that proving the presence of animus is a viable strategy for winning a marriage equality challenge.”).
\item \textsuperscript{38} See Thomas B. Stoddard, \textit{Why Gay People Should Seek the Right to Marry}, Out/Look, Fall 1989, at 8, 12 (arguing that marriage litigation would “most fully test[] the dedication of people who are not gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”).
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immutable trait. Part IV will then look at how this developed view of immutability in post-
Windsor cases should reflect an increased importance on autonomy for sexual identities. Consequently, before concluding in Part VI, Part V will discuss normatively how that progress in autonomy should leverage in the development of sexual orientation antidiscrimination. Specifically, this development could justify possibly for broadening Title VII to be more inclusive of sexual orientation discrimination.

Like the victory observed and expressed in Ronald Reagan’s “Morning in America” ad in 1984,\(^{39}\) the post-Windsor moment offers a stopping point of reflection. The morning after Windsor should look progressively for the possibilities that lie in this entirely new day for LGBT rights.

II. INCREMENTALISM WITHIN THIS INCREMENT: DEVELOPMENTS IN THE NIGHT BEFORE

In characterizing the developmental nature of the marriage equality movement in the U.S., it would be too easy (though not entirely inaccurate) to describe the progress as slow and stagnant for quite a lengthy duration in the early days—with same-sex marriage cases in the 1970s, such as Baker v. Nelson,\(^{40}\) only nascently attracting attention for the issue but without reaching merited success—and progress only hastening within the last 15 years, once recognition for same-sex couples were achieved through civil unions (Baker v. State) and then finally through making marriage legally available to same-sex couples in cases such as Goodridge v. Department of Public Health,\(^{41}\) Varnum v. Brien,\(^{42}\) Kerrigan v. Commissioner of Public Health,\(^{43}\) and Windsor. Describing the movement summarily in this way would obscure a more watchful study of how the details within that narrative of success and setbacks helped shift legal perceptions about same-sex couples but also more broadly how sexuality should be regarded in the law and how all of it has eventually led to this “morning after.” The following focuses on studying the recent trend toward marriage equality with an incrementalist methodology and extends my previous examination\(^{44}\)—both of which helps us track and posit the leveraging of sexual minority rights beyond marriage equality.

A. PARAMETERS FOR INCREMENTALIST THINKING

A more detailed narrative would consider how the night-and-day shift between the early decades of denials of same-sex marriages and then the recent successes brought on by cases that recognized marriage between same-sex couples had between them one long incremental period of progress for the perception of sexual minorities that fits within the classic path often needed for a society to legally accept the idea of same-sex marriage. It is often a three-step process to reach the inevitability of marriage equality.\(^{45}\) Studied comparatively by Kees Waaldijk,\(^{46}\)

\(^{39}\) See Reagan-Bush ’84, supra note __.

\(^{40}\) Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971).

\(^{41}\) 789 N.E.2d 941 (Mass. 2003).

\(^{42}\) 763 N.W.2d 862 (Iowa 2009).

\(^{43}\) 957 A.2d 407 (Conn. 2008).


\(^{45}\) See id. at 7.

\(^{46}\) Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW
William Eskridge, and Yeval Merin, this particular three-step process is one that I have previously termed as “marriage equality incrementalism” and one that I have found coincides well within economist Charles Lindblom’s classic studies on the characteristics of disjointed incrementalism. Within marriage equality incrementalism, Waaldijk, Eskridge, and Merin have identified that for a society to begin legally recognizing same-sex couples in marriage the following must happen: (1) first, same-sex intimacy must be decriminalized; (2) then, efforts towards anti-discrimination for sexual minorities must be instituted; and (3) finally, recognition of same-sex relationship must arise. Once these three steps have been reached, marriage equality is possible—if not inevitable. In my previous work, I revised Step Three from marriage to relationships and as well as noted that we are now in a revised Step Three federally. As Waaldijk, Eskridge, and Merin each have noted, for a society with a history of heavy intolerance toward sexual minorities and for its political consciousness in gradually accepting the concept of same-sex marriage, these steps are significant—not merely for the concept itself, but also for recognizing and elevating the identities of sexual minorities at the same time. Indeed, this simultaneous outcome for accepting the identities of sexual minorities within the achievement of marriage equality is what makes this process so “necessary” as Merin puts it:

[T]he fight for gays for inclusion in the institution of marriage should not be examined as an independent claim; rather it should be assessed in light of the status of gay men and lesbians in Western societies in general and in fields of law other than marriage. The recognition of same-sex couples, I argue, is dependent upon and connected to the status of gays in fields other than family law. Developments such as the repeal of sodomy laws and the enactment of antidiscrimination statutes are required for the later recognition of same-sex couples in family law.

Waaldijk concurs by observing similarly that “once a legislature has provided that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules of family law that do precisely that.” Eskridge illustrates the same sentiment with a cause-and-effect analysis:

Repeal of sodomy laws emboldens some gay people to come out of their closets and emboldens the uncloseted to organize themselves politically and press for other equality assurances. The more openly gay people there are and the better organized they are politically, the greater attention officials will pay to their

49 See Ho, supra note __, 7.
51 See Ho, supra note __, 7.
52 See id. at 53.
53 Id. 6-9.
54 See MERIN, supra note __, at 308-09.
55 See Waaldijk, supra note __, at 440.
arguments for equal legal entitlements, even if popular attitudes are otherwise unaffected.  

Hence, assuming there is legal and historical intolerance toward sexual minorities, a society’s recognition of both its sexual minorities and their rights to marry those of their sexual preference seem to progress in complimentary fashion. This pairing shares observations about underlying goals of the marriage equality movement as well as reminds us that the original strategies for litigating over marriage had in mind legal protections for sexual minorities.

Beyond the elevation of the societal perceptions of sexual minorities, another observation can be made about incrementalism in marriage equality that looks to the shape of that progress. Unintentionally, these three steps might create a straightforwardly-linear progression, but referring to Lindblom’s original thesis on disjointed incrementalism here and its theoretical refinements made later by Edward Woodhouse and Andrew Weiss clarifies how each step is actually reached and surpassed. The evolutionary and incremental progression of a political issue is fought often with ways in which successes and setbacks push and pull to reach from one major step to the next, which reflects almost a collective back-and-forth mental processing of a significant issue—conservative at times in speed and yet democratic in nature for securing majoritarian or popular confidence, and almost predictively progressive once the outcome of this issue processing has been reached. According to Lindblom’s theory, disjointed incrementalism is preoccupied with gradual, “synoptic” changes that propel the status quo rather than drastic overnight changes that occur instantaneously. No “one fell swoop” movements here. Instead, at the societal level, these synoptic changes are products of bounded rationality that is mimetic of a cyclical process of thought that slowly ruminates forward on a complex issue, with stops and starts in between, rather than a swift and facile journey from one goal to another. In the study of incrementalism, Lindblom likens such a journey to “embar[k]ing on a course of mental activity more circuitous, more complex, more subtle, and perhaps more idiosyncratic than [] perceived” and that progress and insight is produced after messy and unhastened vetting that Lindblom anthropomorphizes as “[d]odging in and out of unconsciousness, moving back and forth from concrete to abstract, trying chance here and system there, soaring, jumping, backtracking, crawling, sometimes freezing on point like a bird dog[.]” Lindblom’s attempts to characterize incrementalism as a science of “muddling through” and illustrating it as if it were a mental struggle to process a complicated issue reiterate the importance of recognizing the journey as a highly nuanced one—emphasizing the “increment” aspect of the process. Weiss and Woodhouse, have since taken his expressive descriptions of those circuitous moments of decision-making and identified actual political processes—or what they call, “stratagems”—that

56 Eskridge, supra note __, at 117.
57 See Stoddard, supra note __, at 12.
59 See Ho, supra note __, 17-18.
60 Braybooke & Lindblom, supra note EEE, at 81
61 Id.
62 Id.
63 Id.
64 Id.
happen in that development, partly to bolster Lindblom’s theory but also to respond to criticism that incrementalism mistook for a more simplified path from one step to the next. In furthering the study on marriage equality incrementalism, my previous work married these stratagems to examples of the political process in between the three steps in marriage equality incrementalism that demonstrate why, despite appearances, the path to marriage equality has climbed more circuitously than linearly and why a study regarding incrementalism must be more forgiving toward the lack of simple linearity from one step in the progress to the next. So it is expected that, even with same-sex marriage, an incremental climb up the three steps, from decriminalizing same-sex intimacy to recognizing same-sex coupling has not been one smooth transition, but one with trials and errors that still hopefully pushes toward progress for sexual minorities. In this way, it also makes sense that when progress reaches a “step,” that this “step” might itself include trial and errors and revisions. This back-and-forth, start-and-stop attribute of incrementalist progress also explains in the long haul why the goal of sexual orientation antidiscrimination figures as the second step in marriage equality incrementalism but is likely an issue for which marriage equality should help leverage once same-sex marriages are uniformly recognized. If protection of sexual orientation from discrimination was one of the ultimate goals of the marriage equality movement, then this logically suggests that three steps of marriage equality incrementalism themselves likely amounts to an “increment” that fits within a larger more encompassing incrementalist journey toward unencumbered recognition and acceptance for sexual minorities and their rights. Knowing this characteristic, Weiss and Woodhouse’s stratagems facilitate understanding of the post-Windsor moment to see how the development can leverage further progress. In this article, we will see that this kind of involved and at times “messy” movement noticeably buttressing accomplishments that facilitate progress from one step to another.

With Windsor, I have previously asserted that, within the particular events in our modern consciousness since the early 1970s, all three steps for marriage equality incrementalism identified by Waaldijk, Eskridge, and Merin have finally been reached on the federal level in order to bring us this morning-after. First, the Supreme Court in Lawrence v. Texas in 2003 decriminalized same-sex intimacy by overturning Bowers v. Hardwick (step one). Then President Obama successfully initiated the repeal of Don’t Ask, Don’t Tell in the military in 2011 (step two). And lastly, the decision in U.S. v. Windsor that overturned Section 3 of the Defense of Marriage Act, initiated recognition of married same-sex couples on the federal level (step three). It is important to note that Windsor only started the venture into Step Three, but did not fully complete the journey to solidify a footing that allows for progress that fully recognizes same-sex matrimonial unions on the federal level and indeed the realities in the U.S. qualifies for a revision of Step Three to recognize not same-sex marriages but same-sex

66 See Weiss & Woodhouse, supra note __, at 256.
67 See Ho, supra note __, 12-19.
68 See id.
69 See id. at 18-19.
70 See id at 11-14.
71 See id. at 53-55.
72 See id. at 33.
73 See id. at 33-34.
74 See id. at 53-55.
relationships.\textsuperscript{75} Post-Windsor, it has been the patchwork incrementalism amongst the states themselves—with more than 40 federal district and/or circuit cases on same-sex marriage mostly following Windsor—that have played the role of bringing the issue back to the Supreme Court for a more extensive treatment that furthers the trip in Step Three. Now the question is where we are headed once the moment for marriage equality has been reached. If further developments for antidiscrimination is where we are going, then what ends other than marriage equality do these recent post-Windsor achievements accomplish?

B. THE ESSENTIALIST-CONSTRUCTIVIST CONTINUUM

Noting Lindblom’s characteristics for disjointed incrementalism within the process in which recognition of same-sex marriage incrementally progressed toward quickened inevitability, I have argued that at least federally the evolution of the perception of same-sex couples in the law also brought about a major recalibration of the push-pull between essentialist-versus-constructivist notions about sexual orientation.\textsuperscript{76} By decriminalizing same-sex intimacy, Lawrence began that recalibration.\textsuperscript{77} But a very notable stride in this shift is how Windsor continued this recalibration by perpetuating pro-gay essentialist-constructivist ideas about sexual identity as it relates to same-sex couples. After the federalism issue when he began to critique DOMA substantively, Justice Kennedy’s opinion in Windsor here analyzes the animus-filled impetus that led to the passage of DOMA in 1996, and to his determination that DOMA could not survive constitutionally.\textsuperscript{78} In order to find animus, the opinion reaches toward the congressional house report during the legislation of DOMA and cites specific portions that helped to highlight in Windsor that “[t]he House concluded that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’ ”\textsuperscript{79} Those specific portions of the congressional house report reflected debates over homosexuality and its incongruity within the heteronormative and religiously moral family setup. Because of the argument that procreation was readily possible, in the most “natural” sense, to opposite-sex couples from intimate engagement, but not readily possible from intimate engagement for same-sex couples,\textsuperscript{80} the reports construed same-sex relationships for something biologically deviant from opposite-sex relationships. All of this problematic logic was aligned with what the House Report called “the teleology of the body.”\textsuperscript{81} Thus, what troubled Kennedy in Windsor, it seemed, was a skewed antigay argument based on biology that was narrowly focused to exclude same-sex couples from legal recognition of marriage and reach vacant biological conclusions about same-sex relationships—which was used symbolically to represent the identity.\textsuperscript{82} Choosing to be in a same-sex relationship, one that is not premised in an opposite-sex union, would seem irrational and contrary to the procreative goals of traditional marriage and that choice would be morally condemned. Personal choice and autonomy in this area of marriage had to be subordinated to

\textsuperscript{75} See id.
\textsuperscript{76} See id. 55-61.
\textsuperscript{77} See id.
\textsuperscript{78} U.S. v. Windsor, 133 S.Ct. 2675, 2675 (2013).
\textsuperscript{79} Id. (quoting HR Rep 104-664, p. 12-13 (1996)).
\textsuperscript{81} Id. at 13.
\textsuperscript{82} See Douglas Nejaime, Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination, 100 CALIF. L. REV. 1169 (2012).
biological goals. Intrinsically, the logic and message of the house report was simple: an individual could still naturally procreate in marriage, so long as that individual belonged within an opposite-sex marriage rather than choosing a same-sex relationship, and as far as gay identities were concerned at the time, judgments about choice figured largely in assumptions about the etiology of “being gay” and was usually negative. In essence, this emphasis on biology could be prescribed as an admonishment for the homosexual orientation, and how the choosing of that sexuality over a heterosexual one also affords no favor in the law. Framed in that way, there was very little space in that premise to accept a broader perspective about relationships and sexuality that validated decisions made by same-sex couples. As a result, sexualities, other than one that would reinforce heteronormative and Judeo-Christian preferences, were aberrant according to in this scheme. This justification for DOMA that used biology to create an antigay essentialist view of same-sex couples later came under fire in Windsor when Kennedy read within it a moral blameworthiness that led to both the practical and symbolic effect of DOMA on same-sex couples:

DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.”

With that connection, he uncovered the appropriate-level of animus to determine unconstitutionality.

It is merely one thing to find animus, but another to tie it to perspectives on sexual orientation within the law. Justice Kennedy’s finding of animus in Windsor and the outcome of his majority opinion rejects the possible narrowness and exclusivity of an essentialist perspective that was harnessed in an anti-gay way by DOMA’s proponents because not only did it exclude benefits and rights to same-sex couples but it ultimately demeaned them on both legal and societal levels. It was by arriving at this result that Windsor overturned DOMA to allow states to craft outcomes that emphasize a possible broader perspective on relationships—one that could let individual goals of marriage untouched. Although Kennedy did not explicitly weigh in on the nature of sexuality, he recognized that “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person” and that autonomy in forming identities—even through coupling—needs to be protected in order to avoid indignity: “In acting first to recognize and then to allow same-sex marriages, New York [state] was responding ‘to the initiative of those who [sought] a voice in shaping the destiny of their own times.’” With its antigay essentialist philosophies, DOMA’s pre-emption of New York’s response renders the conclusion that “DOMA seeks to injure the very class New York seeks to protect” and was “strong evidence of a law having the

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83 See infra part III.
85 Id. at 2697.
86 See Ho, supra note __, at 54-55.
87 Windsor, 133 S.Ct. at 2695.
88 Id. at 2694 (citing Bond v. U.S., 131 S.Ct. 2355, 2359 (2011)).
89 Windsor, 133 S.Ct. at 2694.
In other words, Kennedy’s opinion asserted a broadened respect for the ability of individuals to make choices beyond DOMA’s heteronormative and antigay essentialist paradigms and protect the dignity of couples, same-sex or otherwise.

C. THE ANIMUS-DIGNITY CONNECTION

The connection between animus and dignity in Windsor has been a significant one because it reflects incrementalism and serves as a device to leverage from Windsor to other marriage cases in many respects. First, the pairing itself reflects an incrementalist climb but also serves important purposes in the negotiation of further incrementalist progress in pro-LGBT protections. Up until Windsor, within the significant gay rights cases at the Supreme Court, all opined by Justice Kennedy, the use of animus and dignity rights have had their incremental and assorted appearances. Animus was first raised within the context of sexual orientation in Romer v. Evans, in which Colorado’s Amendment 2, a voter approved referendum to ban any specified legal protections of gays and lesbians from discrimination, was found to be constitutionally challenging because “the amendment seems inexplicable by anything but animus toward the class it affects.” Kennedy imported this animus from other equal protection cases outside of sexual orientation, from Department of Agriculture v. Moreno and then identified it in Amendment 2 in order to construct his holding that such animus made the legislative process irrational enough to fail a test for rational basis. There was no explicit mentioning of the concept of dignity in Romer; Kennedy’s preoccupation with the animus that led to the passage of Amendment 2 was that it served to represent disapproval of a class and that the purpose of this animus was to disadvantage the group in which Amendment 2 was intended to burden. Only a small shadow of dignity was hinted at in Romer when Kennedy wrote that the way Amendment 2 was constructed “inflicts on [gays and lesbians in Colorado] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.” Certainly dignitary harms could constitute some of the “injuries” that made up for all of the injuries that Kennedy saw resulting from Amendment 2; but Kennedy did not single out or prioritize dignitary harms in Romer and so such injuries he referred to could also encompass actual denial of certain rights more concretely than rights to human dignity. Part of the reason for keeping a connection between animus and dignity submerged in Romer could have been that Kennedy had to write more narrowly in Romer as his opinion would still be living in the shadow of Bowers v. Hardwick which was still in effect at the time and permitted the criminalizing of same-sex intimacy. If Bowers was able to allow states to brand sexual

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90 Id.
92 Id. at 632.
93 Id. at 635 (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).
94 Id. at 632 (“[T]hat the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).
95 Id. at 634 (“A second and related point is that the laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).
96 Id. at 635.
97 Id. at 635.
minorities as criminals for engaging in behavior that might reflect orientation, then discussing the dignity rights of sexual minorities in *Romer* would have created a visible paradox.

Indeed, it was not until Kennedy was opining in the context of overruling *Bowers* in *Lawrence v. Texas* did he officially bring to attention the dignitary harms inflicted upon sexual minorities from state sodomy statutes. However, in decriminalizing same-sex intimacy, the concept of animus was sufficiently relegated to the background—in historical accounts of sodomy laws in America and in locating the root of modern sodomy laws against same-sex intimacy where Kennedy framed the *Bowers* ruling as “making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral” and that such “condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.” Kennedy’s language here describing the “condemnation” was reminiscent of his discussions of animus in *Romer* as a moral disapproval of a class. Still, animus was not directly raised as a predominant reason to overrule *Bowers* in *Lawrence v. Texas*; it was rather the harms to dignity in regulating private conduct. Kennedy spoke of animus and the *Romer* analysis as a “tenable argument” but also problematic doctrinally to resolve Bower’s continuing validity. Instead, dignity was at the forefront of the discussion, appearing in the case’s preoccupation with overruling *Bowers* on liberty concerns rather than equal protection ones. After all, *Lawrence* was framed within autonomy and privacy interests from the outset, and the invocation of *Casey* for its application to the case made the dignitary harms concerns more easily extrapolated from the context of privacy and contraceptives into the realm of same-sex intimate conduct. Citing the passage in *Casey* regarding the use of contraceptives as “choices central to personal dignity and autonomy” that “are central to the liberty of protected by the Fourteenth Amendment” and that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, and of the universe, and of the mystery of human life,” Kennedy then articulated that likewise “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.”

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discriminate both in the public and in the private spheres. The central holding of *Bowers* has been brought in question

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99 *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (“American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place.” (citing to Brief of American Civil Liberties Union et al, as Amici Curiae 14-15, and n. 18)).

100 Id. at 571.

101 See id. 574-75.

102 See id. 574.

103 Id. 574 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992)).

104 Id.

105 Id.

106 Id.
by this case and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.\textsuperscript{107}

The criminalizing effect—couched in terms of “stigma” and “demean”—solidified the connection to \textit{Casey} and autonomy when Kennedy observed that “[t]he stigma [the Texas] criminal statute imposes, moreover, is not trivial”\textsuperscript{108} and that it was “a criminal offense with all that imports for the dignity of the persons charged.”\textsuperscript{109} Thus, animus remained within the backdrops of the \textit{Lawrence} reasoning, while dignity was introduced and extensively used to contextualize the type of harm justifying \textit{Bower’s} overruling.

The connection between the two concepts was later fully illustrated when Kennedy wrote the majority opinion in \textit{Windsor}. While discussing DOMA’s discriminatory effect against sexual minorities in \textit{Windsor}, Kennedy linked together animus and dignity together most explicitly than he ever did in \textit{Romer} or \textit{Lawrence}. First, DOMA was borne of legislative animus—a moral disapproval that was reinforced by antigayessentialist notions about same-sex relationships—and animus that had an intolerable purpose which Kennedy found was to be “to impose inequality.”\textsuperscript{110} But he further located the dignity rights implications by illustrating what the inequality created by animus in DOMA spoke to the identity of same-sex individuals in the society—stigmatizing them in their relationships and the families they have created.\textsuperscript{111} The furtherance of the two concepts in \textit{Windsor} was not Kennedy’s original invention as lower courts that perpetuated the same-sex marriage issue between \textit{Lawrence} and \textit{Windsor} had made the connection before.\textsuperscript{112} But with \textit{Windsor}, the connection between animus and dignity in the context of marriage discrimination against sexual minorities was highlighted federally at the highest judicial level. Kennedy fit the connection doctrinally and centrally into his calculation of DOMA’s unconstitutionality under equal protection. Although others have couched this case as more so a federalism case,\textsuperscript{113} the appearance and connection of animus and dignity were undeniable and served several purposes and the connection reflected an incrementalist gesture. From \textit{Romer} to \textit{Lawrence}, the individual concepts were introduced in the sexual orientation context; and in \textit{Windsor}, the connection was more fully galvanized into the reason why such discrimination is unconstitutional. In many of these cases post-\textit{Windsor}, this spoken connection between animus and dignity has since served as a template for discussions in lower courts and has percolated into further variations that persuaded courts to permit and recognize same-sex marriages. For instance as Cary Franklin has pointed out, the animus-dignity connection is what she refers to as an anti-stereotyping or mediating principle that contextualizes the narrative of sexual orientation discrimination but also helps courts further justifiably doctrine that protects sexual minorities.\textsuperscript{114} The next part of this article will explore the use of the animus-dignity connection as such a negotiating device in how heightened scrutiny and suspect classification for sexual orientation has been reached in the post-\textit{Windsor} morning.

\textsuperscript{107} \textit{Id.} at 575.
\textsuperscript{108} \textit{See id.}
\textsuperscript{109} \textit{See id.}
\textsuperscript{110} \textit{U.S. v. Windsor}, 133 S.Ct. 2675, 2695 (2013).
\textsuperscript{111} \textit{See id.} at 2696.
\textsuperscript{112} \textit{See, e.g., Windsor v. U.S.}, 699 F.3d. 169, 198 (2nd Cir. 2012).
\textsuperscript{113} \textit{See, e.g., Windsor}, 133 S.Ct. at 2700 (Roberts, C.J., dissenting).
III. ELEVATION AND EXTENSION OF ANIMUS AND DIGNITY CONCEPTS POST-WINDSOR

The continuing incrementalist progression has brought the same-sex marriage debate into a moment where the probability of equality has become less of a debate, partly through the developments in the recent lower and circuit marriage equality rulings since Windsor, and partly through how the animus-dignity connection has illustrated the effect of marriage inequality on sexual minorities and their humanity. Post-Windsor, lower courts began to import and elaborate upon Kennedy’s animus-dignity connection into their own resolutions over such discrimination and utilized particularly the broadness of Kennedy’s language in Windsor to explore the animus-dignity connection in marriage and sexual orientation discrimination even further. Just as the federalism issue in Windsor could be seen as way that Kennedy was able to then force a discussion on marriage inequality—a discussion that ultimately lead to that focus on animus and on dignity rights—the post-Windsor moment has been an interesting one for incrementalist study even merely for observing how subsequent courts and litigants have used some of the open-endedness of the animus-dignity connection in Windsor to reinterpret doctrinally how denying same-sex couples the right to marry constitutes discrimination. Essentially, these courts in post-Windsor marriage cases have picked up where Justice Kennedy left off. Some federal cases in this vein have been more hermeneutical, so to speak, than others—for instance utilizing the opportunity for importing influence from Windsor’s animus-dignity connection not merely to resolve the inequality stemming from marriage discrimination but pushing the boundaries of sexual orientation protection further. In this fashion, two instances come to mind. First is a post-Windsor case by the Ninth Circuit that has become noteworthy for this leveraging: SmithKline Beecham Corporation v. Abbott Laboratories. The case exemplifies the incrementalist progressive spiral as it applied Windsor to determine that sexual orientation was worthy of heightened scrutiny protection in a case outside of the marriage equality debate.

The second instance involves post-Windsor lower circuit development within marriage equality to determine, amongst other constitutional theories, that state same-sex marriage bans violate federal equal protections on sexual orientation by classifying sexual orientation as a protected trait. Exemplified by Obergefell v. Wymyslo, a district court case from Ohio, which bears direct importance for Supreme Court inquiry as it is a Sixth Circuit case, this line of reasoning differ from the large plurality of other post-Windsor marriage equality cases on the federal level that have rendered due process and equal protection violations based on fundamental rights and/or other equal protection theories that do not hold sexual orientation as worthy of heightened scrutiny. Both instances on the federal level—SmithKline and Obergefell—offer rich incrementalist study into the use of animus-dignity connection post-Windsor to elevate notions of sexual orientation and identity in the law federally as we continue to linger in Step Three of the marriage equality incrementalism.

A. SmithKline and Heightened Scrutiny

\[115 \text{ See generally Neil S. Siegel, Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion, 6 J. Legal Analysis 87, 127-40 (2014) (arguing in part that federalism in Windsor helped rhetorically nudge the opinion’s discussions on equality and liberty).} \]

\[116 \text{ SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).} \]

The level of scrutiny in Windsor was never expressly articulated.\textsuperscript{118} Indeed if such silence by Windsor has been the focus of much scholarly debate, then it seems also plausible that courts have offered different interpretations of that silence as well—although mostly in ways favorable to same-sex couples.\textsuperscript{119} This slippage is exactly what provokes collective ruminations that hopefully results in incrementalist evolutions on an issue. A conservative and exegetical reflection over previous animus cases at the Supreme Court-level (including Romer) would likely render that the level of scrutiny that the animus-dignity connection triggered in Windsor was a more “searching” or “toothful” form of rational basis.\textsuperscript{120} There is room here to debate this determination and the marriage cases after Windsor have interpreted Windsor’s silence by protecting sexual orientation on different levels of scrutiny.\textsuperscript{121} In a move that some might find more hermeneutical, SmithKline, a non-marriage equality case, read Windsor as applying heightened scrutiny.\textsuperscript{122} It reached this interpretation through the use of Justice Kennedy’s animus-dignity connection.\textsuperscript{123} By doing so outside marriage and purely in a sexual orientation discrimination context, the SmithKline case has also arguably played a part in incrementally pushing progress forward from the marriage equality movement, and back into the broader steps for protecting sexual orientation from discrimination. At minimum, this transition demonstrates the observation reflected in one of Weiss and Woodhouse’s stratagems that the incrementalist path sometimes encompasses a sequencing of trials, errors, and revisions over a political issue, which also makes sense to both the leveraging up to heightened scrutiny from Windsor’s silence and the return to antidiscrimination even after some of the advances there were met to accomplish Step Two in marriage equality incrementalism when Don’t Ask, Don’t Tell was repealed in 2011.\textsuperscript{124} Again, the illusion of incrementalism is linearity but progress is often realized in a more wayward, win-some-lose-some shape.\textsuperscript{125} This observation from Woodhouse and Weiss might explain why SmithKline’s finding of heightened scrutiny appropriate for sexual orientation discrimination cases could be considered a revisiting of the issue of antidiscrimination by the Ninth Circuit, but also at the same time a forward-looking revision of the circuit’s own previously-established level for protecting sexual orientation under 14\textsuperscript{th} amendment equal protection theory that takes Windsor and marriage equality advances to something broader for sexual minorities.

\textsuperscript{118} See SmithKline, 740 F.3d at 480 (“Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary.”).

\textsuperscript{119} See, e.g., Wolf v. Walker, 986 F.Supp.2d 982, 1010 (W.D. Wis. 2014) (references omitted) (“It may be that Windsor’s silence is an indication that the Court is on the verge of making sexual orientation as a suspect or quasi-suspect classification. . . . Alternatively, it maybe that Romer and Windsor suggest that ‘[t]he hard edges of the tripartite division have . . . softened,’ and that the Court has moved ‘toward general balancing of relevant interests.’ ”)

\textsuperscript{120} See, e.g., De Leon v. Perry, 975 F. Supp.2d 632, 652-56 (W.D. Tex. 2014) (declining to heightened scrutiny analysis for rational basis analysis, citing inter alia Romer to find state marriage ban violated equal protection).

\textsuperscript{121} Compare e.g. id. (applying rational basis) with Whitewood v. Wolf, 992 F. Supp. 2d 410, 431-32 (M.D. Pa. 2014) (applying heightened scrutiny).

\textsuperscript{122} See SmithKline, 740 F.3d at 484 (“[W]e are required by Windsor to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.”).

\textsuperscript{123} See id. at 481-83 (discussing Windsor’s animus and dignity concepts as reasons for applying heightened scrutiny).

\textsuperscript{124} See Weiss & Woodhouse, supra note __, at 256.

\textsuperscript{125} Id.
SmithKline dealt with the dismissal of a potential male juror from voir dire in a suit over HIV pharmaceuticals. During the interview of the male jury candidate, his responses made evident an easy inference that he might be gay through his mentioning of a male partner. Based on this inference, the attorneys for the defendant, pharmaceutical Abbott Laboratories, dismissed the candidate by using a peremptory strike. Almost immediately, opposing counsel for SmithKline Beecham, made the inference from the strike was that the candidate’s dismissal was due to the candidate’s perceived sexual orientation, and opposing counsel challenged that strike based on Batson v. Kentucky. However, unsure whether Batson prohibited a peremptory strike based on sexual orientation, the court allowed the strike to remain in effect. Trial continued and eventually concluded in favor of Abbott, and SmithKline appealed on the basis that its Batson challenge should have been sustained.

On appeal to the Ninth Circuit, this issue of whether this Batson challenge would have precluded Abbott’s peremptory strike based on a perceived sexual orientation brought forth an examination of whether sexual orientation was a classification that fell under heightened scrutiny in equal protection. Although Batson would have prohibited strikes based on race and gender, it was not known whether such challenges could also apply to prohibit strikes based on sexual orientation. However, Batson progeny proved helpful to direct the Ninth Circuit in knowing that beyond race and gender, a Batson challenge would not at least prohibit a peremptory strike against a jury candidate based on a classification normally subject to rational basis. Hence, as the Ninth Circuit put it, “if sexual orientation is subject to rational basis review, Abbott’s strike does not require reversal” and an inquiry into the classification of sexual orientation in equal protection would have to commence.

In doing so, the SmithKline court also found that decades-old Ninth Circuit cases applying rational basis to sexual orientation discrimination in equal protection were already destabilized by a recent Ninth Circuit precedent, Witt v. Department of the Air Force, that had interpreted Lawrence as requiring heightened scrutiny for a substantive due process claim hinging on sexual orientation. Those two prior controlling Ninth Circuit cases over sexual orientation discrimination, High Tech Gays v. Defense Industrial Security Clearance Office and Philips v. Perry, were cases that predated Lawrence v. Texas and were presumably within

126 SmithKline, 740 F.3d at 474.
127 Id.
128 Id. at 475.
129 Id.
130 Batson v. Ky., 476 U.S. 79 (1986); Smithkline, 740F.3d at 475.
131 Id.
132 Id.
133 Id. at 479.
134 Id.
135 Id.
136 Id. at 480.
137 Id.
138 Witt v. Dept. of the Air Force, 527 F.3d 806 (9th Cir. 2008).
139 See Witt, 527 F.3d at 816-18 (finding and concluding “that Lawrence applied something more than rational basis review”).
141 Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997).
the guiding signature of now-defunct *Bowers v. Hardwick*. This destabilization helped *SmithKline* deal with *Windsor*’s silence because *Lawrence* and *Witt* gave the court the doctrine to interpret that silence. Because *Lawrence* had also been quiet about scrutiny level when it decriminalized same-sex intimacy on due process grounds, *Witt* developed factors to determine that *Lawrence* had used heightened scrutiny. The *Witt* factors are: (1) whether there were the kind of post-hoc rationalizations for the law in question that usual rationality inquiry requires; (2) whether there was discussion of a legitimate state interest for justifying the harm inflicted by the law in question as required by heightened scrutiny; and (3) whether the level of scrutiny of the cited or mentioned cases in the analysis leaned in favor of lower or heightened scrutiny. The interesting incrementalist observation here is how the *SmithKline* court’s weighing of these factors here also captured Kennedy’s animus-dignity connection to firmly leverage a step upward toward heightened scrutiny.

Animus and dignity concepts featured significantly in *SmithKline*’s analysis of the first and second factors. The first *Witt* factor allowed the *SmithKline* court to hone in on Kennedy’s finding and use of legislative animus for the passage of DOMA to discount for any showing of post-hoc rationalizations of DOMA by Justice Kennedy. Building off *Windsor*’s analysis of the legislative design, purpose, and lastly effect of DOMA on same-sex couples, the *SmithKline* court retraced Justice Kennedy’s study into the animus behind DOMA’s legislative history and intent (notably paraphrasing that animus as “immorality of homosexuality”) to conclude upon the “moral disapproval” that Justice Kennedy spoke of in *Windsor*. Paired with the observation that Kennedy used this finding of animus to demonstrate that the actual purpose of DOMA was “‘to impose inequality, not for other reasons like governmental efficiency[,]’” the *SmithKline* court found that such disfavorable analysis toward DOMA could not sufficiently evidence any post-hoc rationalization of DOMA in the opinion—in other words, the kind of rationalization that would have evinced a typical rational basis inquiry: “*Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress’s actual purposes. *Windsor*’s ‘careful consideration’ of DOMA’s actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review.” Actual purpose would intimate heightened scrutiny rather than the deferential rational basis review that could be supported by connections between a law and a conceivable, yet hypothetical purpose; *Windsor*, as *SmithKline* noted, did not entertain hypotheticals.

*SmithKline*’s discussion of a finding of a Congressional purpose, fueled by animus, to justify DOMA’s differentiated treatment of same-sex couples in the first factor also led to dignity harms that the court used to balance the second *Witt* factor in favor of heightened scrutiny. The

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143 See *Witt*, 527 F.3d at 814 (“*Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied[].”)

144 See id. at 816-18.

145 *SmithKline*, 740 F.3d at 480.

146 Id. at 481-82.

147 Id. at 481

148 Id. (citing *Windsor*, 133 S.Ct. at 2693).

149 Id. at 482 (citing *Windsor*, 133 S.Ct. at 2694).

150 Id. at 481.

151 Id.
second *Witt* factor required the *SmithKline* court to find a legitimate state interest to justify the harm that DOMA inflicted on same-sex couples:

Just as *Lawrence* required that a legitimate state interest justify the harm imposed by the Texas law, the critical part of *Windsor* begins by demanding that Congress’s purpose “justify disparate treatment of the group.” *Windsor* requires a “legitimate purpose” to “overcome[]” the “disability” on a “class” of individuals. As we explained in *Witt*, “[w]here the Court applying rational basis review, it would not identify a legitimate state interest to ‘justify’ . . . .” the disparate treatment of the group.\(^{152}\)

By distilling *Windsor* through analysis of this factor, the dignitary harms that Kennedy had drawn from the animus behind DOMA helped further the direction in which *SmithKline* would complete its analysis of the second factor. Because “[r]ational basis is ordinarily unconcerned with inequality that results from the challenged state action[,]”\(^{153}\) the *SmithKline* court observed that words like *harm* or *injury* rarely appear in the Court’s decisions applying rational basis review. *Windsor*, however, uses these words repeatedly. The majority opinion considers DOMA’s ‘effect’ on eight separate occasions. *Windsor* concerns the ‘resulting injury and indignity’ and the ‘disadvantage’ inflicted on gays and lesbians.\(^{154}\)

What the *SmithKline* court read from *Windsor* was the lack of any mentioning of a legitimate state interest that would allow a rational basis review to survive in evaluating DOMA’s disparate treatment of same-sex couples, and such reading was built upon Justice Kennedy’s identification of the dignitary harms DOMA imposed upon same-sex couples in place of what the Supreme Court believed would have been a legitimate interest that passed scrutiny.\(^{155}\) Citing *Brown v. Board of Education*,\(^{156}\) *SmithKline* held that “*Windsor*’s concern with DOMA’s message follows our constitutional tradition in forbidding state action from ‘denoting the inferiority’ of a class of people.”\(^{157}\) For *SmithKline*, none of this exemplified rational basis in *Windsor*, but rather pointed to heightened scrutiny. Inequality in it of itself in *Windsor*—i.e. the exclusion of same-sex couples from enjoying recognized marriage rights—did not solely trigger *SmithKline*’s upward ascent from rational basis to heightened scrutiny; only when that inequality was purposefully brought on by a legislative animus designed to inflict dignitary harms on a relegated class is stepping up toward heightened scrutiny then possible. In this way, the *SmithKline* court relied on the animus-dignity connection as it found for heightened scrutiny and as it made an important distinction regarding the specific animus-dignity connection that Kennedy fashioned in *Windsor*: dignity is possibly antithetical to rationality review.

\(^{152}\) Id. (internal citations omitted).

\(^{153}\) Id. at 482.

\(^{154}\) Id. (internal citations omitted).

\(^{155}\) Id. at 482 (“*Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance[,]”).

\(^{156}\) 347 U.S. 483 (1954).

\(^{157}\) *SmithKline*, 740 F.3d at 482.
SmithKline’s analysis of the third and last factor from Witt—whether Windsor used a heightened scrutiny analysis because it cited and relied on heightened scrutiny cases—was the weakest in the Ninth Circuit’s balancing toward heightened scrutiny as Windsor cited to cases that used various levels of scrutiny: Romer (rational basis), Moreno (a more searching form of rational basis that, according to SmithKline has been read in the Ninth Circuit as heightened scrutiny), and Lawrence (heightened scrutiny, at least according to Witt). This was self-propelling for SmithKline to say the least, but SmithKline attempted to be evenhanded by reasoning that “[b]ecause Windsor relies on one case applying rational basis and two cases applying heightened scrutiny, Witt’s final factor does not decisively support one side or the other but leans in favor of applying heightened scrutiny.” Yet with the other factors tipping in favor of heightened scrutiny, a converse result that balanced this final factor the other way would likely not have been fatal to SmithKline’s eventual heightened scrutiny determination.

To initiate the leveraging upward heightened scrutiny to evaluate under equal protection a claim of sexual orientation discrimination, the SmithKline court relied on doctrinal instability in the Ninth Circuit precedents regarding sexual orientation discrimination. But once past this hurdle, it was Kennedy’s connection between animus and dignitary harms in Windsor that became significant for SmithKline’s actual leveraging. As a mediating principle, both animus and dignity concepts helped dismiss possibilities that Windsor employed a rationality review, pushing forward the Ninth Circuit’s doctrine on sexual orientation anti-discrimination. Essentially, with Witt and Lawrence in the periphery and doctrinal framework of its analysis, SmithKline retraced Kennedy’s animus-dignity connection in Windsor to justifiably reach heightened scrutiny review for sexual orientation discrimination, elevating protection of sexual minorities at least within Ninth Circuit cases. What resulted in all of this textual intertwining was enough room and momentum for the SmithKline court to engage in an incremental development that resulted in speaking, at least from the Ninth Circuit’s purview, what remained unspoken in Windsor.

Of course other post-Windsor federal cases have not followed in SmithKline’s footsteps, but stayed closer to a narrower, and supposedly-exegetical reading of Windsor—sometimes pondering, but always leaving intact and undissected the possibility that Windsor’s unspoken level of scrutiny was a heightened one. Those courts in such cases have been more restrained by doctrine. However, even despite using the lowest form of scrutiny for sexual orientation and sketching their pro-gay decisions to conform closer within a cautious signature of Windsor rather than drawing from a perspective that broaden the boundaries of what Justice Kennedy had drawn, these courts still demonstrate incrementalism at work, making smaller progress—but progress, nonetheless—in refining the reasoning within the current doctrine of lower scrutiny in regards to same-sex relationships. In contrast SmithKline breaks out of that cycle—partly because of its non-marriage subject matter, but also partly because it used animus and dignity from Windsor to justify a broad reading that effected a different incrementalist reach, one that

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158 Id. at 483.
159 Id.
161 See Douglas Nejaime, Doctrine in Context, 127 Harv. L. Rev. F. 10, 14 (2013) ("Fearful of reversal and, for some, concerned about potential elevation, these judges experience constraints on decisionmaking that Supreme Court Justices do not.")
bears more normative importance for the furthering of protections and recognition of sexual identity beyond marriage equality.

**B. OBERGEFELL AND SUSPECT CLASSIFICATION IN THE POST-WINDSOR MARRIAGE CASES**

Soon after *Windsor*, the collection of federal same-sex marriage cases that viewed marriage bans as discriminating against sexual orientation and then addressed such discrimination by classifying sexual minorities as a suspect class and prompting heightened scrutiny review would seem to offer another strand of momentum in pushing the incremental progression of sexual orientation protections further along.\(^{162}\) Similarly they have reached as far as *SmithKline* did in application, but validate heightened scrutiny for sexual orientation discrimination in equal protection by using the animus-dignity connection from *Windsor* differently. And similar to *SmithKline*, the animus-dignity connection served to negotiate the doctrinal advances that were sought after.

Other than the Sixth Circuit’s negative ruling toward marriage equality\(^{163}\) and district court cases that did not find that marriage bans in Louisiana and Puerto Rico constitutionally impermissible,\(^{164}\) the large and fairly predictable consensus in the marriage cases post-*Windsor* were predicated on the outcomes for same-sex marriage in Justice Kennedy’s landmark overturning DOMA—whether those successful outcomes were in the realm of substantive due process, federalism, and/or equal protection. Not to trivialize and detract from such significant achievements for the recognition and extension of marriage rights for same-sex couples, the repetitive successes of adjudication, case after case for same-sex couples in federal courts seemed to be a recurrent *Groundhog Day* scenario.\(^{165}\) Many of the litigants sued for the same kinds of recognitions under the same theories with similar uphill battles against state oppositions, and with most resolved in similar judicial fashion invoking or mentioning dignitary harms implications.\(^{166}\) This cycling back-and-forth again exhibits the sequencing of trials and revisions from one increment to the next in the Lindblom, Weiss, and Woodhouse combined theory of disjointed incrementalism.\(^{167}\) However, further critical and normative satisfaction can be extracted from a more detailed study focusing on the differences between some of these cases. Although most post-*Windsor* marriage cases further the issue of equality, only a handful of these cases—the ones that actually try to resolve the issues through sexual orientation discrimination—truly and meaningfully help propagate the legal recognition and protection of sexual minority

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\(^{162}\) See, e.g., *Wolf v. Walker*, 986 F.Supp.2d 982, 1009-1014 (W.D. Wis. 2014) (finding sexual orientation a protectable trait as suspect or quasi-suspect classification); *see also Whitwood v. Wolf*, 992 F.Supp.2d 410, 424-30 (M.D. Pa. 2014) (finding sexual orientation a protectable trait as suspect or quasi-suspect classification as well).

\(^{163}\) See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).


\(^{165}\) *Groundhog Day* (Columbia Pictures 1993) (motion picture).

\(^{166}\) See generally Austin R. Nimocks, *History and Recent Developments in Same-Sex Marriage Litigation*, 15 Engage: J. Federalist Soc’y Prac. Groups 19, 22 (2014) (“And although the litigation is voluminous and geographically diverse, the nature of the various cases, and the arguments presented in each one, do not vary significantly. The arguments made in the post-*Windsor* federal challenges are primarily threefold: (1) substantive due process; (2) equal protection; and (3) full faith and credit.”); *see also Freedom to Marry, Roadmap to Victory: Marriage Rulings in the Courts*, available at http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last visited Feb. 23, 2015) (tallying marriage litigation successes since *Windsor*.)

\(^{167}\) *See supra*, Part II.
identities outside of the marriage context while using Windsor’s animus-dignity connection as a mediating principle. One such leading example has been Obergefell v. Wymyslo.168

Like SmithKline, some post-Windsor marriage cases that were unobstructed by circuit precedents from re-classifying sexual orientation had the opportunity to leverage up. But they declined to do so and often relied on Romer for qualifying the silence Windsor specifically retained from expressing a certain level of scrutiny that was used to overturn Section 3 of DOMA. In the daybreak provoked by Windsor, such speculative opportunities would seemingly prompt more daring courts to launch newer doctrinal inquiries for firmer protections against discrimination for sexual minorities under equal protection.

Obergefell, an early post-Windsor same-sex marriage case from the federal district of Ohio that narrowly pre-dates SmithKline, did receive plaintiffs’ challenge that the Ohio same-sex marriage violated equal protection and rendered a decision under a heightened scrutiny that prompted the court to classify sexual orientation as a protectable trait under suspect or quasi-suspect classification.169 Its use of animus and dignity concepts ran throughout the portions of the case in which such elevation occurred.170 Plaintiffs here were surviving spouses of same-sex marriages legally obtained outside of Ohio, and had been refused recognition of their marriages on their deceased spouses’ death certificates by the state of Ohio.171 In seeking declaratory and permanent injunctive relief compelling Ohio to recognize those same-sex marriages, plaintiffs sued in both due process and equal protection theories under the 14th amendment.172 In preamble-like fashion, the Obergefell court made clear that its position on both due process and equal protection grounds to direct Ohio recognition of the plaintiffs’ valid out-of-state same-sex marriages on Ohio death certificates was taken from Windsor:

The conclusion flows from the Windsor decision of the United States Supreme Court this past summer, which held that the federal government cannot refuse to recognize a valid same-sex marriage. . . . And now it is just as Justice Scalia predicted—lower courts are applying the Supreme Court’s decision, as they must, and the question is presented whether a state can do what the federal government cannot—i.e., discriminate against same-sex couples . . . simply because the majority of the voters don’t like homosexuality . . . under the Constitution of the United States, the answer is no, as follows.173

Textually, the court’s implicit hint here in regards to how its reading and application of Windsor appears in how the court appropriated and paraphrased Justice Scalia’s sentiment to frame its present issue: that the discrimination against same-sex couples was based on a dislike for the inherent trait of homosexuality that these same-sex couples bore. A close review of the footnote

169 See Obergefell, 962 F.Supp.2d at 972-74.
170 See, e.g., id. at 979-80 (court using Windsor’s finding that DOMA’s exclusion of same-sex couples “demeans” them to frame its due process analysis); see also e.g. id. at 991-993 (court relying on Windsor’s finding of animus in DOMA to similarly render Ohio’s ban was promulgated by animus).
171 Id. at 972-73.
172 See id. at 973.
173 Id. at 973-75 (referencing Windsor, 113 S.Ct. 2675) (footnoting Windsor, 113 S.Ct. at 2710 (Scalia, J., dissenting) (footnoting Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013) and Kitchen v. Herbert, 961 F.Supp.2s 1181 (D.Utah 2013).
in this passage qualifies the Obergefell court’s mentioning of lower courts that were relying Windsor also reveals a citation to Griego v. Oliver, a post-Windsor state-level case from the Supreme Court of New Mexico, that applied intermediate scrutiny to an equal protection claim predicated on sexual orientation discrimination to overturn the New Mexico same-sex marriage ban. But also just how profoundly the Obergefell court extended and how incrementally further its extension seems from cases that hesitated to apply heightened scrutiny is glaringly observable in Obergefell’s treatment of plaintiffs’ theory of sexual orientation discrimination in Ohio’s same-sex marriage ban. Again, the animus-dignity connection had a mediating role in bringing about this doctrinal development.

Although in this earlier development in Obergefell, this ruling ultimately would have narrow effect, as an as-applied challenge, upon just the litigants in the case, its opinion and influence would eventually carry across other post-Windsor same-sex marriage decisions. Interestingly, in the portion from Obergefell on sexual orientation discrimination on equal protection, the court inserted another extensive preamble before weighing in on the actual merits. This preamble served more than the court’s throat-clearing as it unilaterally carved a significant precedential line between what merits were about to be revealed and the sexual orientation and animus decisions, Windsor and Romer, from the Supreme Court. The Obergefell court began with the recognition of same-sex marriages resulting from Windsor and traced the equal protection theory used in Windsor back to the Romer decision against Colorado’s Amendment 2, recounting particularly that Romer was a case decided in rational basis on the issue of sexual orientation discrimination under equal protection. It seemed as if the Obergefell court was about to use Romer to also fill the silence left by Windsor on the level of scrutiny. However, what differed in Obergefell was the use of Romer in particular for framing the issue around sexual orientation discrimination. Where other cases used Romer predominately to match its application of rational basis in qualifying Windsor, Obergefell pressed more at the animus against sexual minorities that Romer found at the heart of Colorado’s Amendment 2’s passing, emphasizing in Romer’s own words that the amendment had been a “‘status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake[.]” With Romer, the Obergefell court also carefully connected the animus against sexual minorities to the dignitary harms that existed in the law but was still nascent in Romer, harms that Kennedy would later sketch more fully in Lawrence; it highlighted a passage in

174 Griego, 316 P.3d 865.
175 Id. at 885 (“Plaintiffs prevail when we apply an intermediate scrutiny level of review under an equal protection analysis.”).
176 See Obergefell, 962 F.Supp.2d at 987 (“As a result, lower courts, without controlling post-Lawrence precedent on [the equal protection] issue, should now apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive strict scrutiny.”).
177 See Obergefell, 962 F.Supp.2d at 983-86.
178 Id. at 984-86.
179 Id. at 984 (“In reality, the decision in the United States Supreme Court in Windsor was not unprecedented. The Court relied upon its equal protection analysis from a 1996 case holding that an amendment to a state constitution, ostensibly merely prohibiting any special protections for gay people, in truth violated the Equal Protection Clause under even a rational basis analysis.” (citing Romer v. Evans, 517 U.S. 620 (1996)).
180 De Leon v. Perry, 975 F.Supp.2d 632, 652-53 (W.D. Tex. 2014) (using Romer merely as the standard for the kind of scrutiny to be used for sexual orientation discrimination in equal protection).
181 Obergefell, 962 F.Supp.2d at 985 (citing Romer, 517 U.S. at 635).
Romer that described the effect of Amendment 2: “As the Supreme Court held so succinctly in Romer: ‘[Colorado law] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A statement cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause[].’” 182 Romer might not have been as forthcoming with what that inequality did to the dignity rights of sexual minorities at the time due to Bowers, but the Obergefell court’s next immediate line observing Windsor drew out what harms that a comparable act of discrimination with a similar type of animus could bring about: “As the Supreme Court explained in striking down Section 3 of DOMA, ‘[t]he 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 entered into same-sex marriages made lawful by the unquestioned authority of the States.’” 183 What harm and effect that was merely “unequal” and that classified sexual minorities as “strangers” to the law in Romer was now in Windsor—by incremental shift likely through Lawrence, though not mentioned here—revisited as “stigma” that has negative dignitary implications. Focusing less on rational basis, the Obergefell court’s recitation of Romer and Windsor in this way illustrated one way it was relying on the animus-dignity connection by Kennedy while setting up the analogy and impetus for its present adjudication. This connection was what permitted the Obergefell court to determine, at a threshold level, that the Ohio ban differentiates between out-of-state marriages that comprise of same-sex couples and those that comprised of opposite-sex couples. 184 And it is also the animus-dignity connection that the Obergefell court observed between Romer and Windsor that would then be emulated within issues of sexual orientation discrimination the court similarly framed.

In Obergefell’s application of the factor test for determining protectable trait for suspect or quasi-suspect classification, the concepts of animus and dignity appeared throughout in various deconstructed incarnations. After destabilizing the Sixth Circuit’s existing precedents that controlled the appropriate level of scrutiny for sexual orientation classifications under equal protection was not hard for the Obergefell’s case, a move reminiscent of SmithKline in which the court simply found that the controlling cases that read such claims under rationality 185 were all predicated on one progenitor case, Equality Foundation of Cincinnati, Inc. v. City of Cincinnati, 186 that was based on Bowers, 187 the Obergefell court seemed unimpeded from applying the Supreme Court factors that would justify sexual orientation classifications under heightened scrutiny. 188 In doing so, it differed from SmithKline, which never used the Supreme Court factors of suspect classification in reaching heightened scrutiny appropriate for sexual orientation classification, but also it represents both an incrementalist “spiraling up” within Step Three that was made possible by the extensions of that animus-dignity connection afforded by Windsor in staking new doctrinal ground. That connection was realized throughout the

182 Id. at 984.
183 Obergefell, 962 F.Supp.2d at 984-85 (citing Windsor, 133 S.Ct. at 2693).
184 Id. at 985 (“Here, in derogation of the law, the Ohio scheme has unjustifiably created tiers of scrutiny of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal.”).
186 See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).
187 See id. at 986.
188 Id. at 987.
Obergefell analysis of the four Supreme Court factors determining protected classes: (1) history of discrimination, (2) ability to perform or contribute to society; (3) immutability; and (4) political powerlessness. As we will see, the animus-dignity connection here both contextualized discrimination and at the same time permitted the court to adopt standards against that discriminating context.

With historical discrimination, the Obergefell court’s finding was premised on the historical antigay animus it highlighted from trial documents to demonstrate the high probability of this factor. At the same time, the court ran through a quick history of antigay animus to build a history of discrimination, the characterization of that animus changes from the version in Windsor that was mainly premised on moral disapproval. From extracting animus in describing congressional bans of gay and lesbians travelers, Eisenhower’s executive order discharging federal employers and requesting the firing of federal contractors who were gay, examples of discrimination from the U.S. military, exclusion from places of business all the way to referencing a 2013 comparison made between same-sex marriage and incest by Pennsylvania governor Tom Corbett, the Obergefell court’s version of minorities in this observation was in some way a more menacing cruelty untethered to a peculiar morality. It was a societal animus that, without moral justification, however incorrect, seemed even more hateful and unnecessary. Although quickly depicted, it was a secular animus that the Obergefell court relayed with also no lesser impact than the kind of stigmatizing harm against sexual minorities. The way in which the court described the acts here motivated by animus exemplified such indignity. For instance, because of the animus within Eisenhower’s executive order, private companies with federal contracts had to “ferret out” gay employees (as if they were dehumanized, animal-like pests); or because of the historical animus toward sexual minorities in the military, gay servicemembers were refused GI Bill benefits, and restoration of undesirable discharges, and could still be criminalized for sodomy. The animus is perhaps secularized but these descriptions all still resonate with the stigmatizing harm that Windsor had observed were suffered by sexual minorities as a result of negatively differentiating them from the general society through an animus-filled act. Of all these illustrations here by the Obergefell court, the worst (and most indignant) was the mentioning of Pennsylvania governor’s comparison that demeaned same-sex marriage by comparing it to incest—and by doing so, also demeaned same-sex couples. And all of these animus-dignity illustrations effectively helped the court to describe and contextualize the history of sexual orientation discrimination.

In its analysis of whether sexual minorities could be differentiated from suspect classification because their specific distinction is or is not related to an ability to perform or contribute to society, the Obergefell court found that sexual orientation had no bearing on

189 See id.
190 Id. at 987-88.
191 See Windsor, 133 S.Ct. at 2693 (noting that the animus behind DOMA was moral disapproval of homosexuality).
192 Obergefell, 962 F.Supp.2d at 987.
193 Id.
194 Id. at 987-88.
195 Id. at 988.
whether it would impede or improve performance or contribution. Though a bit cursory, the court accomplished this analysis in favor of sexual orientation by a comparison and contrast between sexual orientation and other traits that might hinder societal performance or contribution (age and mental handicap) and traits that would not (race, gender, alienage, and national origin). In likening sexual orientation to the latter grouping, the animus-dignity connection was exhibited in two places here in the court’s analysis. First, in dislodging associations between homosexuality and a trait that could hinder societal performance or contribution, the court carefully and specifically chose to differentiate sexual orientation from mental illness and placed homosexuality as “a normal expression of human sexuality”—both gestures worked in tandem here with one breaking away negative stigma of homosexuality while another according it a normalized connotation that in the end “has no inherent association with a person’s ability to lead a happy, healthy, and productive life or to contribute to society.” Essentially, the court dignified same-sex sexuality in order to find no relationship to societal performance or contribution. The other place in this analysis that drew upon the animus-dignity connotation was at the end of this factor analysis, when the court concluded explicitly that “sexual orientation is akin to race, gender, alienage, and national origin,” and quoted the Supreme Court’s ruling in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, by noting that those traits just mentioned “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” The emphasis specifically added by the court to “prejudice and antipathy” drew upon recollection of animus-motivated laws that have historically plagued other groups in the suspect class (e.g. anti-miscegenation laws and race) but could also remind us of laws that have at the center of recent marriage equality rulings and as well as Amendment 2 from *Romer*.

The *Obergefell* court was careful on weighing the factor of political powerlessness by not falling into the snare of thinking that this factor would not balance favorably for sexual minorities because of their growing presence in society and political achievements in the recent decades; rather the inquiry was more encompassing, asking whether sexual minorities had the “strength to politically protect themselves from wrongful discrimination.” Out of the many examples the court cited of how the law had not afforded direct political and legal protections for sexual minorities—including mentioning of the failed attempts to pass ENDA—an attempt to explain the causes of such political failings allowed the *Obergefell* court to include animus toward sexual minorities in different forms such as physical violence against gays and lesbians, various types of hostility (public, political, and social), prejudice, and condemnation on moral and political levels. Here was where the court used the animus-dignity connection to explain away the root of political powerlessness for sexual minorities. As the court exemplified in one instance, “violence against gay and lesbian people engenders intimidation, which can ‘undermine

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197 *Obergefell*, 962 F.Supp.2d at 988-89.
198 *Id.*
199 *Id.* at 988.
200 *Id.* (citing to Doc. 46-1 at ¶ 11).
201 *Id.* at 989.
203 *Obergefell*, 962 F.Supp.2d at 989.
204 *Id.* (citing *City of Cleburne*, 473 U.S. at 440).
205 *Id.*
206 *Id.* at 989-90.
the mobilization of gays and lesbians and their allies to limit their free exercise of economic and social liberties.’” 207 The animus inflicted upon sexual minorities can then inhibit their ability to access and exercise their rights with dignity.

Lastly, of these four factors, immutability is often the most controversial one for sexual minorities as it parallels frequent societal and cultural debates about whether the root of a person’s sexual orientation is nature or nurture—a biological one or one based on choice. 208 But with animus and dignity concepts as a mediating guide, the Obergefell court sidestepped that debate by adopting a different standard for immutability, one in which the requirement “is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon.” 209 This standard is a seemingly “softer” one than a standard predicated on a trait that was biologically unwavering, and one that other marriage equality courts have recognized only recently prior to Obergefell. 210 It is a standard for immutability that also aligns itself better with the animus-dignity connection. Although the court found that scientific evidence was convincing that sexual orientation was biologically immutable, the court was more interested in the concept of sexual orientation having both emotional and biological aspects that stem from a person’s physical and sexual attraction:

There is now broad medical and scientific consensus that sexual orientation is immutable. “Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person’s sexual orientation through religious or psychotherapy interventions have not been shown to be effective.” 211

In fact, the court found persuasive that “there is significant evidence to show that interventions to change sexual orientation can be harmful to patients, and no major mental health professional organization has approved their use.” 212 But then the court commented upon sexual orientation normatively: “Even more importantly, sexual orientation is so fundamental to a person’s identity that one ought not be forced to choose between one’s sexual orientation and one’s rights as an individual—even if such a choice could be made.” The court cited to a passage in Lawrence on privacy and personal intimate decision-making to imply the dignitary harms that would implicitly arise if the converse were to happen—indeed the cost to sexual minorities if they were forced to change their sexual orientations. 213 Although not explicitly mentioned, the court’s finding here about sexual orientation in regards to immutability brings about the question: what would or could “force” someone to change or choose involuntarily between

207 Id. at 990 (quoting Doc. 42-1 at ¶58).
209 Id. at 990 (referencing Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000); Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment).
211 Obergefell, 962 F.Supp.2d at 991 (citing Doc. 46-1 at ¶ 10).
212 Id. (citing Doc. 46-1 at ¶ 25).
213 Id. at 991.
orientations in a way that is harmful to dignity? In the subtext of this court’s finding here, one implicit answer—but not necessarily the only answer—would be an act of animus. After using the animus-dignity connection to contextualize the etiology and the results of the discrimination felt by sexual minorities, the court adopted a new standard for immutability—one that addressed that context of discrimination while also finding sexual orientation conducive for suspect or quasi-suspect classification. Here, the standard for immutability is not one that is closely tied to biological permanence, but one that reaches through to personal, private significance that reflects fundamental individual choice and autonomy via the animus-dignity connection so prevalent in pro-marriage equality cases in the post-Windsor morning. One of the implicit conclusions of Obergefell is that law and (likely) policy can interfere with people’s autonomy to make or force them to hide their traits. If particular laws and policies, standing from a heteronormative vantage, can assert this pressure, then the effect of interference is an example of “compulsory heterosexuality” on the operational level but also an example of what should trigger larger dignity concerns. The question that this “softer” immutability standard raises to help define a suspect classification is whether doing so would provoke the kinds of personal dignitary violations recognized by Lawrence and Windsor, and thus this standard seems to prohibit compulsion. In effect, this is the mediation by the animus-dignity connection that helps Obergefell leverage doctrine at the same time contextualizing and narrating the discrimination of LGBT individuals.

Part IV will elaborate on the substantial results of this mediation but what is helpful to note here in understanding the court’s gesture to elegant sexual orientation protection is how animus and dignity was instrumental in both humanizing discrimination and allowing the court to move toward a fundamental approach in immutability to address the kind of concerns that discrimination raises. All in all, it was the contours of the animus-dignity connection that helped craft and bolster this factor in favor of sexual minorities in Obergefell, and it was this reasoning that induced another increment of progress for the protection of sexual minorities within this Step Three moment. With that, heightened scrutiny in Obergefell was appropriate for sexual orientation discrimination under federal equal protection, and thus sexual minorities became a protected class—at least until its reversal in DeBoer v. Snyder. The application of that higher level of scrutiny, amongst other theories, settled the marriage recognition issue in Obergefell for the plaintiffs. In its own distinctive way, it seemed that Obergefell was reinforcing the original goal of sexual orientation protection that marriage litigation had been premised upon.

In sum, the animus-dignity connection facilitated the outcomes of SmithKline and Obergefell and prompted this furtherance for sexual identity within the law. Part IV of the article will briefly explore and interpret the meaning of these advances, particularly Obergefell’s immutability standard and analysis and the potential of SmithKline. Both provide promising

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214 See id. (noting that “sexual orientation is so fundamental to a person’s identity that one ought not be forced to choose between one’s sexual orientation and one’s rights as an individual”) (citing Lawrence, 539 U.S. at 576-77).

215 See Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, 5 Signs 631, 632-40 (1980) (coining the term to illustrate how heterosexuality is often presumed as normative for the existence of women).

216 Obergefell, 962 F.Supp.2d at 991.

217 DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

218 Obergefell, 962 F.Supp.2d at 991.
developments for sexual orientation beyond marriage if harnessed strategically and incrementally.

IV. CHANGING WHAT’S UNCHANGEABLE: IMMUTABILITY & AUTONOMY

If one were to take a snapshot to memorialize that moment in the post-Windsor dawn, when both SmithKline and Obergefell leveraged sexual orientation into heightened scrutiny review under equal protection, the picture could have easily located a bright and optimistic trajectory in marriage incrementalism’s Step Three at the time. Yet, the trajectory that post-Windsor marriage equality cases brought to the goal of protecting sexual orientation was more complex than merely chasing an upward jurisprudential climb. The use of Windsor’s animus-dignity connection in these cases and the continued regard for sexual orientation as a protected class revealed a new significant development in the legal recognition of sexual identities on the federal level: the valuation of autonomy in defining sexual identity as key to protecting sexual orientation under suspect or quasi-suspect classification. At this point in the morning after Windsor, autonomy, as refined and contextualized by the animus-dignity connection, has risen to become an animating idea behind recognizing sexual orientation as a protected category in discrimination cases under equal protection. Amongst other constitutional ideas in regards to sexual minorities, this revelation has been what Step Three of marriage equality incrementalism has helped jurisprudentially innovate.

One place to see this is in the way that Obergefell’s change in how it viewed immutability for the purposes of finding sexual orientation as a protectable trait. As discussed above, animus and dignity concepts likely influenced the Ohio federal district court in adopting this standard—a standard that was predicated on personal liberty. Not only did that connection between animus and dignity serve as a mediating device to contextualize the specific narrative of discrimination against sexual minorities and also to broaden doctrine that addressed it, but the connection also exists to negotiate essentialist and constructivist concerns in the standard itself to highlight and protect personal autonomy interests in forming sexual identities. All of it was in turn useful for convincing the court itself to think why sexual orientation was worthy of suspect or quasi-suspect classification in equality jurisprudence.

Although the Obergefell court adopted an approach to immutability that seemed to be a “softer” one (at least according to both Edward Stein219 and Zachary Kramer220), what seems “softer” is partly because malleability is suddenly no longer tethered to biology; rather it is dependent on a test of personal liberty. Certainly parallels can be drawn between this recalibration of immutability that is favorable for protecting sexual orientation to Justice Kennedy’s gesture in overturning Section 3 of DOMA by finding that DOMA had hindered the legitimacy and dignity of the personal relationship choices of same-sex couples.221 After all, Kennedy had highlighted that one of the reasons DOMA was able to restrict same-sex couples

219 See Edward Stein, Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights, 89 Chi.-Kent L. Rev. 597, 633-34 (2014) (calling the alternative definition of immutability similar to Obergefell’s definition as “soft immutability”).
220 See Zachary A. Kramer, The New Sex Discrimination, 63 Duke L.J. 891 (2014) (referring to the immutability standard similar to Obergefell’s as “a softer definition of immutability”).
221 See Windsor, 133 S.Ct. at 2694 (finding that DOMA “demeans” same-sex couples and their relationship and familial choices).
was facilitated by a legislative animus premised on biology. But there is some difference too from that perspective. What seemed “softer” in Obergefell’s immutability standard was something that helped move the court away from prior doctrine that justified regulating sexual minorities through slippery arguments based on anti-gay sensibilities that reinforced heteronormative essentialism and in turn toward valuing their autonomy. This standard for immutability is not a new one in federal courts. Its application for finding that sexual orientation as a trait for suspect or quasi-suspect classification was imported from a line of asylum cases that notably culminated in one determined by the Ninth Circuit in Hernandez-Montiel v. INS— which Obergefell referenced. In Hernandez-Montiel, there was a noteworthy valuation of autonomy in regards to viewing sexuality as immutable in the way that the court specifically phrased that sexual orientation and identity “are so fundamental to one’s identity that a person should not be required to abandon them.” Hernandez-Montiel determined very briefly that sexual identity had a strong physiological component, but then emphasized psychological and constructive components of sexual identity—personality, appearance, and dress that are reflective of orientation—as well that was also important to a person’s overall identity, suggesting a volitional, expressive reaction to physiology that rounds out the experience of sexuality. Interestingly, however, despite opining on how “fundamental” sexual orientation and identity are to personhood in Hernandez-Montiel, the court never clearly or strongly articulated its sentiment into a standard for immutability that values the trait of sexuality as one that ought not to be changed, but leaves it implicit. Later cases, such as Obergefell, drew that out more explicitly.

So again we see the importance of the animus-dignity connection in mediating an outcome in which the Obergefell court decided to use this “softer” approach, an approach that protects autonomy, on a trait that otherwise has been plagued with nature-versus-choice debates. The narrative and experience of sexual orientation discrimination that animus and dignity concepts help illustrate had its role in justifying the adoption of a standard that did not regard the importance of whether being a sexual minority had a biological etiology nor whether it was pure choice. The court was more concerned with how fundamental sexual identity is to an

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222 See id. at 2694 (citing specific legislative history and intent that was premised on procreation and childrearing as a protectable interests for opposite-sex only marriage); see H.R.Rep. No. 104–664, pp. 12-13 (1996) (“At its core, it is hard to detach marriage from what may be called the ‘natural teleology of the body’: namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.”).


224 See Obergefell, 962 F.Supp.2d at 990.

225 See Hernandez-Montiel, 225 F.3d at 1093.

226 Id. (“Many social and behavioral scientists “generally believe that sexual orientation is set in place at an early age.”) (citing Suzanne B. Goldberg, Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men, 26 Cornell Int’l L.J. 605, 614 n. 56 (1993)).

227 Id. (“Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.”) (citing Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. L.Rev. 1753, 1775 n. 3 (1996); Naomi Mezey, Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts, 10 Berkeley Women’s L.J. 98, 100–03 (1995); Gilbert Herdt, Same Sex, Different Cultures: Exploring Gay and Lesbian Lives 20 (1997)).

228 See id.

229 See, e.g., Obergefell, 962 F.Supp.2d at 991.
individual’s existence and whether the answer to that question warrants the highest equal protection.

We see this shift in focus in how the standard subordinates biology in Obergefell’s immutability inquiry. Previously, the rule that courts used to determine the immutability factor had a larger predication on biology. This predication manifested specifically in the requirement that the protectable trait had to be something of an “accident of birth.” This focus opened the door for antigay essentialist arguments. A predication on biology paired well with debates on the root of homosexuality and the existing scientific evidence that was too inconclusive to declare that homosexuality was something based in the body, and from this, a slippery tautology arose that if homosexuality was not biologically rooted, then homosexuality must have been a choice, and to choose in this way deviated from what heteronormative values considered “natural.”

This tautology, this assumption about homosexuality, would exist incompatibly with Frontiero’s rule that constitutionally-protected classes in which equality jurisprudence shielded discrimination based on traits that were involuntary in nature—in other words, traits that a person could not help existing with. Moreover, this tautology led to antigay essentialism because the more that it seemed that homosexuality was not rooted in biology but was a personal choice against dominant and hetero-normative values, then the easier it was to qualify anything that had a relationship to the body—for instance, sexual conduct between same-sex individuals—as degenerate. In contrast to being heterosexual, this choice would be considered a bad one. Once that connotation was sealed, the idea of being homosexual as purely a personal lifestyle choice without a biological cause could then be susceptible to disapproval that encompassed moral or legal grounds—in other words: animus.

But with this standard that the Obergefell court imported from cases that evaluated religion and alienage as protected traits, the court’s attention was drawn away from an inquiry about the significance of biology. This focus-shift is why when the Obergefell case talked about biology, it could make a determination that orientation was biologically immutable because that conclusion no longer was relevant for debate. It could have cited to more scientific studies and written a lengthy treatise on the biological root of sexual orientation and still in the end reach the same conclusion that sexual identity is protectable. Instead, in regards to orientation, the standard that Obergefell used requires only a distinctive trait that is tied to biology, not in a causal way necessarily, but in a way that makes sexual orientation and sexual attraction something involuntary.

Within Obergefell’s softer standard for immutability, once that notion that sexual orientation is involuntary was accepted, then the court’s preoccupation focused on the individual and personal reaction to that involuntariness and how meaningful it was to one’s identity.

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231 Frontiero, 411 U.S. at 686.
232 See Graham, supra note __, at 187-95.
233 See id. at 192-95.
234 Id.
235 Id.
236 See Hoffman, supra note __, at 1512 (noting this concept of immutability “is sensitive to the importance of self-concept and embraces the idea that certain characteristics are core to an individual’s sense of self”).
Whether or not the person reacts in a way that references his or her sexual orientation is an act that reflects that individual’s personal autonomy and one that the law should protect from interference. In this manner, the debate between nature or choice was then recalibrated so that choice stood less susceptible to denigrating arguments that lump judgments over the subject matter of that choice with the ability to make that choice. The focus was instead on personal freedom itself. Laws that interfere with the individual freedom to choose something regarded as constitutive of identity would necessarily restrict personal autonomy in a way that could marginalize, hide, or obscure sexual identity. The effect of this would be stigmatizing or, alternatively, harmful to dignity.

This is a furtherance of Windsor’s realignment of essentialist and constructivist concerns in laws regulating same-sex relationships. The shift is not simply one that is moving from one end of identity theory (essentialism) to another (constructivism). Rather, like Windsor any shift in the axis that straddles between essentialism and constructivism here is a shift from the antigay ideologies of both essentialism and constructivism over to positive versions of essentialism and constructivism that further the interests of sexual minorities. In choosing this standard for immutability, Obergefell strikes a middle ground—something in which Janet Halley spoke of in evaluating the effectiveness of essentialist and constructivist arguments in sexuality and the law. This recalibration is simple to see in the standard because the standard abandons biological causation that could lead to antigay essentialism and conversely takes up the idea of sexuality as something innate biologically or something involuntary that, from the essentialist vantage point, does not readily cast judgment but has more potential to broach a better understanding of sexual minorities. At the same time, the standard transfers significance from antigay ideas about choice and construct in being homosexual that led from moral approbation and blameworthiness to ideas about sexuality as a personal construct and choice that, first and foremost, reflects the value of autonomy of the individual, but also has the effect of possibly characterizing the identities of sexual minorities as positive reflections on humanity. The result of all of this traversing is ultimately a conclusion by the Obergefell court that autonomy in sexual identity formation based on orientation is to be protected equally. Thus, the reach toward immutability here contributes to the rise of autonomy that has emerged in sexual orientation antidiscrimination since Lawrence and Windsor. And the importance here is that autonomy under Obergefell is not being raised narrowly in the realm of same-sex conduct or relationships, but tied to an explicit declaration of heightened scrutiny protection for sexual orientation. Herein lies the significant incremental development.

In the district court cases within the Sixth Circuit’s provenance after Obergefell, the modified approach to immutability was continuously referenced in bringing about marriage recognition for same-sex relationships, with all of them at least reflective and encouraging about

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237 See Graham, supra note __, at 173 (noting that “[t]his alternative understanding of immutability expands the concept for equal protection purposes, while also accomplishing two important goals: (1) it moves past a fault-based model of immutability that generally seeks to exclude from protection groups whose moral culpability or personal responsibility are the cause of their condition, and (2) it moves toward an autonomy-based model of immutability that is premised on a respect for human dignity, which protects critical constitutive aspects of personhood.”).

protecting sexual orientation as a suspect or quasi-suspect class. *Henry v. Himes* allowed the same court in *Obergefell* to revisit the issue of heightened scrutiny and cement its prior ruling in regards to that level of protection for sexual orientation. *Obergefell* had been an as-applied challenge against the Ohio marriage ban and the litigants in *Henry* challenged the same ban facially. But the results were no different. Citing *Obergefell* for direct influence and *SmithKline* for persuasive guidance, the district court here was able to cling to precedent to use heightened scrutiny in recognizing out-of-state same-sex marriages under equal protection in this facial challenge, indirectly validating its prior justifications using choice and autonomy to change the outlook on immutability.

Only one case in the post-*Windsor* canon of lower federal district cases in the Sixth Circuit did not examine sexual orientation under immutability in ruling favorably for marriage for same-sex couples. But other marriage cases that shared the same circuit as *Obergefell* had their respective levels of acknowledgment for the *Obergefell* ruling in regards to the new immutability standard. The federal district court in Kentucky appeared less direct in following *Obergefell*—at least at first, when it visited the issue in *Bourke v. Beshear*, and only acknowledged *Obergefell* and the possibility of suspect class protection for sexual orientation, but declined to follow *Obergefell* because it stopped at *Windsor*’s silence and was not willing to proceed any further doctrinally from prior Sixth Circuit cases that had denied suspect classification to sexual orientation.

Yet the court did note that “a number of reasons suggest that gay and lesbian individuals do constitute a suspect class,” including that “immutable or distinguishing characteristics that define them as a discrete group.” Subsequently when this same court revisited the issue in its next same-sex marriage case *Love v. Beshear*, the court followed in *Obergefell*’s steps by invalidating Sixth Circuit precedent that precluded heightened scrutiny and then by applying the factor test to determine suspect or quasi-suspect classification. In doing so, the *Love* court analyzed the factors fairly swiftly, but paused at length at immutability where again the standard for immutability was qualified from a firm standard that could have biological ties to one that reflected the contours of *Windsor*’s animus and dignity concepts in order to underscore the importance of individual choice and autonomy:

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240 Id. at 1039.
241 Id. at 1053-54.
242 Id. at 1052-54.
243 See *Tanco v. Haslam*, 7 F.Supp.3d 759 (D. Tenn. 2014). The case unfortunately followed *Bourke* but predated *Love*, and examined *Bourke*’s analysis for declining heightened scrutiny and resolving its marriage ban suit upon rational basis. Yet, in doing so, the *Tanco* court took note of recent developments, implicitly highlighting the concepts of animus and dignity by referring specifically to the “animating principles of *Windsor*” and “the relationship between discriminatory state marriage laws and the United States Constitution’s guarantees.” Id. at 762. *Tanco* was a very favorable case for same-sex couples and had the *Tanco* court render its decision after *Love*, perhaps it would have had more impetus to step up to recognizing sexual orientation as a suspect class through the same gestures upon autonomy since it relied so heavily on *Bourke*.
245 Id. at 548-49.
246 Id. at 549.
247 Id.
249 Id. at 545.
Strictly speaking, a person *can* change her citizenship, religion, and even gender. Legislative classifications based on these characteristics nevertheless receive heightened scrutiny because, even though they are in a sense subject to choice, no one should be forced to disavow or change them. That is, these characteristics are “an integral part of human freedom” entitled to constitutional protection, as is sexual expression.  

At minimum, the *Love* court’s analysis here merely redefined the standard to reflect a leaning toward personal autonomy. But the borrowing of ideas from *Obergefell* to *Love* was also notice and affirmation of these preferences toward autonomy. Moreover, like *Obergefell*, the contour of the animus-dignity connection appeared in *Love*’s articulation of the immutability standard. Within the reference to legislation that regulate citizenship, religion, and gender statuses in heightened scrutiny purview, the court likened sexual orientation, which is often regulated by legislation that is based on animus, to traits such as citizenship, religion, or gender because the court here cited to *Lawrence* to observe what the Supreme Court had taken note previously—that sexuality similarly resided within a person’s identity so integrally that to force change, meaning to infringe upon one’s personal autonomy, would implicitly result in harms to dignity.

In the Ninth Circuit, the discussions about protected class and the broader application of the immutability factor in regards to sexual orientation and with autonomy in mind were already further underway. Although after *SmithKline*, there was a brief incremental pause with one federal district court case, *Geiger v. Kitzhaber*, declining to follow *SmithKline*’s use and application of heightened scrutiny in a marriage case over Oregon’s same-sex marriage ban, the pause was only attributed to a pending request for a rehearing *en banc* of *SmithKline* that rendered *SmithKline*’s ruling not yet final and binding at the time. *Geiger* nonetheless did overturn the Oregon marriage ban, but on other grounds. District courts in Arizona summarily determined their cases in favor of marriage equality. A Montana federal marriage case, *Rolando v. Fox*, applied *SmithKline* very readily in its equal protection portion, as did a later Alaska federal case, *Hamby v. Parnell*.

In this way, *SmithKline*’s reach toward heightened scrutiny seems different mainly because it did not touch upon immutability directly and foreclosed connecting autonomy and immutability in the way *Obergefell* did. But the Ninth Circuit had already seen such factor analysis before in other sexual orientation anti-discrimination cases that led to similar autonomy considerations in both asylum and marriage equality cases. For instance, *Golsinski v. U.S. Office of Personnel Management*, which was one of the DOMA appeals simultaneously

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250 Id. at 546.
252 Id. at 1140-41.
253 Id. at 1147.
256 Id. at 1232-32.
258 The asylum cases that used the broader immutability trait standard as discussed in this Part, *supra*, were Ninth Circuit cases. See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
pending while *Windsor* was being heard and decided at the Supreme Court and then subsequently dismissed as a result of *Windsor*, was a district court opinion that analyzed the factors in favor of protecting sexual orientation as a suspect class.²⁶⁰ Particularly with the immutability factor, the ideas of individual choice and autonomy rendered the standard for evaluating immutability changed to one that evaluated sexual orientation as a trait “so fundamental to one’s identity that a person should not be required to abandon it.”²⁶¹ Here, the standard resembles *Obergefell*’s in emphasizing choice, and only the lack of *Windsor*’s animus and dignity concept in the *Golinski* passage is noticeable. The court noted that the harm would be “abhorrent”²⁶² but without elaborating in any way that involved dignitary harms the way *Windsor* did.²⁶³ Moreover, unlike *Obergefell* the reasoning in *Golinski* also did not rely on *Lawrence*, but looked either directly at precedence that pre-dated *Lawrence*²⁶⁴ or persuasively at cases that muted the dignity implications from *Lawrence*.²⁶⁵

Also, after *SmithKline, Latta v. Otter*,²⁶⁶ a post-*Windsor* marriage case from the federal district court in Idaho, did analyze *SmithKline*’s adoption of heightened scrutiny for sexual orientation discrimination under equal protection and noted that such standard applied beyond animus and irrational stereotyping cases.²⁶⁷ Though the district court here did not evaluate the suspect classification factors directly, it did refer to the Second Circuit’s analysis of the factors in its appellate opinion in *Windsor v. United States*,²⁶⁸ which had rendered sexual orientation a protected class under the factors.²⁶⁹ The Second Circuit’s *Windsor* decision did reflect autonomy in the margins when it refined the immutability standard. That decision used a standard that emphasized “distinguishing characteristics” in helping identify sexual orientation as an immutable trait, but also disregarded the relevance of physical changeability as something problematic to the definition of immutability, footnoting examples with alienage and national origin that reflected how considerations of immutable traits could involve the idea that “‘changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity,’”²⁷⁰ and as a result indirectly valued personal autonomy: “[E]ven though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter was whether the characteristic of the class calls down discrimination when it is manifest.”²⁷¹ And so when *Latta* reached the Ninth Circuit, a renewed application of *SmithKline* was not hard to reach.²⁷²

²⁶⁰ *Id.* at 986-87.
²⁶¹ *Id.* at 987.
²⁶² *Id.*
²⁶³ *Id.*
²⁶⁴ *Id.* (referencing *Hernandez–Montiel v. INS.*, 225 F.3d 1084, 1093 (9th Cir. 2000), overruled in part on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir.2005)).
²⁶⁵ *Id.* (referencing and quoting *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir.2005); *Watkins*, 875 F.2d at 726 (Norris, J., concurring); *In re Marriage Cases*, 183 P.3d 384 (2008)).
²⁶⁷ *Id.* at 1076.
²⁶⁹ *Latta*, 19 F.Supp.3d at 1076.
²⁷⁰ *Windsor*, 699 F.3d at 183 n 4.
²⁷¹ *Windsor*, 699 F.3d at 183; see also *Id.* (“BLAG argues that a classification based on sexual orientation would be more “amorphous” than discrete. It may be that the category exceeds the number of persons whose sexual orientation is outwardly “obvious, immutable, or distinguishing,” and who thereby predictably undergo
What *SmithKline* did in breaking the door open for heightened scrutiny in sexual orientation discrimination cases in equal protection is to allow that opened door to usher in other decisions that might affirm and reflect the idea of autonomy in immutability standards. Though the concepts of heightened scrutiny had been explored in the Ninth Circuit, it was not until *SmithKline* (and also *Windsor*) that there was any meaningful revisit of the issue that had precedential weight. *SmithKline*’s significance was as an intermediary between those earlier cases and the post-*Windsor* cases, using *Windsor*’s animus-dignity connection to rationalize heightened scrutiny and in effect facilitate future sexual orientation discrimination cases that would latch onto an evolving view of immutability and perhaps one that would recognize in this post-*Windsor* morning the autonomy principles in sexual identity. Despite this difference from *Obergefell, SmithKline* still relied on animus-dignity concepts to make ultimately heightened scrutiny available for sexual orientation discrimination cases under equal protection in a way that emphasized autonomy, just not as directly.

Thus, in the post-*Windsor* cases, following *SmithKline* and *Obergefell* progression up to heightened scrutiny, both Ninth Circuit and Sixth Circuit marriage cases showed promise in taking that arrival at autonomy and incrementally affirming, refining, or commenting upon it within the context of *Windsor*’s animus-dignity connection. Despite the fact that progress was varied from case-to-case and from circuit-to-circuit, that gradual progress is indicative ofincrementalist rumination as the cases seem more forward-looking for the rights of sexual minorities in general. Even with the Sixth Circuit’s later reversal of *Obergefell* in *DeBoer v. Snyder*, the set-back could be something that appears to incrementalist thinking as an event that does not warrant alarm for the eventual progress of pro-LGBT protection—although in the short term it seemed as if the reversal could appear damaging. We are in Step Three and not Step One after all. All of this seemingly unstable back-and-forth has its place in the political and legal evolution of the issue of sexual orientation discrimination. So far, it is what this leveraging in the post-*Windsor* cases has arrived upon that matters most for the rest of the metaphoric day after *Windsor*. The significant affirmation not just about the law’s widening acceptance of sexual identity and its amenability for placing sexual orientation at higher levels of protection in equality jurisprudence bear attention. However, specifically there is even more significance in the idea of locating sexual orientation as a fundamental component of individual personhood by illustrating that harms of indignity could arise if laws otherwise continued to interfere with the right for someone to engage autonomously in self-identification based on sexual orientation. Part V of this article will speak normatively about that development involving autonomy and what it poses for the challenges in sexual orientation and the law in the future after marriage equality.

V. STEPPING FORWARD INTO THE REST OF THE DAY

In his “Morning in America” ad, there was a key figure about the domestics of Ronald Reagan’s envisioned America that served as a peculiar vehicle for reminding audiences of the lowered inflation rate that his administration purportedly secured up to 1984.273 Although one

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272 Latta, 771 F.3d at 458.
273 Reagan-Bush ’84 supra note __.
could argue that the point of observing that “6,500 young men and women will be married”\textsuperscript{274} later in the afternoon of Reagan’s metaphoric day was merely a Madison-Avenue device for raising awareness over Reagan’s economic accomplishments in his first term, the prolonged use of the traditional white chapel wedding and the pastoral scenes with the young opposite-sex couple kissing at the altar before clergy and then leaving the chapel steps with rice tossed above their heads could also be taken incidentally as a calculated re-enforcement of American family values and domestic norms at a time when social mores about co-habitation and families were changing—and had been changing since the 1970s.\textsuperscript{275}

Two decades later, after so many literal days in America have rotated incrementally past Reagan’s 1984 campaign, this morning after \textit{Windsor} is not quite “a morning again”—as Reagan’s ad had portrayed its moment, preserving retrospective norms—but a morning pushing forward as this day symbolically moves into its afternoon with same-sex marriages already possible, pushing forward upon new ground to norms about marriage that hopefully pursues constitutional guarantees to those not represented only by white church weddings. And while state marriage rights have included same-sex couples, the pending afternoon after \textit{Windsor}, when perhaps such rights are more firmly secured, is an opportunity not to be cabined by just the goals of marriage equality, but to focus on what else the movement ought to do normatively for the treatment and protection of sexual identity under the law.

Despite the recent Sixth Circuit reversal of its district court cases that had reached heightened scrutiny protection for sexual orientation, the same-sex marriage movement is still developing and on the federal level we are still in Step Three of marriage equality incrementalism. The recent sagas have not pushed the national and political consciousness elsewhere beyond this third step, but as mentioned above, they are indicative of disjointed incrementalism as the issue continues to advance judicially on the federal level. In the wake of both a circuit split caused by the Sixth Circuit and the pending Supreme Court decision this summer,\textsuperscript{276} the sentiment in regards to the underlying goals of pursuing protections for sexual minorities must remain stable—that beneath the recent triumphs of same-sex marriage in courts, such developments should carefully continue to leverage the legal protections of sexual orientation by building off the recent doctrinal advances discussed in the sections above that have, in one way or another, valued autonomy in an individual’s reactions to sexual orientation that eventually serves as a fundamental, protectable component of self-determination, and that also changes societal perceptions about sexuality. These post-\textit{Windsor} advances that this article have described exemplifies this sentiment as it has led some courts such as \textit{Obergefell} to recognize sexual orientation as a protectable trait. The achievements that \textit{Windsor} has brought to same-sex couples have been manifold and sometimes overwhelming in a positive way; even just the correlation between animus and dignity concepts to help contextualize the harms suffered by same-sex couples has been repeatedly used to further marriage equality in courts has been helpful for furthering doctrinal analysis over marriage inequality. Nevertheless, one cannot lose sight of the idea that as same-sex couples marry in this pending symbolic afternoon, progress does not end at the altar. As marriage equality was propelled by the incremental strides in sexual

\textsuperscript{274} \textit{Id.}

\textsuperscript{275} \textit{See Andrew Cherlin, MARRIAGE, DIVORCE, REMARRIAGE} 11-13 (1992).

orientation protection—i.e. decriminalizing same-sex intimacy and anti-discrimination—it should in exchange continue to further protections for the rights of sexual minorities. What has brought those marriages to their legal inevitability should persist to meet larger purposes of LGBT equality.

One of the earlier strategies in gay activism was to use marriage as a way to protect orientation at the highest level. But in the post-Windsor cases, examples of achievements in equality jurisprudence, such as those in SmithKline and Obergefell, that brought heightened scrutiny and protected classifications to sexual orientation discrimination, are not as common as judicial rulings that have noticed Windsor’s silence on scrutiny levels in equal protection but for whatever reasons reached marriage equality on rational basis review or decided in favor of same-sex couples through heightened scrutiny in due process theories that were not based explicitly on sexual orientation discrimination—theories which state marriage bans were seen to infringe on the fundamental right to marry of same-sex couples. In some capacity, each of these theories do further the rights of sexual minorities for beyond the issue of marriage. The fundamental rights arguments, for instance, have perpetuated victories for same-sex couples in the context of state recognition of their marriages and even for their families. Outside of the marriage and family context, however, one wonders how directly pliable some of these doctrinal successes can be for sexual orientation discrimination that does not involve same-sex relationships or adopting children. In this sense, if sexual orientation antidiscrimination is not explored beyond the marriage and family context, we may be slowing down at a ceiling that stops at marriage and same-sex relationships and may lag in opening up to developments that further antidiscrimination as a whole for sexual orientation.

In this way, SmithKline and Obergefell have been exceptions. This potential increase for recognizing autonomy is a major step in raising the level of sexual orientation protection against discrimination federally—not just because it facilities leveraging toward suspect classification, but such recognition bolsters and develops constitutional ideas regarding privacy and individual personhood in the realm of sexual identity into actual doctrine. The courts here were not engaged in an overly-simplified debate about essentialism versus constructivism; they were not venturing into the nature-versus-nurture discussion over sexuality in popular culture. The refinement of the standard through autonomy—from a fault-based, biological emphasis to a focus on involuntariness and then fundamental personal choice—illustrates how consensus need not be about the biological source of the trait of sexual orientation but about how individuals respond to that biology in a way that should also not be normatively mutable or likewise encroached upon by some form of involuntary coercion (perhaps based in animus or otherwise) that leads to violations of human dignity. From an incrementalist perspective, these courts are not concerned primarily with theories of identity, but rather in the long haul with affording justice. They do so by attempting to safeguard individual and personal autonomy and their shift to higher doctrine would serve as means to pursue their ends.

Although American antidiscrimination law—as represented emblematically by the famous phrase from well-known Footnote 4 from U.S. v. Carolene Products—has historically

278 304 U.S. 144, 152 n. 4 (1938).
harbored its interests in protecting “discrete and insular minorities” based on protected group traits rather than on individual liberties, some existing tensions between the protections of traits and the weight of individual autonomy have for some time called into question the workability of various antidiscrimination protections. For instance, in the context of race discrimination, the historical group-minded theory behind antidiscrimination laws is challenged by multiracials and the concept of elective race that reinforces an individual’s right to racial self-identification. Likewise in the current state of affairs, a person’s intersectionality within a discrimination claim may pose issues regarding how his or her identity is regarded by discrimination categories in a way that results in the law interfering with a person’s own self-determinative right to identify with one group over another. In another way, however, the tension does not necessarily pose a problem for our concepts of equality and liberty in a modern democratic state—but merely how to delineate regulations that accurately reflect those ideas and promote antidiscrimination. In the constitutional realm, autonomy and equality have often been intertwined in cases dealing with sexual orientation discrimination. One of the most notable examples is Lawrence where the right of privacy and intimacy was equally extended to individuals practicing same-sex intimacy with the underlying idea that previous criminalization of such conduct was geared to targeting homosexuals. In the post-Windsor marriage cases, a similar framework that intertwined liberty and equality was used to extend the fundamental right to marry that has always been available to opposite-sex couples to same-sex couples. Rather, what appears as tension can also perhaps be viewed in the same way as the animus-dignity connection could be viewed: a negotiation or mediating device that allows for contemporary intertwining of these concepts to contextualize current issues within discrimination and signal how to resolve them doctrinally as well as incrementally signal reforms.

279 Id.
280 See Julie Chi-hye Suk, Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law, 55 Am. J. Comp. L. 295, 340-41 (2007) (“U.S. law tends to limit antidiscrimination law to problems that look like, or are analogous to, the historic problems of race-based slavery and segregation, emphasizing the historic harm to groups rather than individuals.”).
281 Find source.
285 Lawrence v. Texas, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy . . . . just as heterosexual persons do. The decision in Bowers would deny them this right.”); see also Graham, supra note __, at 198-99.
286 See, e.g., Kitchen v. Herbert, 755 F.3d 1193, 1231-30 (10th Cir. 2014) (holding that “those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex”).

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This seems promising for incrementalism and the elevation of protections that envelope sexual orientation in the afternoon after Windsor. If one of the underlying goals of marriage equality was to effectuate and pave the path to heightened protections for sexual minorities, then further developments that play into this negotiation continues the discussions after the legalities of the same-sex marriage issue has been definitively resolved. Further advances in antidiscrimination protection for sexual orientation could benefit from the recent SmithKline and Obergefell developments of autonomy in conceptualizing sexual orientation as a protected class.

After marriage equality, placing sexual orientation firmly within a protected trait in Title VII could be the next step in the incrementalist climb after marriage equality that constructively leverages the developments from the same-sex marriage movement forward as means to an even larger political end. Although Title VII does not expressly include sexual orientation as a protectable category, there is already some slippage within what “because of sex” means before claims addressing against gender-stereotyping that allows some claimants to assert claims that could factually involve sexual orientation discrimination but also qualify as gender-stereotyping. Originally, Congress intended to enact Title VII on the basis of protecting race, but other categories such as gender were later added in subsequent amendments. The complex interplay in the characteristics of sex and gender have gradually carved out a line of cases, including Supreme Court precedent in Price Waterhouse v. Hopkins that have adjudicated Title VII cases in situations where gender-stereotyping was at play under the Act’s definition of discrimination “because of sex.”

Couching this idea in Judith Butler terms, the performative or expressive aspects of gender have broader—and perhaps fuzzier—borders than biological sex-determinancy or inferences. Although other gender-stereotyping cases have articulated that the gender-stereotyping theory could not be utilized to “bootstrap protection for sexual orientation into Title VII,” sexual minorities have been able to lodge discrimination claims in situations where they were marginalized harmfully when the expressive aspects of their personal identity based on their sexual orientation belied conventional expectations about their biological sex; such results have varied.

289 See Price Waterhouse, 490 U.S. 228.
290 See id. at 251; see also e.g. Oncale v. Sundowner, 523 U.S. 75 (1998).
291 See Zachary Kramer, Note, The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII, 2004 U. Ill. L. Rev. 465, 487 (2004) (“The central idea of the gender stereotyping theory is that an employee is being judged against the standard of how a stereotypical person of the same sex should look and act. In the same way, the gender stereotyping theory compares a person’s anchor andexpressive gender.”).
293 See Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (staying within bootstrapping doctrine in gender-stereotyping case). But see Prowl v. Wise Bus. Forms, Inc., 579 F.3d 285, 291-92 (3d Cir. 2009) (holding that as long as an employee—regardless of his or her sexual orientation—has sufficient evidence that a reasonable jury could conclude harassment occurred “because of sex.”)
This notion of marginalization or discrimination of individual gender expression based on dominant expectations of sex—harnessing aspects of essentialism to bolster one idea of what it means “to be a man or a woman” in order to eclipse other ideas—places tolls on personal autonomy. In this way, such harms resemble the context of discrimination that the animus-dignity connection illustrated in the doctrinal from one of evaluating immutability to another. Both share concerns for personal autonomy in the midst of safeguarding against discrimination, and both have associations with marginalization based on sexual orientation. In a side-by-side comparison, there could be enough overlap between gender-stereotyping cases in Title VII and Obergefell’s rendering of sexual orientation as an immutable trait to eventually broaden the interpretation of “because of sex” in Title VII.

Also, because Title VII protects groups based on common traits, the immutability of traits features importantly into Title VII’s calculation of which members of society to protect. In essence, protected Title VII categories reflect characteristics of identity that have been rendered immutable and courts have recognized this aspect of Title VII antidiscrimination. Despite the sometimes-waning reliance on the immutability factor even by the Supreme Court and despite the existence of other factors for determining protected classes in equal protection cases, at some level both equality jurisprudence and Title VII rely on immutability as a criteria for higher levels of antidiscrimination protection. All of these observations seem in this fashion to build toward an idea that getting to suspect classification and heightened scrutiny for sexual orientation in the post-Windsor marriage cases ought to provoke a normative response from Title VII’s perspective to expand protections of sexual orientation discrimination. However, given the current delay and mixed results with efforts to pass the Employment Non-Discrimination Act


295 See Richard Thompson Ford, Bias in the Air: Rethinking Employment Discrimination Law, 66 Stan L. Rev. 1381, 1418 (2014) (acknowledging that “Title VII prohibits discrimination only on the basis of immutable characteristics” while also critiquing of the immutability criterion); see also Bandsuch, supra note __, at 987 (2009) (noting that “[c]ourts have continued to rely almost exclusively—and thus incorrectly—on the immutability standard in Title VII cases . . . ”); see also e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding that close relatives are not a suspect class because, “[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”); Dean v. D.C., 653 A.2d 307, 330 (D.C. 1995) (discussing constitutional rights by determining “the extent to which sexual orientation is immutable”); Jacobson v. Dep’t of Pub. Aid, 646 N.E.2d 949, 953 (Ill. App. Ct. 1994), aff’d, 664 N.E.2d 1024 (Ill. 1996) (holding that parents of children, ages, 18-21 who live at home, do not “constitute a suspect class” using the immutable characteristic argument from Lyng v. Castillo).

296 See Stein, supra note __, at 626 (“After the immutability factor first emerged in the Supreme Court’s equal protection jurisprudence, the Court has sometimes included immutability as among the factors it considers in determining whether to apply heightened scrutiny. However, the Court does not always talk about immutability when it is determining the level of scrutiny a classification deserves.”) (references and citations omitted).

297 See Bandsuch, supra note __, at 981-82 (“The courts, in both Title VII and equal protection cases, began using ‘immutability’ (i.e., the ease or difficulty of changing a trait or characteristic) as another measure of the needed ‘materially adverse affect’ upon a protected class. The courts, in fact, went so far as to classify immutability as a ‘requirement’ for Title VII coverage, rather than just recognizing it as another factor among many to consider when determining adverse impact and protected class status.”) (referencing Frontiero v. Richardson, 411 U.S. 677 (1973); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), cert. denied, 499 U.S. 1113 (1981); Roberto J. Gonzalez, Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine, 55 Stan. L. Rev. 2195, 2217 (2003).
(ENDA) in Congress, any advancements for furthering sexual orientation protection in Title VII will likely not come from a congressional amendment to the Act, as political and congressional actors are not aligned enough for a large consensus on LGBT rights even with recent leveraging of marriage equality—again, a ceiling in the incremental path. The less-than-favorable congressional environment for ENDA, however, does not mean that pro-LGBT changes in Title VII are necessarily fatal as well. With the expansions of protected categories in other federal antidiscrimination laws, Nancy Levit observes that “[i]n the interim, doctrinal advances may be the best way to expand the reach of categories of protected people.” To that effect, she asserts that “[o]ne way to enlarge protections is to redefine the boundaries of the protected categories.” She also offers gender-stereotyping as a possible example of how doctrinal advances might help expand Title VII protections for sexual orientation.

If courts are the first route, then the post-marriage equality advances in courts must reinvigorate the discussion of immutability of sexual orientation and find influence in the marriage cases, such as Obergefell that have adopted a better anti-stereotyping approach to immutability than the approach that emphasized biological mutability, and cases such as SmithKline that found heightened scrutiny suitable for sexual orientation. From that angle, sex discrimination in Title VII needs an expansion warranted by a reflection from the successes in marriage equality and the norms for sexual minorities envisioned by same-sex marriages. Accordingly, Nancy Levit notes that “[e]mployment discrimination law is also most successful when it calls attention to normative changes.” Zachary Kramer, who has observed that in the realm of employment law, “[s]ex discrimination law has not kept pace with the changing nature of sex discrimination,” seems to share Levit’s sentiment when he finds that “when it comes to developing antidiscrimination protections, the lived experience of discrimination should determine the doctrine and not the other way around.” Admittedly, using a different standard of immutability that could help successfully evaluate sexual orientation as a protectable trait in order to reify further protections for sexual orientation under Title VII is only a compromise in the face of changing norms about how we think of identity. But advances in incrementalism always have externalities. Identity is more slippery than our current laws suppose and should defy categorical thinking.

300 Id.
301 Id.
302 Id. at 486.
303 Id. at 496.
305 Id. at 896.
306 See Weiss & Woodhouse, supra note __, at 256.
307 Holning Lau, An Introduction to Intragroup Dissent and Its Legal Implications, 89 Chi.-Kent L. Rev. 537, 539 (2014) (“To be sure, not all individuals feel a strong sense of membership in racial, ethnic, and religious groups, but these groups have been socially constructed in such a way that they are often salient to people’s identity. Other social groups may have much weaker connections to identity.”) (citing Natasha J. Silber, Note, Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law, 88 N.Y.U. L. Rev. 1873, 1879-82 (2013); Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263, 282-89 (1995)).
our antidiscrimination laws address discrimination, trait discrimination is, as many have echoed, becoming increasingly outdated or non-functional and ideas about discrimination are becoming more focused on individuals rather than group identities.\footnote{Kramer, The New Sex Discrimination, supra note __, at 899 (“But the new sex discrimination demands a vision of equality that is rooted in difference rather than sameness, a vision of equality that understands that no two women (and no two men) are the same.”)} The “softer” immutability standard used by Obergefell, which Kramer also endorses in sex discrimination,\footnote{Id. at 948-49.} would seem to further an increment toward reflecting those changing norms about the way society regards identity construction, while serving to protect those norms as the same time. Taking a page from how religion receives a special status under the law and is mutable in the literal sense as one can changed religious affiliations, Kramer notes that within current notions about sex and gender, particularly with transgender individuals, sex and gender are more like religion in terms of mutability than not.\footnote{Id. at 948.} Religion, of course, is immutable based on the standard closer to the one from Obergefell. So in his comparison between religion and sex as protected traits, Kramer advocates that “[m]aybe we need a softer definition of immutability.”\footnote{Id. at 949} The effect would be an emphasis on autonomy of which we have seen this standard to be capable of ascribing: “Under this view, immutability is more about the effect of changing one’s identity rather than the ability to change it.”\footnote{Id. at 950.} This would reflect the change in lived experiences, at least from Kramer’s perspective.

What is at stake ultimately is autonomy. Autonomy after all resides significantly in modern theories of democratic rights because individualism and self-determinancy has figured into the concept of humanity. Eric Mitnick, in rendering his own concept of “constitutive autonomy,” notes how political philosophers—Joseph Raz and John Stuart Mill, among others—have idealized autonomy in regards to an individual’s creation of the self and that not having such autonomy would subvert an individual’s humanity.\footnote{ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION: GROUP-DIFFERENTIATED RIGHTS IN LIBERAL THEORY 142 (2006).} “In this sense,” Mitnick writes, “liberalism envisions individual constitutive autonomy as essential to the fulfillment of basic human dignity. Exercising constitutive autonomy, on this view is what it means to be free, to be human.”\footnote{Id.}

Relating all of this back to sexual orientation antidiscrimination, autonomy helps leverage advances within equality because inequality here is still concerned with the distribution of rights—even if the right involves something as intangible as self-determinism.\footnote{See Franklin, supra note __, at 874 (“[D]ue process prohibits the enforcement of this prescriptive conception of sexuality and the family, as it infringes people’s liberty to make certain ‘deeply personal choices about love and family.’ ”) (quoting Kitchen, 961 F. Supp. 2d at 1203).} In that sense, Obergefell’s immutability standard, specifically, and SmithKline’s the leveraging of heightened scrutiny, contextually, should both be noted by courts to bear potential for contributing toward expanding protections for sexual minorities under Title VII. Henceforth, the developments in the post-Windsor morning discussed in this article must serve legal purposes beyond furthering

\footnote{Kramer, The New Sex Discrimination, supra note __, at 899 (“But the new sex discrimination demands a vision of equality that is rooted in difference rather than sameness, a vision of equality that understands that no two women (and no two men) are the same.”)}\footnote{Id. at 948-49.}\footnote{Id. at 948.}\footnote{Id. at 949}
same-sex relationships. They ought to be expanded for sexual identity in the LGBT movement’s next increment of advancement.

VI. CONCLUSION

Unlike presidential terms of office, the LGBT political movement does not have term limits and there is no re-election currently at play here. Progress for the movement is coming continually, with starts and stops at each increment. This particular morning after Windsor may be one of celebration, but it is also one of strategizing about the next set of progresses that awaits. For if we have some doctrinal momentum, then recent developments must move us forward into a new day.

In this regard, the recent developments for sexual orientation in equal protection claims from the post-Windsor cases are notable for their potential to push beyond marriage equality and leverage for changes in federal antidiscrimination laws that favor protecting sexual minorities. These developments do provide momentum not only for the law to recognize the significance of sexual identities but also for us uncover how individual autonomy rights so regularly valued in modern concepts of self-determinism are hindered when such recognition is refused.