WEATHER PERMITTING: INCREMENTALISM, ANIMUS, AND THE ART OF FORECASTING MARRIAGE EQUALITY AFTER *U.S. V. WINDSOR*

JEREMIAH A. HO*

ABSTRACT

Within LGBT rights, the law is abandoning essentialist approaches toward sexual orientation by incrementally de-regulating restrictions on identity expression of sexual minorities. Simultaneously, same-sex marriages are become increasingly recognized on both state and federal levels. This Article examines the Supreme Court's recent decision, *U.S. v. Windsor*, as the latest example of these parallel journeys. By overturning DOMA, *Windsor* normatively revises the previous incrementalist theory for forecasting marriage equality's progress studied by William Eskridge, Kees Waaldijk, and Yuval Merin. *Windsor* also represents a moment where the law is abandoning antigay essentialism by using animus-focused jurisprudence for lifting the discrimination against the expression of certain sexual identities.

If the law is shifting from essentialism while veering closer to marriage equality, then will these parallel journeys end by reaching a constructivist approach to sexual identity? Pure constructivism poses thorny risks for attempts to include orientation as a suspect classification for heightened scrutiny. As an example, the immutability factor is likely to resist constructivist ideas that sexual identity is a choice or a construct. *Windsor*'s use of animus-focused jurisprudence hints at a solution that allows the abandoning of essentialism to reach a middle ground because animus-focused jurisprudence moves the examination away from whether a trait is protectable under equal protection toward the animus that created the discrimination within a law itself. This Article explores *Windsor*'s animus-focused jurisprudence as the convergence of both marriage equality and incrementalism, and posits normative reasons for sustaining this jurisprudence stepping forward.

* Assistant Professor of Law, University of Massachusetts School of Law. I would like to thank the following for their support and assistance along the way: Kali Hague, Marsha Sonner, Elizabeth Stuewe, Stephanie Randall, Bo Turney, Rome Rapier, Justin Steele, Sarah Moxon Sawyer, and Courtney Paulding-Zelaya. I am also grateful to Professor Richard Peltz-Steele for advice in writing and to the UMass School of Law for funding this research. Lastly, special thanks to Jessica Almeida, Emma Wood, Nancy Gray, Mario Nimock, Hakan Sjoo, Lance Royer, and Kurt J. Hagstrom.

I. INTRODUCTION

In early April of 2009, the National Organization of Marriage (NOM) used the metaphor of an impending storm in its first anti-marriage equality web-video to characterize the institutional threat that it perceived the extension of marriage rights to same-sex couples would pose.[1] Unlike a mere patch of flowers in May, the effect of these torrential April showers, as the ad conveyed, would be catastrophic to the rights of non-gay citizens—more likely flood than floral. Titled "Gathering Storm," the video's message begins with a seemingly-random ensemble of average, everyday adults standing before a wall of storm clouds amassing together and unfolding angrily, punctuated with an occasional lightning bolt between one ominous moment and the next.[2] Each member of the ensemble takes turns delivering, with eyes directly into the camera, lines from the following message: "There's a storm gathering. The clouds are dark, and the winds are strong. And I am afraid. Some who advocate for same-sex marriage have taken the issue far beyond same-sex couples. They want to bring the issue into my life. My freedom will be taken away."[3] Then after some further sermonizing, the ad climaxes toward a close-up shot on a young woman as she utters lines that echo sentiments from the preceding narrative, but this time with more dramatic urgency: "But some who advocate for same-sex marriage have not been content with same-sex couples living as they wish. Those advocates want to change the way I live. I will have no choice. The storm is coming."[4]

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[1] *National Organization for Marriage "Gathering Storm" TV Ad*, YOUTUBE (Apr. 7, 2009), http://www.youtube.com/watch?v=xGi2r-M_gQ8.

[2] *Id.*

[3] *Id.*

[4] *Id.*

Although NOM tries to convey that marriage equality is naturally—like a serious and encroaching storm—a threat upon the rights of all Americans, a closer reading of the advertisement reveals that what NOM asserts as natural actually exists as an ideological construct. Shortly after the advertisement had aired, critics of NOM's ad immediately observed the thin smoke-and-mirrors that was NOM's *sturm und drang* over the inevitability of marriage equality. Frank Rich's *New York Times* op-ed famously blasted the message, noting that "[i]f it advances any message, it's mainly that homophobic activism is ever more depopulated and isolated as well as brain-dead."[5] With those sentiments in mind, the soundness of the message's content is called substantially into question and the artifice behind the storm reveals itself a bit more evidently. Further close reading of the ad shows that not only the substance of the message was artifice, but so are many components of the video that helped stage the delivery of that message. For instance, the message was not delivered in a more seemingly-organic narrative—perhaps as a vignette or some other situational depiction—but rather such delivery was done by speakers directly into the camera, breaking that proverbial fourth wall in a way that tries to reproduce a documentary or testimonial style. The testifying ensemble of speakers may seem like a sampling of everyday people, but in fact they were also constructed purposefully for the ad; they were carefully chosen actors.[6] Even the storm itself—although magnificently dark and foreboding with ultra-fluorescent snaps of lightning—was a computer-generated effect that swirled indignantly when the message was somber and then cleared itself up precisely on cue.

In this way, NOM's attempt to liken same-sex marriage as a displacement of the status quo becomes suspicious and contrived. What reveals is a construct resembling the familiar fear-mongering rhetoric that has convincingly subordinated sexual minorities in the past, in which the dominant political force has attempted to justify attitudes, policies, and laws that abridge the rights and exclude visibility of sexual minorities. By posing an us-versus-them dichotomy through lines such as, "But some who advocate for same-sex marriage have not been content with same-sex couples living as *they* wish," NOM implies that significant enough differences exist between gays and straights and that such differences are the highlighted reasons for not permitting same-sex couples to marry while continuing to allow different-sex couples to do so otherwise.[7]

This essentialized approach to marginalizing gays is not new. Harnessing so-called principles of existence that seem objectively universal but also terribly divisive has existed as a way to justify isolating minority groups.[8] Differences do exist naturally between gays and straights, but are such differences appropriate as justification for the categorical denial of rights to gays *versus* straights? By playing up inherent differences that then allows for a split in such treatment, NOM's

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[5] Frank Rich, *The Bigots' Last Hurrah*, N.Y. TIMES (Apr. 18, 2009), http://www.nytimes.com/2009/04/19/opinion/19Rich.html?_r=3&ref=opinion\&.

[6] *See* Kate Pickert, *A Storm Over Gay Marriage*, TIME (Apr. 10, 2009), http://www.time.com/time/nation/article/0,8599,1890523,00.html.

[7] In this Article, I use the terms "gay," "homosexual," and "LGBT" interchangeably.

[8] *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 56-58 (2001).

message succeeds in showing what critical race theorists have long claimed: that essentialism can be used against a targeted minority group.[9]

NOM launched the "Gathering Storm" ad at a critical point in the recent marriage equality debate—just five months after California citizens had passed Proposition 8, redefining marriage in the state as only between a man and a woman, and within the same moment states such as Iowa, Vermont, and Maine all moved to legalize same-sex marriage within their borders.[10] This juncture was crucial as restrictive attitudes toward marriage equality had started to loosen.[11] In this way, the NOM ad was reactionary and reaffirming—that California might have foreclosed same-sex marriage in 2008, and yet other states were not quite squelching the issue. But the failure of essentialism here and the ad's exposure as construct left its message hollow in content and NOM paranoid at best. Numerous parodies of the NOM ad that appeared shortly on the web seem to highlight that paranoia of the "Gathering Storm" and reveal the absurdity at the crux of NOM's sentiments against sexual minorities.[12] The only thing skillfully essentialized was animus and artifice.

And yet, the NOM message did harbor a small ray of truth with one line: "Some who advocate for same-sex marriage have taken the issue far beyond same-sex couples."[13] In an odd twist of irony, this particular line—whether read within the context of an anti-marriage equality ad or isolated in its entirety—might be the single, most accurate statement about the marriage equality movement in that ad. The marriage equality issue is *indeed* far beyond same-sex couples; the issue has decidedly more profound implications—implications that, as Steven Colbert's satirical response to the NOM ad precisely underscored, "won't be solved by clearing your web browser."[14] Yet here again, NOM obfuscates that idea and uses the line to set up the "potential storm" that leads to inequality, overlooking that the implications of marriage equality are less about some threatening intrusion of same-sex couples into the lives of heterosexuals, and much more about the fundamental visibility, inclusion, and acceptance of the gay identity within the terror of mainstream American existence.

The tension between essentialism and social constructivism has almost always lurked behind the marriage equality debate, and by extension the movement for gay rights, as traditionally the differences characterized by sexual orientation—gay or straight—has been fixed from a biological perspective in order to reach the politics of marginalization through discourse between nature versus nurture, truth versus

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[9] *Id.*

[10] *See* Pickert, *supra* note 6; *see also Timeline: Same-Sex Marriage*, CNN: THIS JUST IN (Oct. 18, 2012, 02:33 PM EST), http://news.blogs.cnn.com/2012/10/18/timeline-same-sex-marriage/.

[11] *See Changing Attitudes on Gay Marriage*, PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT (June 2013), http://features.pewforum.org/same-sex-marriage-attitudes/.

[12] *See* Japhy Grant, *The 10 Best Responses to the "Gathering Storm"*, QUEERTY (Apr. 20, 2009), http://www.queerty.com/the-best-responses-to-the-gathering-storm-ad-20090420/.

[13] *See Gathering Storm*, *supra* note 1.

[14] *The Colbert Report: Episode 542* (Comedy Central television broadcast Apr. 16, 2009), *available at* http://www.colbertnation.com/the-colbert-report-videos/224789/april-16-2009/the-colbert-coalition-s-anti-gay-marriage-ad.

hypothesis, biology versus choice, *us versus them*. But recently observable within the marriage equality movement, the abandonment of essentialism with respect to sexual orientation has started gaining momentum in the law. Particularly since the Supreme Court decriminalized consensual same-sex intimacy in *Lawrence v. Texas*,[15] there has been a progressive undoing of essentialist approaches toward sexual minorities traceable along the specific legal path to marriage equality promulgated previously and extensively by William Eskridge,[16] Yuval Merin,[17] and Kees Waaldijk.[18] In their earlier comparative studies of the rise of marriage equality internationally, they have acknowledged a few common legal incremental steps that most societies usually undertake in a genuine road toward marriage equality.[19] Conflated together, Eskridge, Merin, and Waadiljk's theories of incrementalism have provided a substantial and workable line of decisional behavior indicative of legal and societal changes toward marriage equality successes in numerous states and countries. Since their theorizing prior to *Lawrence* and other recent triumphs for sexual minorities, the U.S. has brought their independent and collective hypotheses alive on both federal and state levels to set the stage for accomplishing the extension of marriage to same-sex couples.

This Article will explore, on the federal level, the notion that the marriage equality movement in the U.S. has progressed onto the last phase of Eskridge, Merin, and Waaldijk's incrementalism. In June 2013, *U.S. v. Windsor*,[20] ushered our national, social, and legal imaginations into the final stage of marriage equality's inevitability. Concurrently, the journey along this particularized incrementalism has also revealed an observable abandonment of essentialism approaches in the law toward sexual minorities. This Article examines how the incremental process toward marriage equality has facilitated that abandonment by tracing the way the law has dislodged the regulation of identity expression for sexual minorities along each step of the Eskridge-Merin-Waadiljk incrementalist approach. From there, this Article will then posit that abandonment's significance, as it reveals more clearly the development of animus-focused jurisprudence in order to further the rights of sexual minorities.

Beyond this Introduction, Part II will recapitulate the theory of incrementalism as originally proposed by Eskridge, Merin, and Waadijlk, and add to their existing legal scholarship by adjusting that path to reflect certain significant developments in the law regarding sexual minorities that have taken place since their earlier works. Part

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

[16] WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) [hereinafter ESKRIDGE, EQUALITY PRACTICE].

[17] YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

[18] 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 437, 437-68 (Robert Wintemute & Mads Andenæs eds., 2001).

[19] *See* Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii-xiv; *see* MERIN, *supra* note 17, at 308-09.

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

III will examine the U.S. variation to that theme of incremental change—through *Lawrence v. Texas*; the repeal of Don't Ask, Don't Tell; and *Windsor*—and determine the journey's substantial completion on the federal level. Part IV will then describe how the undoing of essentialist approaches toward sexual minorities within the U.S. variation has produced the rise of animus-focused jurisprudence and end with normative considerations on its development post-*Windsor*. As that development is achieved, marriage equality should prove less catastrophic than a storm, but no less resonant.

II. STEP-BY-STEP: THE ESKRIDGE-MERIN-WAALDIJK INCREMENTALISM REVISITED

A. The Original Theory

Comparative studies on the incrementalist path toward marriage equality came about roughly at the same time during the entrance and adoption of civil unions, domestic partnerships, and other "marriage-lite" relationships schemes by legislatures across Western countries and individual U.S. states in the 1990s and early new millennia. Promulgated by Kees Waaldijk in the Netherlands, and William Eskridge and Yuval Merin in the U.S., each of their separate studies observed that marriage equality movements internationally succeeded often through a specific incremental path propounded by certain sequential changes.[21] At the time, these studies attempted to shed insight into the particular legal transformations that might eventually forecast the inevitability of same-sex marriage within a country or a state and also serve normatively as strategies—however gradual—for LGBT rights activism.[22] Calling his interpretation of incrementalism a "law of small change," Waaldijk's study proposed a step-by-step approach to marriage equality through his substantially historical account of same-sex marriage developments in the Netherlands.[23] Eskridge named his incrementalist theory, "equality practice,"[24] and used it to justify favorably the enactment of civil unions, particularly in Vermont in 1999 with *Baker v. State*.[25] In slight contrast to Waaldijk and Eskridge, Merin's position on incrementalism in his study was more heavily focused on its existence as an activist means to the process of achieving marriage equality, calling incrementalism a "necessary process," which relays both descriptive and normative observations at the same time.[26]

Although Waaldijk, Eskridge, and Merin each have slightly different takes on marriage equality incrementalism, their scholarship about marriage equality's inevitability latch onto some common recognition of incrementalism as a vital

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[21] *See* Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii-xiv; MERIN, *supra* note 17, at 308-09.

[22] Waaldijk, *supra* note 18, at 440; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii; MERIN, *supra* note 17, at 327.

[23] Waaldijk, *supra* note 18, at 440.

[24] ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii.

[25] Baker v. State, 744 A.2d 864 (Vt. 1999).

[26] MERIN, *supra* note 17, at 327 ("The *necessary process* hypothesis is both descriptive and normative: it reflects how countries have actually moved toward the recognition of same-sex partnerships, and it prescribes what has to take place in countries and states that have yet to provide comprehensive recognition to same-sex couples, such as the United States.").

evolutionary staircase that will guide the movement toward that end. The notion of incrementalism runs deeper than supposing that merely time will change things. That evolutionary staircase with relatively specific steps escalates to progressively recast the visibility of sexual minorities upon the wide plain of civil legal rights in a society. By consensus, Eskridge, Merin, and Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized.[27] Once a state has crossed these three steps, the conditions for marriage equality will then be most evident. Subtle differences in Merin, Waaldijk, and Eskridge's individual approaches exist alongside the broader similarities each has expressed in this same, three-step trajectory. For instance, unlike Eskridge and Merin, Waaldijk emphasizes that after the first step of decriminalizing sodomy, an adjustment to the age of consent follows.[28] Meanwhile, Merin takes more expressly into account a possibility of a fourth step in Europe for parenting rights to flourish,[29] and Eskridge idiosyncratically ties equality practice to communitarian and post-modern implications.[30] Otherwise, all three scholars bear very similar incantations of a legal evolution toward marriage equality. Their differences might be in the variations of shape or color of the staircase steps, but not in the placement and order of the steps and in the final destination of same-sex marriage that these steps should reach. For its remainder, this Article, will refer to their strand of incrementalism *interchangeably as the Eskridge-Merin-Waaldijk theory or marriage equality* incrementalism.

But what is more interesting is the broad commonality that Waaldijk, Eskridge, and Merin have each noted or characterized *in between* these steps. They each have observed the positive opportunity incrementalism affords to humanize the historically unpopular identities of sexual minorities.[31] For Waaldijk, who wrote first about the particular steps that the Netherlands took to recognizing same-sex marriage, he pegged the process behind incrementalism as not just the recognition of same-sex marriage but rather "the legal recognition of homosexuality"—even though he is less forthcoming about the connection between recognition of sexual identity and same-sex marriage as he is concerned with detailing the three steps the Netherlands took to conferring marriage rights toward same-sex couples.[32] Similarly, in explaining his "necessary process," Merin acknowledges that "the 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."[33]

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[27] Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii-xiv; *see* MERIN, *supra* note 17, at 308-09.

[28] Waaldijk, *supra* note 18, at 440.

[29] MERIN, *supra* note 17, at 327.

[30] *See generally* ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 159-230.

[31] *Id.* at xiii.

[32] *See generally* Waaldijk, *supra* note 18, at 437-68.

[33] MERIN, *supra* note 17, at 308.

Eskridge's version appears most emotionally illustrative of this connection between incrementalism that results in marriage equality and societal acceptance of an undermined sexual identity. Within his "equality practice," Eskridge dramatizes what he believes are the effects of incrementalism toward the social recognition of sexual minorities in tandem with the more immediate goal of furthering same-sex marriage:

> If you are sickened by "homosexuals," you are unlikely to support gay marriage, but you might favor sodomy decriminalization for practical reasons, such as your belief that the state is wasting its time snooping around people's bedrooms. Yet sodomy decriminalization and a lessoning of public condemnation of homosexuality will embolden some of your gay friends, family members, and coworkers to come out of their closets. You may be shocked at first, and you can assimilate them as exceptions to your dislike of homosexuals, but your antigay attitudes may soften as you enter middle age. Over time, your interaction with gay people might open you up to acquiescing in antidiscrimination laws, if your experience has been that gay coworkers are okay and that antigay workers are troublemakers. You could still oppose same-sex marriage, but even this attitude might bend when your daughter partners with another woman and your spouse and other children accept her and integrate her partner into the extended family. As each step in the progression toward gay equality encourages more people to be openly gay, not only can middle-aged homophobic attitudes change, but the attitudes of new generations might start out less homophobic. These changes will support gay equality.[34]

Although Eskridge makes large, and at times, nearly tenuous, connective leaps between the steps of incrementalism in his illustration, the account that he draws is not impossible—that with each step, both the mainstream perceptions of sexual minorities and the self-identification of gay people will renegotiate to propitiate closer to acceptance and equality.[35] Indeed Eskridge underlines this transformative notion by setting up the binary between what he calls, a "politics of recognition" and a "politics of preservation," in regards to the mainstream reaction to sexual minorities as they become more visible within each step of incrementalism while the larger legal mechanism moves toward same-sex marriage.[36] The trip made in equality practice is from, what he designates, a politics of preservation that retains the status quo of the institution of marriage to exclude same-sex couples toward a politics of recognition where sexual minorities have engaged in the process of social and legal recognition.[37] In their respective ways, all three scholars suggest at the transformation of society's acceptance and recognition of sexual minorities as the underlying result of incrementalism while, on the surface, incrementalism pushes onward to marriage equality.[38] In the U.S., this change has been manifested within

[34] ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 117.

[35] *Id.* at 115.

[36] *Id.* at 112.

[37] *Id.*

[38] *See generally* Waaldijk, *supra* note 18, at 437-68; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 117; MERIN, *supra* note 17, at 308.

the last decade by gradual narratives that led to *Windsor* and how those narratives have altered the regulation of the identity expression of sexual minorities. Within the current U.S. narrative of marriage equality since *Lawrence*, incrementalism on the federal level has particularly involved the way that the law has handled the expression of identity for sexual minorities. Thusly, incrementalism not only provides the structural stairs for obtaining same-sex marriage, but as we will see, it also is a mechanism that has started to help strip away the marginalization of sexual minorities by pushing the law away from antigay essentialist approaches to sexual minorities. The result of de-marginalization explains why the incremental process requires certain steps to surpass before even the inevitability of marriage equality is possible.

B. Dealing with Incrementalist Imprecision

At the time of this writing, it has been more than a decade since the Eskridge-Merin-Waaldijk theory came into scholarly view. Since 2002, when Merin and Eskridge published their works on incrementalism, sexual minorities have triumphed over a myriad of significant successes and setbacks in the path to gaining equality rights. For instance, in 2002, *Lawrence* had not overruled *Bowers v. Hardwick*[39] and DOMA still restricted the federal definition of marriage for different-sex couples.[40] Merin and Eskridge's respective 2002 studies came out a year before Massachusetts would usher in same-sex marriage with *Goodridge v. Department of Public Health*.[41] At that same time, Proposition 8 in California would have referred back to a 1982 ballot measure titled Victim's Bill of Rights that affected the state's evidentiary code rather than a ballot measure redefining marriage between a man and a woman in the state constitution.[42] Don't Ask, Don't Tell had not yet been repealed, and no support for same-sex marriage was imminent from the White House; and in fact, before President Obama would endorse gay rights or marriage equality as goals at his inaugurations[43]—not to mention broadcast his support for same-sex marriage on television[44]—there was, in contrast, congressional support for the Federal Marriage Amendment to keep marriage as only for different-sex couples.[45] The catalysts that

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

[40] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

[41] *See generally* ESKRIDGE, EQUALITY PRACTICE, *supra* note 16. MERIN, *supra* note 17; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[42] See Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881 (1992).

[43] David G. Savage, *Inauguration 2013: Obama Hints at Greater Gay Marriage Support*, L.A. TIMES (Jan. 21, 2013), http://articles.latimes.com/2013/jan/21/news/la-pn-inauguration-2013-obama-gay-marriage-support-20130121.

[44] Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all.

[45] Jonathan Turley, *The American Gothic Amendment: Tinkering with the Constitution for the Wrong Reason*, CHI. TRIB. (May 19, 2002), http://articles.chicagotribune.com/2002-05-19/news/0205190435_1_same-sex-marriages-marriage-act-marriage-matters.

prodded the *Hollingsworth* and *Windsor* cases seemed nascent. In 2002, the Eskridge-Merin-Waaldijk theory in the U.S. was exactly what the name designates—*a theory*. Since then, marriage equality incrementalism has been set into motion in the U.S. and some of the events above have directly tested that theory while others have shown their importance peripherally between the incremental steps.

Critical voices have revisited the theory from time to time, mostly fixating on its tendency to generalize and also for its fit for the U.S. given our system of federalism where marriage is regulated by the states[46] and the way marriage is viewed—often religiously—by the public.[47] Indeed, post-2002, when applied to the marriage equality movement in the U.S., the Eskridge-Merin-Waaldijk theory seemed to be an imperfect theory—either not taking as much account of the nuances of the marriage equality movement through our system in which individual states regulate marriage, or appearing to focus on generalities rather than social conditions specific to the country or state that might affect the process. In light of recent acceleration in gay rights activism, the U.S. journey on the incrementalist path has some variation enough to pose revisions to the theory that account for the criticisms, but not a wholesale rejection. As discussed *infra*, such criticisms, though relevant, might have been premature because with *Windsor*, the theory's applicability has actually been proven quite strongly.

Specifically, step three of the Eskridge-Merin-Waaldijk theory—originally the legal recognition of same-sex couples through alternative relationship schemes, such as civil unions and partnerships—could now be broadened to encompass, not only those schemes, but also marriage itself, which possibly abridges the steps from three to two for some journeys. As discussed later, the Eskridge-Merin-Waaldijk theory can embrace its descriptive functions just as it has always done, but it take its normative functions less narrowly and restrictively. With that stated, the differences between the U.S. and elsewhere that had once seemed to reject the applicability of the Eskridge-Merin-Waaldijk incrementalism on American soil can be reconciled for a workable prediction of the inevitability of same-sex marriage in the U.S. In this manner, we can use incrementalism as a helpful guide to assist us in reaching marriage equality in fifty states, rather than using it as a mandated road that must be taken with exacting ritual.

C. The Spirit Versus Letter Approach

At its core, disjointed incrementalism—the broader process theory mechanism that houses the Eskridge-Merin-Waaldijk theory—assumes bounded rationality. Although it harbors long-term historical ties to Burkean notions of tradition and societal change,[48] incrementalism as a recent economic, political science and policy

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[46] Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 135 (2010).

[47] M. V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE J.L. & FEMINISM 71, 84-85 (2005).

[48] *See* Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1408 (2009) ("Still another explanation for the history and tradition proffer might be an underlying commitment to a Burkean-style incrementalism, with the view that the risks associated with sharply altering tradition may outweigh the benefits of change." (footnote omitted)). *See generally* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

decision-making theory is most closely linked to Yale economist, Charles Lindblom and his examinations on the process of gradual social changes that deviate minimally from status quo and how this type of transformation is more realistic than "synoptic" changes in which grand units of decision-making are accomplished in gestures that resemble "one fell swoop."[49] Incrementalism denotes gradual changes as more realistic, noting that "[w]hen a man sets out to solve a problem, he embarks on a course of mental activity more circuitous, more complex, more subtle, and perhaps more idiosyncratic than he perceives it"[50] and that once "he is aware of some of the grosser aspects of his problem solving . . . he will often have only the feeblest insight into how his mind finds, creates, dredges up—which of these he does not know—a new idea."[51] In this way, Lindblom characterizes incrementalism as the product of bounded rationality: "Dodging in and out of the unconscious, 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, [the man] exploits mental process that are only slowly yielding to observation and systematic description."[52]

Applicable variously outside of the marriage equality movement, incrementalism has been subsequently "reframed" and summarized by other social science scholars to exhibit the following basic "stratagems":[53]

a. Limitation of analysis to a few somewhat familiar policy alternatives, of which one possible form is simple incremental analysis: consideration of alternative policies differing only marginally from the status quo;
b. Intertwining of analysis of policy goals and other values with the empirical aspects of the problem—that is, no requirement that values be specified first with means subsequently found to promote them;
c. Greater analytical preoccupation with ills to be remedied than positive goals to be sought;
d. A sequence of trials, errors, and revised trials;
e. Analysis that explores only some, not all, of the important possible consequences of a considered alternative;
f. Fragmentation of analytical work to many partisan participants in policy making, each attending to their piece of the overall problem domain.[54]

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[49] J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrate State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 72 (2010); Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599, 625-26 (2009).

[50] DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS 81 (1963).

[51] *Id.*

[52] *Id.*

[53] Andrew Weiss & Edward Woodhouse, *Reframing Incrementalism: A Constructive Response to the Critics*, 25 POL'Y SCI. 255, 256 (1992).

[54] *Id.* In its theoretical distillation, incrementalism—as it has been studied by others in the social sciences—has been a theory that embraces imperfections. Professors James Krier and

When applied to the marriage equality movement, the particular Eskridge-Merin-Waaldijk theory of incrementalism embodies and exhibits the same kind of limitations that Lindblom's theory prescribes. Indeed, at close glance, all of those six stratagems of Lindblom's incrementalism appear in Eskridge-Merin-Waaldijk's more specified incrementalist theory for marriage equality. Without doubt, the term "incrementalism" was not misappropriated when Waaldijk, Eskridge, and Merin each used it to identify the possible steps it took for a society to achieve marriage equality.

For instance, with the first stratagem—the limitations on policy alternatives—the journey from decriminalization of consensual same-sex intimacy to initiation of antidiscrimination policies covering sexual orientation, and finally to legal recognition of same-sex couples, can be thought of as a journey comprised of limited alternative policies differing marginally from one status quo to the next. In fact, when Waaldijk refers to his incrementalist theory as a "law of small change," he fashions those small changes recognizing gay rights happening only " 'if that change is either perceived as small' "[55] or alternatively " 'if that change is sufficiently reduced in impact by some accompanying legislative "small change" that reinforces the condemnation of homosexuality.' "[56] Waaldijk cites examples of decriminalization of consensual same-sex intimacy in European countries where

> decriminalisation of sexual activity between adult men (and women) was accompanied by the maintenance or introduction of various specifically homosexual offences, including bans on homosexual activity "in public" (United Kingdom and Romania), or leading to "public scandal" (Bulgaria, Romania and formerly Spain), as well as on "proselytism" for it (Austria, Cyprus and Romania).[57]

In describing "equality practice," Eskridge notes that incrementalism "proceeds by little steps taken in a particular order"[58] and that one of the imperfections in the gay rights movement in the U.S. and elsewhere is that the "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the

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Mark Brownstein, in writing about pollution control in environmental law, has commented that the widely-accepted Lindblom model of incrementalism considers "practical obstacles" part of the process of slow change and that "[f]ragmented institutions and segmented problem-solving simply reflect the way reality shapes institutions and procedures. The world cannot be remade to fit the ambitions of comprehensive rationality; useful decision theory has to be tailored to the ugly imperfections of the real world." James E. Krier & Mark Brownstein, *On Integrated Pollution Control*, 22 ENVTL. L. 119, 126 (1992). Lindblom himself had argued that humans are incapable of designing perfect systems because human rationality is inherently limited. *See* Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 80 (1959). In this way, Lindblom explains that democracies "change their policies almost entirely through incremental adjustments. Policy does not move in leaps and bounds." *Id.* at 84.

[55] Waaldijk, *supra* note 18, at 440.

[56] *Id.*

[57] *Id.* at 441 n.18 (citations omitted).

[58] ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 115.

law."[59] As such, "[f]or gay rights, the impasse suggested by this paradox can be ameliorated if the proponents of reform move step by step along a continuum of little reforms. Step-by-step permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments."[60] Consequentially, this path is one that prefers a slow and steady pace.

With the second stratagem that characterizes incrementalist motions as "intertwining of analysis of policy goals and other values with the empirical aspects of the problem,"[61] economist Andrew Weiss and political scientist Edward J. Woodhouse, in defending Lindblom, explain further that this means there often is "no requirement that values be specified first with means subsequently found to promote them."[62] This stratagem could be signified by how—although the three events nearly required by the Eskridge-Merin-Waaldijk theory seek the surpassing of consensual same-sex intimacy laws, of discrimination against sexual minorities, and of legal recognition of same-sex couples—these events are not necessarily linked with the overall consequence of marriage equality in mind. Rather, each step can function—and does function—to achieve the de-marginalization of sexual minorities, but they are not informed by each other prior to each achievement. Despite the more nuanced readings of the *Lawrence v. Texas* majority (including Justice Scalia's reading of it as expressed in his dissent) that claim that the Justice Kennedy's opinion was a towering moment for the extension of marriage to same-sex couples,[63] the opinion itself in its then-present effect was narrower—only pertaining to invalidating laws that criminalized sexual minorities for engaging in consensual sodomy, and it was not facially evident that Kennedy penned the majority opinion with the goal of marriage equality; in fact, the majority demarcated the significance of its ruling by opining that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[64] Instead, Kennedy wrote that "the case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[65] Although after the ruling, in scholarly and activist dissection, *Lawrence* does bear eventual incremental significance for the marriage equality movement, *Lawrence* itself was confined to existing as a due process case that decriminalized anti-sodomy laws and handed no precedent on equality of marriage for same-sex couples.[66] This kind of self-

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[59] *Id.*

[60] *Id.*

[61] Weiss & Woodhouse, *supra* note 53, at 256.

[62] *Id.*

[63] *See* Stephen Reinhardt, *Legal & Political Perspectives on the Battle Over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11 (2005); Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

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

[65] *Id.*

containment in the increments likely demonstrates why Eskridge-Merin-Waaldijk incrementalism embodies Lindblom's idea of incrementalism because it does not explicitly harbor a means-ends momentum each time an increment is about to be met.

The third stratagem in Lindblom's incrementalist theory shows that the process of change harbors "[g]reater analytical preoccupation with ills to be remedied than positive goals sought."[67] The Eskridge-Merin-Waaldijk incrementalism is rife with this attribute as well. For instance, in his "necessary process," Merin describes this preoccupation after framing his incrementalist theory by starting with the discriminatory subordination of sexual minorities in the U.S. and abroad, both publicly and covertly.[68] As a result, Merin articulates that the incremental process for sexual minorities to gain recognition of their relationships is an escalation towards greater tolerance that is embodied in his rendition of the three steps, couched from a remedial stance more so than an affirmative stance: "The first and basic level is to remove from the criminal code (if they exist) sanctions against homosexual and lesbian conduct; the second level is to prohibit discrimination against gay men and lesbians on the basis sexual orientation."[69] Merin describes both first and second steps from a perspective of removal and restriction: the law must take away the roadblocks that will prohibit future subordination of sexual minorities—in either steps, things must be "removed" or "prohibited" so that the marginalization is redressed. Only finally in incrementalism's step three does Merin's description seem a bit more positive when he describes that step as "affirmatively recogniz[ing] same-sex partnerships as equal to opposite-sex unions for various purposes, beginning with 'soft' rights such as various economic benefits and following that step with comprehensive recognition of same-sex partnerships."[70]

The fourth stratagem involving incrementalism as "[a] sequential of trials, errors, and revised trials" could be envisioned again by Waaldijk's description that in his "law of small changes," where "each step in this standard sequence is in fact a sequence in itself."[71] Again, the U.S. example of decriminalization of consensual

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[66] *See* Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117, 146-47 ("While the decisions in both *Bowers* and *Lawrence* turned on the issue of a constitutional right to homosexual sodomy, it is clear from the briefs and oral argument that the Justices were much more informed (and presumably mindful) of the decision's potential impact on related matters embedded in family law. Indeed, Justice Kennedy took great care to distance *Lawrence* from the fomenting marriage equality debate." (footnotes omitted)); *see also Lawrence*, 539 U.S. at 578 (opining that the majority decision in *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[67] Weiss & Woodhouse, *supra* note 53, at 256.

[68] MERIN, *supra* note 17, at 308. Merin notes that "in many countries, including most U.S. states, gays do not enjoy the protection of antidiscrimination laws," and that "[n]ot only are gay men and lesbians not legally protected from discrimination, but, to varying degrees and depending on the country, the vast majority of the legal systems of the Western world still covertly discriminate against them." *Id.*

[69] *Id.* at 309.

[70] *Id.*

[71] Waaldijk, *supra* note 18, at 440.

same-sex intimacy in *Lawrence* serves demonstratively. Although the Supreme Court did not invalidate anti-sodomy laws until 2003 with *Lawrence*, the entire process of decriminalization is likely to have involved *Bowers v. Hardwick*[72] nearly two decades before, with the first Supreme Court litigation over anti-sodomy laws in Georgia. That first attempt failed to bring about decriminalization of anti-sodomy laws, and 17 years passed before the issue was again heard at the Supreme Court-level.[73] In the interim, the Court ruled favorably for gay rights in *Romer v. Evans*,[74] which overturned an amendment to Colorado's constitution that prohibited any governmental anti-discriminatory legislation protecting sexual minorities.[75] The Court had invalidated that amendment after an enhanced rational basis analysis found animus behind the amendment.[76] When the issue of anti-sodomy laws circled back to the Court in *Lawrence*, *Romer* was used, in conjunction with *Planned Parenthood of Southeastern Pa. v. Casey*,[77] which had also been ruled upon between *Bowers* and *Lawrence* in order to create a "serious erosion"[78] of the "foundations of *Bowers*."[79] This nearly two decade span between first and second litigations at the Supreme Court that resulted eventually with the first step in the Eskridge-Merin-Waaldijk incrementalism did not come about through one complete gesture, rather even a quick glance reveals that this increment resulted from an evolving process of its own, that redefined the issues that finally brought forth change.[80]

The fifth noted stratagem of incrementalism reflects how the process contains "analysis that explores only some, not all, of the important possible consequences of a considered alternative."[81] This particular stratagem is mirrored in the way that the original Eskridge-Merin-Waaldijk incrementalist theory all found at the time that the legal recognition of same-sex relationship—the last step—only included the possibility of same-sex couples being legally recognized in categories alternative to marriage, such as civil unions and/or partnerships. Waaldijk's version of legal recognition includes only parenting and same-sex partnerships[82]; while Eskridge

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

[73] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

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

[75] *Id.* at 635-36.

[76] *See id.* at 632-36.

[77] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[78] *Lawrence*, 539 U.S. at 576.

[79] *Id.*

[80] Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 55 SUP. CT. REV. 75, 109 (2003) ("That is to say, *Romer* called into question the premise articulated in that opinion that the mere fact of majoritarian disapproval of homosexuality is a sufficient warrant for legislation disadvantaging homosexuals. Even now it seems to me that gays, lesbians, and bisexuals can more directly claim protections from adverse governmental consideration of their orientation in employment, family, and housing decisions by invoking *Romer*." (citations omitted)).

[81] Weiss & Woodhouse, *supra* note 53, at 256.

[82] Waaldijk, *supra* note 18, at 440.

mentions the same about partnerships but also overwhelmingly fits civil unions and reciprocal beneficiaries into the fray[83]; and Merin shares broad similarities with Eskridge by describing his step three as comprising registered partnerships and civil unions.[84] At the time of their original theorizing, when the incidents of marriage equality internationally was thinner than what it is presently, and the visibility of sexual minorities and their entitlement to equality had not escalated into consciousness with the kind of acceptance today, legal recognition of same-sex couples through partnerships, civil unions, and other forms short of marriage was likely more tenable compared to the option of actual marriage itself. Though marriage was itself a possible legal recognition of same-sex couples because it existed as the ultimate legal recognition of personal relationships, it was likely not as *probable* for sexual minorities at the time Eskridge, Merin, and Waaldijk promulgated their incrementalist theory. And although the possibility of bypassing these alternative forms of legally-recognized relationships for marriage itself would be much more possible if a state had already achieved the second incrementalist step—antidiscriminatory legislation based on sexual orientation—Eskridge, Merin, and Waaldijk all chose to exclude it from the list of possible ways of legally recognizing same-sex couples in order to fulfill this third and last increment of their theory. And as we will see, such acceleration of LGBT rights and visibility since then implies changes in this list of alternatives.

Finally, the last stratagem which allows the process to break the "analytical work to many partisan participants in policy-making, each attending to their piece of the overall problem domain"[85] can be inferred by the complexity and studied in avenue of ways in which each of the increments could be resolved. For instance, decriminalization of consensual same-sex intimacy could be achieved either through a majoritarian body—which is how Waaldijk has described the way many European countries did away with their anti-sodomy laws[86]—or through counter-majoritarian measures such as in *Lawrence*, where the Supreme Court overturned the Texas statute against consensual sodomy.[87] Within either situation the partisanship would exist, even thinly, as the decision to decriminalize becomes part of the decision-making. In *Lawrence*, the ruling to invalidate anti-sodomy laws was a result of a majority vote on the Court of 6-3 between liberal and conservative justices.[88] In the marriage equality struggle in California, that increment involved judicial review by the California State Supreme Court in *In Re Marriage Cases* that rendered same-sex marriage legal in 2008.[89] Then a public ballot measure, Proposition 8, followed that consequently revoked the future ability of same-sex couples to marry.[90] Further

[83] ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiv.

[84] MERIN, *supra* note 17, at 333.

[85] Weiss & Woodhouse, *supra* note 53, at 256.

[86] Waaldijk, *supra* note 18, at 440.

[87] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[88] See *id.*

[89] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[90] Dan Morain & Jessica Garrison, *Gay Marriage Timeline: Focused Beyond Marriage*, L.A. TIMES (Nov. 6, 2008), http://www.latimes.com/news/local/la-me-timelinegaymarriage-2008nov06,0,496938.story#axzz2onYMEnjD.

resolution in the courts ensued—this time federal—with a final opinion by the Supreme Court in *Hollingsworth v. Perry*.[91] Each step along the way had its own actors—from judges to voters to litigants and finally to the panel of Supreme Court Justices.

The above-demonstration shows that the Eskridge-Merin-Waaldijk incrementalism does fit within the signature of Lindblom's classical theory of incrementalism. This analysis is not merely helpful in showing that the Eskridge-Merin-Waaldijk theory exists as a variant of Lindblom's examined theory of change, but it rather observes what kind of studied attributes that such a theory would evidently hold. In this way, knowing these attributes—or stratagems—allows more functional critiques of the theory when the three incremental steps are applied to same-sex marriage in the U.S.—whether the movement is really filled with *small changes*, whether it gets us to *practice equality*, whether some of the steps in the process are really *necessary*. Again, because of incrementalism's implicit entanglement with bounded rationality, academic defenders of Lindblom, such as Andrew Weiss and Edward Woodhouse, have noted a general misunderstanding that arises when others study a particular transformation along an incrementalist path; they are impatient with it—perhaps by a sheer human incapability to understand the theory because they overlook bounded rationality:

> [T]he misunderstandings arise partly because incrementalism runs against the grain of fundamental precepts in Western culture. Especially among students of policy making there remains an excessive faith in the possibility of conducting politics largely via systematic professional analysis, and Lindblom's debunking of this notion may have seemed to challenge noble aspirations of using government for social justice, environmental protection, and other progressive purposes.[92]

These misunderstandings, according to Weiss and Woodhouse specifically, have often led scholars, who are both critics and supporters of the theory, astray.[93] The tension, as Weiss and Woodhouse seem to imply when they propose to address this problem with misunderstanding, is with normative uses of the theory, and how critics of the theory perhaps become too involved with the specific details: "A possible tack in this direction is to go back to the *spirit* rather than the *letter* of Lindblom's work, getting away from unproductive debates over secondary issues like small steps and inviting a reopening of the underlying inquiry."[94] Weiss and Woodhouse suggest the negotiation between descriptive and normative approaches of incrementalism generally use the descriptive approach in broad strokes to inform the normative approach so that one reflects towards the underlying *spirit* rather than

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[91] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[92] Weiss & Woodhouse, *supra* note 53, at 267.

[93] *Id.* at 267 ("One possibility is simply to say that the critics are wrong and let it go at that. But the fact that some very good scholars have been put off by one or more aspects of the concept as they understand it, and the original formulation of incrementalist ideas (particularly the discussion of small steps) probably contributed to the misunderstanding. As important, even the advocates are making little progress developing the incrementalist tradition.").

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

letter of incrementalist movements in order to then pose questions normatively.[95] In this way, their defense about the utility of incrementalism highlights not its predictive nature of things but what incrementalism can tell us about effective strategies:

How do individuals, organizations, and societies cope with limits on human understanding, and how can they do it better as so to improve policy making? If condemned by lack of time, resources, and cognitive power to proceeding with inadequate understanding, how can we become *better* incrementalists or better strategic thinkers and actors more generally? What strategies, institutions, and processes would be helpful in promoting the improved use of strategic analysis and action through social life?[96]

> This kind of study can be gaze appropriately upon the incrementalism behind marriage equality. Instead of its predictive value about the inevitability of marriage equality, the normative uses of the Eskridge-Merin-Waaldijk incrementalism lies in strategy and choices to make as the incremental steps has the ability to take us closer and closer to a common goal. This approach, to look more for the broad strategies rather than the predictive nature of incrementalism, might assist those investigating the Eskridge-Merin-Waaldijk theory and importing lessons learned from comparative versions internationally into obtaining marriage equality in the U.S. Chiefly, this observation about incrementalism would seem to temper voices critical of the theory, which could place previous criticisms of the Eskridge-Merin-Waaldijk theory into question as critics have highlighted the theory's predictive nature and rejected the theory based on such over-reliance on the "letter" of the theory rather than the "spirit."[97]

As Lindblom himself also notes about incrementalism in his original, exegetical work on the theory in general, the mechanisms in this type of slow change embodies a certain deceptive flexibility:

The series of analyses and evaluations that typically characterize problem solving in the field of public policy is not always a tidy series, not always explicitly identified as a series, not always recognized as a series. Sometimes frames of reference shift in the course of series, in some cases so much so that new steps take on the superficial appearance of an entirely new line of problem solving. But this appearance should not obscure the *continuity* that often exists below the level of superficial observation.[98]

Lindblom seems to suggest that no matter how disjointed or obscure the particular series of transformative negotiations that embody an increment appears,

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[95] *Id.* at 267.

[96] *Id.* at 267-68.

[97] *See* Aloni, *supra* note 46, at 160 ("More troubling is the suggestion that the process of achieving legal recognition of same-sex marriage can be definable[.]"); *see also* Badgett, *supra* note 47, at 75 ("Many historians of sexuality note that historical 'progress' in tolerance of homosexuality is not linear. . . . Not surprisingly, the incrementalists offer no clear idea about how long each incremental step should or will take.").

[98] BRAYBROOKE & LINDBLOM, *supra* note 50, at 100-01.

the underlying continuity inhabits a bigger, unifying picture, with unifying themes. He illustrates this idea about incrementalism with the following example:

> [A] shift in congressional attention from income-tax legislation to sales-tax legislation might reflect a continuing concern and a serial attack on certain problems of income distribution. Shifts in attention from controversy over large aircraft carriers versus bombers to a missile program to public policy on basic research to federal aid to education should not obscure an underlying continuity of interest in national security—even though the consideration of federal aid to education requires attention to many issues other than national security.[99]

This flexibility inextricably plays into the sequential trial-and-error stratagem illustrated by the way the Supreme Court decriminalized sodomy—notably trial-and-error first with *Bowers*, and then success later with *Lawrence*.[100] But flexibility is also pertinent to marriage equality incrementalism more broadly as it would possibly allow for revision of the letter—or letters—within the spirit of the Eskridge-Merin-Waaldijk theory to reflect idiosyncrasies in the U.S. version and the refinement of strategies that reflects such idiosyncrasies—not to mention, address its critics.

D. Revising Step Three

With spirit and flexibility noted, one example of using the spirit-versus-letter approach reconciles the Eskridge-Merin-Waaldijk theory with both Erez Aloni's major criticism of the theory's exclusive reliance on civil unions and marriage-like classifications for step three's legal recognition of same-sex relationships, and M.V. Lee Badgett's criticism that the three steps do not heavily account for the socio-political climate of the U.S., but promotes the path in a general, nearly all-too universalist way.[101] Together, however, Aloni and Badgett's observations can be conflated in a way that assists in refining marriage equality incrementalism in the U.S., and reflect the transitioning political climate and the public fervor for same-sex marriage presently.

When the Eskridge-Merin-Waaldijk theory was first observed and disseminated, the justification for marriage alternatives, such as civil unions and partnerships—these other forms of recognizing intimate relationships—was progress because it gave rights to same-sex couples that they had not received before.[102] This justification was important because these types of recognition short of marriage and

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[99] *Id.* at 101.

[100] *Compare* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is at best facetious. . . . Nor are we inclined to take an expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause."), *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

[101] *See* Aloni, *supra* note 46, at 160; *see also* Badgett, *supra* note 47, at 84.

[102] *See* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 865-866 (2001) [hereinafter Eskridge, *Liberal Reflections*] (discussing how Vermont's civil union laws conferred similar rights and benefits to same-sex couples).

conferring of rights and benefits previously unavailable to same-sex couples were necessary for fulfilling the kind of legal recognition of same-sex relationships that step three required to further the progression eventually toward marriage equality; as Merin notes, "[b]efore same-sex marriage becomes possible, the final step of the necessary process must be completed, namely, broad recognition in the form of registered partnership or civil union[.]"[103] At the time, part of this recognition's importance as a pre-requisite for marriage equality depended on the changed perceptions of same-sex couples after obtaining this recognition for their relationships. Eskridge's step-by-step approach relies partly on the paradox that the "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law."[104] From here, Eskridge's hope with Vermont's civil unions—and with civil unions largely—was that "[t]heories of prejudice suggest how Vermont's newest move, same-sex unions, will contribute to the rational and tolerant society of that state in a way that anti-discrimination laws do not."[105] He acknowledged that "[i]n important respects, the civil union law is inconsistent with the premises of the liberal state as applied to same-sex couples: it treats them differently from different-sex couples, and for reasons that are hard to justify without resort to arguments grounded in state denigration or even prejudices."[106] However, in an underlying fashion, these alternative types of legal recognition amount to an avoidance of bigger ills, leading us to a place where "functionally, the law ameliorates, rather than ratifies, a sexuality caste system."[107] Eskridge's premise, then, held some truth because prior to these alternative types of relationships, same-sex couples did not have the legal spotlight upon them in a way that conferred rights that were closer to the neighborhood of marriage rather than the neighborhood of invisibility—or worse, the neighborhood of social and legal contempt.[108] With utopian flare, Eskridge noted, in respect to Vermont in 2000, that the civil union system there "is one where liberal values of rationality, mutual respect, and tolerance among gay and straight people can flourish."[109]

More than a decade has passed, and the question now is whether public opinion stands similarly today as when Eskridge made his observations about Vermont's civil unions. This question shows that Aloni and Badgett are right that comparative models of marriage equality might not be as helpful for the U.S. as previously

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[103] MERIN, *supra* note 17, at 333; *see also* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 655 (2000) [hereinafter Eskridge, *Comparative Law*] ("Once same-sex unions are euphemistically recognized as 'registered partnerships,' and modest numbers of people take advantage of the new institution to formalize their well-ordered middle-class unions, it would then be, I hypothesize, a smaller step to recognize same-sex marriage.").

[104] Eskridge, *Comparative Law*, *supra* note 103, at 648.

[105] Eskridge, *Liberal Reflections*, *supra* note 102, at 870.

[106] *Id.* at 854.

[107] *Id.* at 864.

[108] *See, e.g.*, Eskridge, *Liberal Reflections*, *supra* note 102, at 865-866 ("Following [*Baker v. State*], the civil unions law gives civil-unioned partners a variety of state-supported rights and benefits that they did not have before the law was adopted.").

[109] *Id.* at 870.

conceived because the "letter" itself—the details—in step three could be changed to reflect the transformations on the national imagination and marriage equality movements since the early 2000s.[110] This kind of revisionist enquiry is part of the flexibility Lindblom and his defenders conceptually prescribed. And the possible way to reconcile this attribute of incrementalism and the development and idiosyncrasies of the U.S. in marriage equality is to use them to expand what could belong in step three's legal recognition of same-sex couples.

First, since Eskridge and Merin separately wrote about incrementalism in 2002 to the time of this writing, eighteen states (California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), and the District of Columbia have extended marriage to same-sex couples.[111] As far as idiosyncrasies that distance the U.S. from other countries, our system of federalism recognizes that marriage in the U.S. is not directly regulated by the federal government, but by individual states.[112] Although Eskridge and Merin do both acknowledge the federal and state players when they describe the U.S. journey[113] and both Aloni and Badgett's scholarly criticisms indirectly exhibit the concept of federalism,[114] Jane Schacter's recent specific emphasis on the states—specifically calling it "patchwork" or "federalist" incrementalism—draws this notion out that there might be two major categorical journeys of incrementalism on American soil: one, federally, and the other, collectively through the patchwork of states, which presumably consist of 50 mini-journeys.[115] It is not just once that the U.S. has to journey through the three steps of the Eskridge-Merin-Waaldijk theory for marriage equality, but the journey plays out on the federal level and concurrently through a patchwork of states until that patchwork is obliterated by all 50 states recognizing same-sex marriage.[116] Since Merin's work, which was the latest scholarship on incrementalism, the U.S. has been moving steadily toward positive notions regarding the rights of sexual minorities. The patchwork of more than one-fourth of the states in the Union recognizing same-sex marriages reflects changing attitudes in this fashion. Particularly prescient since President Obama's support of marriage equality, the number of political figures and institutions changing views and backing same-sex couples in receiving marriage rights has grown quickly—including changes in attitude of politically conservative

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[110] *See* Aloni, *supra* note 46, at 160; *see also* Badgett, *supra* note 47, at 84.

[111] HUMAN RIGHTS CAMPAIGN, *Marriage Equality and Other Relationship Recognition Laws* (July 1, 2013), *available at* http://www.hrc.org/files/assets/resources/marriage_equality_laws_072013.pdf.

[112] *See* United States v. Windsor, 133 S. Ct. 2675, 2689-90 (2013).

[113] MERIN, *supra* note 17, at 337. *See generally* ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 1-42.

[114] *See generally* Aloni, note 46, at 127-36; Badgett, *supra* note 47, at 72.

[115] Jane S. Schacter, *Splitting the Difference: Reflections on* Perry v. Brown, 125 HARV. L. REV. F. 72, 74 (2012).

[116] *See id.*

groups and individuals.[117] Socially, public opinion has switched from condemning same-sex marriage to much more support in the last decade.[118]

In Lindblom's incrementalism, these changes would suggest significant impact on the "letters" of marriage equality incrementalism that should fine-tune the journey in the U.S. to ultimately capture the "spirit" of the incremental shift. In addition, the existence of same-sex marriage in the "patchwork" states, the visibility of same-sex couples in those states who are recognized under those laws, and the changing support for marriage equality could be tipping the balance in the legal recognition of same-sex relationships toward marriage equality itself directly, rather than marriage-like alternatives first and then marriage equality secondly. This notion might be even furthered if several of those patchwork states reached marriage equality from anti-discrimination laws that included sexual orientation (step two), and had bypassed legally recognizing same-sex relationship through civil unions or partnerships (step three). Indeed, such "outliers," as Iowa, Minnesota, and New York, in the patchwork—that did achieve marriage equality rights without crossing the step that required civil unions or partnerships—and would support the notion that the inevitability of marriage equality in a particular state might allow for jumping over civil unions to dash to the marriage alter itself.[119] Just as Aloni is right that there are variations on how to get to same-sex marriage,[120] so is this phenomenon playing right into the revisionist stratagems of Lindblom's observations generally about incrementalism.

Secondly, the relevance of civil unions and partnerships have been placed into question by the potential "separate but equal" stigma of these alternative marriage-like schemes. Douglas NeJaime recently tracked the transition showing how civil unions, in particular, were once celebrated and then later vilified in the marriage equality movement.[121] At first, "[a]dvocates framed civil unions, which provided same-sex couples with the state-based rights and benefits of marriage, as a measure that achieved equality."[122] But even as early as 2003, when litigation over *Goodridge* was in full swing, NeJaime describes how pro-gay lawyers in *Baker v. State* now involved in *Goodridge* had the opportunity to "frame the Vermont experience as one

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[117] Michele Richinick, *A Year After Obama's Gay Marriage "Evolution"*, MSNBC (May 9, 2013, 03:24 PM EST), http://tv.msnbc.com/2013/05/09/gay-marriage-progress-report-a-year-after-obamas-evolution/.

[118] Gary Langer, *Poll Tracks Dramatic Rise in Support for Gay Marriage*, ABC NEWS (Mar. 18, 2013, 02:00 PM EST), http://abcnews.go.com/blogs/politics/2013/03/poll-tracks-dramatic-rise-in-support-for-gay-marriage/.

[119] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Defining Marriage: Defense of Marriage Acts & Same-Sex Marriage Laws*, http://test.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last visited Aug. 4, 2013).

[120] *See* Aloni, *supra* note 46, at 127-28 ("Generally speaking, while some states, such as Vermont and Connecticut, have followed the theory of small change, other states have followed very different paths. In fact, many states have legalized same-sex marriage without ever passing civil unions or following the path proscribed by Waaldjik." (footnotes omitted)).

[121] Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISC. 184 (2013).

[122] *Id.* at 185.

that produced inequality and continued discrimination."[123] Then even later in 2006, with Massachusetts as the only state with marriage equality and New Jersey about to follow Vermont by installing civil unions, "LGBT rights advocates protested,"[124] and deliberately challenged civil union's relevance by pointing out that civil unions could easily lead to second-class citizenry.[125] NeJaime observed that the LGBT rights lawyers in Vermont and Massachusetts knew what they were doing when they advocated for civil unions first and then abandoned it when marriage equality seemed more salient.[126] Their calculating shift hinged upon the rise of marriage equality in particular over alternative types of marriage-like recognition and connotes an expiration of the functional significance of civil unions "as a temporary solution."[127]

At the same time, Elizabeth Glazer has posited the gaining complexity with civil unions in part because such legal recognition of same-sex couples do sustain that visibility that Eskridge, Merin, and Waaldijk previously urged as the important, step-three jumping-off point before marriage equality.[128] Glazer writes that civil unions present an interesting slippage that adds to the same-sex marriage debate, "highlight[ing] that it is not only the liberty interest of not being forced to assimilate that is essential for the LGBT rights movement but also the equality interest of not being treated differently from couples whose members are of different sexes."[129] According to Zachary Kramer, "[t]he point is that the marriage equality movement needs to keep an open mind when it comes to proposed marriage reforms. Marriage is a continually evolving social practice, and marriage law evolves alongside it, sometimes as the catalyst for change, other times in response to a change in social practice."[130] This kind of negotiation is what incrementalism can afford sequentially.

If there are some states or journeys in the incrementalist path for which marriage equality is the natural leap from anti-discrimination that includes sexual orientation and others that approach this journey more thoughtfully about civil unions and find some relevance for alternative legal recognitions of same-sex couples short of marriage, then step three in Eskridge-Merin-Waaldijk theory could be enlarged to include same-sex marriage as another option. Of course, this change would abridge step three for those states that reach for it, rather than installing an alternative scheme. Nonetheless, despite the substantial trend of states that customarily follow the Eskridge-Merin-Waaldijk path of adopting an alternative scheme first and then

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[123] *Id.* at 192 (referencing Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders at 4–5, *Ops. of the Justices to the Senate*, 802 N.E.2d 565 (No. 09163)).

[124] *Id.* at 185.

[125] *Id.* at 186.

[126] *Id.*

[127] *Id.* at 192 (footnote omitted).

[128] Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 131 (2012).

[129] *Id.* at 142.

[130] Zachary A. Kramer, *The Straight and Narrow*, 2012 CARDOZO L. REV. DE NOVO 147, 153 (referencing STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005)).

fulfilling step three before adopting same-sex marriage, the small minority of outlier states that bypassed this step and successfully obtained marriage equality (Iowa, Minnesota, and New York) would support that option as a viable one for future pro-marriage equality states popping up within the patchwork. This shortcut might possibly be consistent with the need, relevance, and significance of alternative relationship recognition when the opinion of same-sex relationships and sexual minorities have changed since Eskridge, Merin, and Waaldijk first introduced the theory. What Eskridge and Merin might have considered a necessary increment, because of the "newness" of legally recognizing same-sex couples, has now been weakened due to the positive visibility of same-sex couples in the law since the early 2000s, or the rise of same-sex marriage in individual states since Massachusetts. Here is where Schacter's patchwork incrementalism might also have a similar effect toward remodeling that third step in the Eskridge-Merin-Waaldijk incrementalism. If states like Iowa, Minnesota, and New York, that were at step two with some antidiscrimination laws covering sexual minorities, continue to move toward marriage equality before adopting civil unions or partnerships, adding marriage equality into step three—essentially doing away with that last step altogether—would be a tenable revision of incrementalism, created by its own progress. Here in lies flexibility.

In sum, to tease out the normative uses of the Eskridge-Merin-Waaldijk theory, the key, according to scholars who have defended Lindblom's incrementalism is to funnel incrementalism's general predictive worth toward anticipating what the next step will be, rather than anticipating when marriage equality will happen. Flexibility and intelligent trial-and-error exist as attributes of Lindblom's incremental decision theory and should prompt adjustment and re-adjustment along the "spirit" of the marriage equality movement and not its "letters." In this way, a revision to step three is suggested to include a "side-step" option for legally recognizing same-sex couples through marriage itself—thus, for some journeys, collapsing the third original step of the Eskridge-Merin-Waaldijk theory. Doing so would hopefully reconcile critical concerns over straight-jacketing the U.S. to the letter of Eskridge-Merin-Waaldijk incrementalism and not account for social and political differences that pose significance.

Lastly, the final descriptive insight that avails itself for normative strategy is related to this Article's main premise and the focal discussion in Part III, which is that the underlying continuity beneath the marriage equality incrementalism the U.S. has taken federally has all involved de-regulating the expression of sexual identities as a reflection of how the law has destabilized the traditional use of antigay essentialism. Particularly with DOMA's partial invalidation in *Windsor*, Part IV will then evaluate this transition normatively for its merit as a strategy posed by the U.S. variation of the Eskridge-Merin-Waaldijk theory with the rise of animus-focused jurisprudence. Such enquiry so far—and those remaining—in this Article has been conducted within the spirit of Lindblom's incrementalism with the hopes of striving to become better incrementalists when it comes to marriage equality's trajectory in the U.S.

III. IDENTITY EXPRESSION AND THE FEDERAL JOURNEY OF THE ESKRIDGE-MERIN-WAALDIJK INCREMENTALISM

The U.S. variation of marriage equality incrementalism, as theorized by Eskridge, Merin, and Waaldijk, has moved the law away from an antigay essentialist approach that has harmed the social visibility of sexual minorities. From *Lawrence*

to *Windsor*, Part III explores why and how the steps that animate the Eskridge-Merin-Waaldijk theory have substantially occurred federally.

A. Decriminalization of Same-Sex Intimacy in Lawrence v. Texas

By itself, *Lawrence v. Texas* imparted much momentum for sexual minorities by overruling its previous affirmation and tolerance of anti-sodomy laws in *Bowers*.[131] The issue's high visibility and the Court's determination to revisit and decriminalize conduct possibly indicative of a sexual identity have been discussed at length as an immense event for sexual minorities.[132] It was also the clearest indication of reaching step one in the Eskridge-Merin-Waaldijk theory.

However, even as step one, *Lawrence* was itself too the product of incrementalism. According to Justice Kennedy's majority opinion, what led to the Court's post-*Bowers* enquiry into anti-sodomy laws was a societal evolution of the sodomy issue toward sexual minorities after 1986, coupled with two important decisions in privacy and anti-discrimination that came forth during that same time.[133] Kennedy noted that "the deficiencies in *Bowers* became even more apparent in the years following its announcement"[134] and summarized the decline in the number of states who still criminalized sodomy (from 25 states to the 13 at the time) and how many of those declining states failed to execute their sodomy statutes by adopting "a pattern of nonenforcement with respect to consenting adults acting in private."[135] The two post-*Bowers* cases Kennedy mentioned were *Planned Parenthood of Southeastern Pa. v. Casey*,[136] and *Romer v. Evans*.[137] Kennedy characterized *Casey*

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[131] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[132] *See, e.g.*, Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004) ("Much like the opinion of the Court in *Romer v. Evans*, also written by Justice Kennedy, *Lawrence* is powerful and important and will have a profound impact on the law and especially on the lives of lesbian and gay Americans." (footnote omitted)); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) ("For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America."); Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 403, 403-04 (2004) ("Looking on the events of the past few months, *Lawrence v. Texas* can be called a watershed moment in the battle for gay rights. Social pundits, politicians, and ordinary people have had their eyes opened to the discrimination that gay people face on a daily basis. Sexual orientation has justified hatred and violence against a minority that has had to fight tooth and nail simply to preserve the right to petition their government for protection." (referencing *Romer v. Evans*, 517 U.S. 620, 623 (1996))); Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1 ("The Supreme Court issued a sweeping declaration of constitutional liberty for gay men and lesbians today, overruling a Texas sodomy law in the broadest possible terms and effectively apologizing for a contrary 1986 decision that the majority said 'demeans the lives of homosexual persons.'").

[133] Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

[134] *Id.* at 573.

[135] *Id.*

[136] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

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

as having "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[138] and that *Casey*'s pronouncement here for an individual's autonomy for making such decisions was inconsistent with *Bowers*.[139] Specifically, under *Casey* but not *Bowers*, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[140] From *Romer*, Kennedy imported the spirit of anti-discrimination from that case's ruling on Amendment 2 to Colorado's Constitution, which had broadly singled out homosexuals and denied them protection under the state's laws.[141] Kennedy in *Lawrence* was aided by how *Romer* was unsympathetic under an enhanced rationality review of a law created by animus toward a particular group.[142]

Yet, the intersection between privacy and anti-discrimination was not just a facial justification for the *Lawrence* Court to raise issue with the Texas sodomy law and then decriminalize its prohibited conduct. Framing the decision within existing legal dialogue in private autonomy and anti-discrimination set the opinion up for focusing on how the criminalization of sexual conduct infringed not just upon the rights of consenting adults but also how the law restricted the way in which sexual minorities expressed their identities. This is one of the symbolic reaches of *Lawrence*.

1. *Bowers*' Anti-Gay Essentialism

By dealing with identity expression, *Lawrence* had to comment on the antigay essentialism apparent in *Bowers*. Little difficulty now exists in seeing how *Bowers* treated homosexuality as inferior by criminalizing the way the law believed this particular identity and orientation essentially manifested: through same-sex intimacy.[143] The significance of labeling sex acts comes into focus as Justice White's narrowing of the issue in *Bowers*—which could have focused on sodomy as a practice generally since the Georgia law did not differentiate between different-sex and same-sex partners—to "homosexual sodomy" immediately created a categorization based on biology as "homosexual sodomy" would imply a host of other sex acts not under scrutiny, including *inter alia*, "heterosexual sodomy" and, of course, heterosexual penile-vaginal intercourse.[144] This implication drew itself out

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[138] *Lawrence*, 539 U.S. at 574 (citing *Casey*, 505 U.S. at 851).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See* DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 81 (2005) ("Once Justice White dismissed the idea that there could be any right to privacy reasonably enjoyed by gays and lesbians, he accorded antisodomy laws the broadest judicial deference.").

[144] *See* Bryan M. Tallevi, Comment, *Protected Conduct and Visual Pleasure: A Discursive Analysis of* Lawrence *and* Barnes, 7 U. PA. J. CONST. L. 1131, 1150 (2005) ("Under the *Bowers* regime there was a clear hierarchy of sexual practices, with varying levels of regulation dependent on the moral and societal approbation attached to each act. Generally, sexual conduct within the marital framework for the purpose of procreation was deemed most worthy of protection from overzealous state regulation, followed by sexual conduct engaged in by unmarried monogamous heterosexuals. Other heterosexual acts involving a deviation

quite early in *Bowers* when Justice White examined case law dealing with privacy, marriage, and reproductive rights, and failed to recognize that the rights from such case law "bears any resemblance to the claimed constitutional right of homosexuals to engaged in acts of sodomy that is asserted in this case."[145] White also found "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."[146] Biology was at the center of *Bowers*' distancing of homosexual sodomy from other sex acts—or at least White's nitpicking fixation on differences and his attempt to isolate, based mainly on arguing that acts between consenting same-sex parties bore no apparent likeness to acts that were mainstream or procreative, or acts that were previously the subject of the Court's preoccupation in other cases.[147] That biological difference was drawn by the catalogue of criminal anti-sodomy laws and historical references that White conjured to show how "[p]roscriptions against that conduct have ancient roots,"[148] and bolster his characterization of that history of disapproval, and arguably animus.[149] From biology, differentiation, and animus, the *Bowers* majority then fashioned its position to marginalize homosexual sodomy and, in turn, upheld the Georgia to regulate sex in this way.[150] That reasoning also led to the reluctance of the Court later in the opinion "to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause" that would otherwise recognize homosexual sodomy.[151]

Bowers, of course, did not stop sexual minorities from engaging in consensual intimacy. Partly, the desuetude that some states exhibited in non-enforcement bolsters this assumption.[152] However, *Bowers* rendered a value judgment that then justified the law to hold "homosexual sodomy"—and perhaps by extension, other same-sex acts and practices—as naturally criminal.[153] The implications for identity expression and social visibility would be that when sexual minorities would

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from the heterosexual, two partner paradigm—including homosexual conduct, promiscuous conduct, pornographic acts, and fetishes—were placed far lower on the totem pole of sexualities." (referencing Gayle Rubin, *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*, *in* SEXUALITY, GENDER, AND THE LAW 551-60 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2d ed. 2004))).

[145] Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

[146] *Id.* at 191.

[147] *Id.* at 190-91.

[148] *Id.* at 192.

[149] *Id.* at 193-94 n.5-7.

[150] *Id.* at 196.

[151] *Id.* at 194.

[152] Anon., Note, *In Sickness and in Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2047-48 (1996) ("In those states in which anti-sodomy laws remain, they generally are unenforced. Lack of enforcement can hardly be attributed to a dearth of prohibited conduct. Rather, desuetude reflects a lack of actual concern for the private sexual behavior of consenting adults.").

[153] *Id.* at 2047 n.51.

"practice" their orientation through sex acts, they would be rendered criminal. Figuratively, this result was the storm that gathered over sexual minorities for the next 17 years. The law, under *Bowers*, could metonymically harness the biological differences within sex acts between homosexual and heterosexual categories and then categorize one such group of acts as criminal in order to facilitate such criminal branding of sexual minorities. That metonymy was problematic as it underscored narrow assumptions about sodomy practices and sexual orientation that considered sex acts as nearly accurate indicators of orientation and excluded possibilities of sexual identity as something perhaps more fluid.[154] At its crux, the Court's reliance on biology produced an antigay essentialism that attempted to capture the homosexual who practiced an act that might be indicative of orientation.

Justice Blackmun's dissent in *Bowers* found the majority's construence of "homosexual sodomy" too narrow and problematic.[155] In addition to finding that privacy law would allow sodomy practices to be constitutionally protected, Blackmun also found that the majority's narrowing of the issue down to whether a fundamental right to homosexual sodomy existed ignored how the Georgia law could have also applied to sodomy between heterosexuals, which underlines the majority's attempt to regulate the identity expression of sexual minorities to reflect disapproval of the group.[156] Blackmun's dissent also combated some of the biological assumptions that could lead to antigay essentialist approaches and suggest more debatable fluidity within the definition of sexual identity beyond sex acts than the majority had let on.[157] For instance, the importance of biology was de-emphasized and some semblance of construction was built over the majority's essentialism when Blackmun wrote that "[d]espite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or disorder [by the American Psychological Association]. But obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality."[158] Whatever that definition of sexual identity may be—biology or choice, nature versus nurture, essentialism or construct—it seemed to Blackmun that this fluidity fit centrally into why a broader view of the Georgia statute was more appropriate than what the majority utilized because that fluidity manifests in one way in which individuals define themselves, through intimacy: "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggest, in a Nation as diverse as ours, that there may be 'right' ways of conducting those relationships and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[159] Blackmun opined broadly, applying this observation across orientations,

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[154] *See* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 450-56-(1994) (discussing "sodomy-as-fiction" stereotyping of gays).

[155] *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting).

[156] *Id.* at 201.

[157] *Id.* at 205.

[158] *Id.* at 202 n.2.

[159] *Id.* at 205.

focusing on commonalities and writing, not between "homosexuals" and "heterosexuals," but writing about "individuals."[160] Notably and interestingly, Blackmun challenged the majority's essentialism by questioning the problematic criminalization of homosexual sodomy based on a heavy-handed reliance on biology that, in his view, led to a terse justification for anti-sodomy laws.[161] Instead of biological and essentialist comparisons between homosexual and heterosexual sex, Blackmun—in a very Millian tone—would have outlawed sex acts based on those that harmed others over those that would not:

> [I]t does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante,* at 2846), on the other. . . . Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.[162]

In this way, Blackmun found reason here that the *Bowers* majority interfered with an individual's right to determine one's identity by artificially (and irrationally) overemphasizing the biological differences between heterosexual and homosexual sex.[163] And carrying this reasoning with him, Blackmun concluded his dissent with a

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[160] *See id.* at 206.

[161] *See id.* at 200 ("[T]he Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. . . . [Hardwick]'s claim that [the *Georgia anti-sodomy law] involves an unconstitutional intrusion into his privacy and his right* of intimate association does not depend in any way on his sexual orientation." (citations omitted)); *see also id.* at 202-03 ("I believe that Hardwick has stated a cognizable claim that [the Georgia anti-sodomy law] interferes with constitutionally protected interests in privacy and freedom of intimate association. . . . The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one." (footnotes omitted)).

[162] *See id.* at 209 n.4 (citations omitted). Pamela Karlan, who was the clerk that aided Justice Blackmun's dissent in *Bowers*, has acknowledged the possible connection between Blackmun and John Stuart Mill during the writing of the dissent, through Blackmun's defense of H.L.A. Hart's thesis against governmental interferences with privacy. TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 285 (2008).

[163] *See Bowers,* 478 U.S. at 205-06 (Blackmun, J., dissenting) ("Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' The fact that individuals define themselves in a significant way through their *intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there* may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest of all individuals have in controlling the nature of their intimate associations with others." (citations omitted)).

hope toward future change that also leveraged incrementalism. "It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*,"[164] Blackmun wrote, conveying his "hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationship poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[165] His hope would have to stretch not three years, as in *Gobitis*, but 17.

2. *Lawrence*

The facts of *Lawrence v. Texas* involved two men, John Geddes Lawrence and Tyler Gardner, who were arrested and charged in Houston, Texas after police there discovered them involved in consensual homosexual conduct that fell within the definition of "deviate sexual intercourse" under the Texas criminal code.[166] They were both subsequently convicted under the same statute and their convictions were affirmed on appeal.[167] When *Lawrence* did overturn *Bowers* in 2003, Justice Kennedy, in writing for the majority, targeted that interference with the right to determine one's identity discussed by Blackmun.[168] Although the Court bypassed an equal protection analysis and foreclosed the possibility of making sexual orientation a suspect class, the Court's analysis focused on the substantive rights that resulted in one way in which the law de-regulated sexual identity.[169]

Curiously, *Lawrence*'s use of a liberty analysis does not mean that the opinion harbored no aspect of equality-based jurisprudence or that the issue lacked overtones of inequality. In fact, Justice Kennedy observed that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[170] Perhaps in order to acknowledge that merit existed under equal protection, Kennedy seemed to note that the Texas statute had two layers within its offensiveness—that it both violated some protectable liberty interest in privacy and that it expressly criminalized conduct *only if* practiced by members of the same sex, which is why that law led to unequal treatment of sexual minorities: "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 discrimination both in the public and in the private spheres."[171] Some have observed that Kennedy's intertwining of privacy interests here with discrimination makes the

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[164] *Id.* at 213-14.

[165] *Id.*

[166] TEX. PENAL CODE ANN. § 21.06(a) (West 2003); Lawrence v. Texas, 539 U.S. 558, 562-563 (2003).

[167] *Lawrence*, 539 U.S. at 563.

[168] *Id.* at 577.

[169] *Id.* at 574-75.

[170] *Id.* at 575.

[171] Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 300 (2011) (citing *Lawrence*, 539 U.S. at 575).

liberty claim in *Lawrence* somewhat equality-based.[172] As Kim Forde-Mazrui has remarked, "[t]he majority's expressed reason for [invalidating all anti-sodomy laws], however, was an equality-based concern over discrimination against gay and lesbian people if gender neutral anti-sodomy laws were permitted."[173]

But by focusing primarily on liberty rather than equality, *Lawrence* reached further in its scrutiny of the Texas statute because it also allowed the Court to examine not just *who* the Texas statute targeted, but also *what* the statute regulated.[174] Again, because if the Georgia statute at issue in *Bowers* were to be left intact but only the Texas statute in *Lawrence* invalidated, a conclusion could be drawn that sodomy could be criminalized across orientations, which would have left undisturbed the potential of criminalizing homosexuality through anti-sodomy laws that did not expressly single out the sex of those caught in the act. Due process invalidated the sodomy statute in Texas and allowed the *Lawrence* Court to more easily give a uniform comment on anti-sodomy statutes across the board and decriminalize behavior that could represent a lifestyle based on sexual identity.[175] Kennedy exemplified an attribute of this broader focus when he discussed the similarities of both *Bowers* and *Lawrence*, pinpointing not on the narrower technical differences between the Texas and Georgia statutes where an equal protection discussion would highlight, but noting broadly the dangers and untenable effects of both laws to sexual minorities regardless of how they facially targeted the orientation of alleged offenders:

> The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[176]

As Kenji Yoshino has noted, the liberty analysis, as opposed to equal protection, characteristically hones in on the broad similarities amongst points of cultural pluralism as courts talk about what rights are protectable under due process in order to carve out an approach to civil rights jurisprudence.[177] Justice Kennedy and the majority's use of the liberty analysis here plays well into declaring that the criminalization of homosexual conduct, whether facially or non-facially same-sex

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[172] *Id.* at 300.

[173] *Id.* at 301 ("To be precise, the majority in *Lawrence* relied on substantive due process grounds, invalidating all antisodomy laws, rather than the equal protection basis of Justice Sandra day O'Connor's concurrence, which would have invalidated only antisodomy laws limited to same-sex participants." (citations omitted)).

[174] *Id.* at 304-05.

[175] *Id.* at 301 ("To be precise, the majority in *Lawrence* relied on substantive due process grounds, invalidating all antisodomy laws, rather than the equal protection basis of Justice Sandra day O'Connor's concurrence, which would have invalidated only antisodomy laws limited to same-sex participants." (citations omitted)).

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

[177] *See generally* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 792-797 (2011).

indicative, has the potential of infringing on the private autonomous rights of sexual minorities: essentially criminalizing the private aspects of their lifestyles, and abbreviating their identities—and ability to express their identities—in that way.[178] *Bowers* exhibited this result indirectly when the opinion recited that Hardwick was self-identified as a "practicing homosexual," which is why he fell within "imminent danger of arrest" under Georgia law.[179] Although Hardwick needed to pronounce himself as a "practicing homosexual" for standing reasons in the suit, this self-identification pointed to how the sodomy law promoted categories of "practicing" and "non-practicing" homosexuals and the demeaning consequence of criminalization for those homosexuals who "practiced" their own lifestyles and what it meant to those who felt obliged under the law to choose not to practice. Where *Bowers* refused to acknowledge this assumption, the implications in *Lawrence* drew this out.

Kennedy's slightly-indistinct calibration between due process and equal protection in *Lawrence* has not lacked criticism. One of the most prominent assessments pinpointed Kennedy's failure to clearly articulate whether there was a fundamental right at issue in this case involving anti-sodomy laws. For example, Laurence Tribe has argued that in *Lawrence*, "the Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating 'fundamental rights.'"[180] Instead, what the opinion focused on were protectable interests framed within either privacy or liberty claims or both that resulted in a myriad of scholarly readings.[181] Without a more crystallized pronouncement that the arrests of Lawrence and Garner violated some sort of fundamental right, *Lawrence*'s articulation that consensual sodomy laws infringed upon adult private autonomy appeared less stable within that historical due process framework. This has led to some confusion.[182]

But this muddled writing might have been deliberate to allow *Romer*, an equal protection case, to influence this opinion as *Lawrence* is replete with notions of anti-discrimination. As we will see in Part IV, though *Lawrence* is not an equal protection case, the case also borrowed from *Romer* by harnessing the outlining of animus behind the criminalization of sodomy as bolstered by *Bowers*.

Within the Eskridge-Merin-Waaldijk theory, the imprecision of Kennedy's majority opinion in *Lawrence*—albeit sometimes producing significantly dire

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[178] Mark Strasser, Lawrence, Mill, *and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 285 (2006) ("While the full ramifications of Lawrence will not be clear for some time, the decision at the very least suggests that same-sex relations and relationships, like different-sex relations and relationships, have positive worth, and that states are not free to stigmatize members of the lesbian, gay, bisexual and transgender (LGBT) community.").

[179] Bowers v. Hardwick, 478 U.S. 186, 188 (1986).

[180] Tribe, *supra* note 132, at 1898.

[181] *See, e.g.*, Hunter, *supra* note 132; *see also* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1140 (2004); Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1584 (2005).

[182] See Anthony Marroney Noto, Lawrence *and the Morality of "Don't Ask, Don't Tell" After* Lofton, Witt, *and* Cook*: The Law Before and After the Appeal*, 7 SETON HALL CIRCUIT REV. 155, 157-58 (2010).

consequences in actual lower court case law for gay litigants—lies in the scope in which the decision and its decriminalization of sodomy exists alongside subsequent moments in the gay rights movement. That shortcoming, particularly in the arguably-stunted reach of *Lawrence*'s precedent, signaled as just the first step in marriage equality incrementalism that much work still remained to be done. Despite some shortcomings, however, *Lawrence* did offer a significant advance from *Bowers* toward expanding and extending the rights of sexual minorities and recognition of same-sex relationships by targeting the antigay essentialism setup in *Bowers* and anti-sodomy laws. And marriage equality was another marker up another step that now seemed inevitable. Justice Scalia's Pandora's box reaction to the *Lawrence* majority in his dissent broadcasted this potential when he warned the public not to believe that the opinion would not end up "dismantl[ing] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[183] Prior to *Windsor*, several notable lower court cases after *Lawrence* arguably tamed the bite of Scalia's remarks when they distinguished themselves from the opinion in dealing with anti-sodomy laws.[184] But the murkiness of the *Lawrence* opinion, which led to such distancing in the post-*Lawrence* cases, highlighted that the goal toward recognizing same-sex identities was a lengthier tale—entwined between both the liberty and equality aspects of the Constitution. And Scalia, though on a problematic side of history, was actually right about *Lawrence*.

Ultimately within identity expression, the decriminalization of consensual sodomy in *Lawrence* is a commentary on sexual identity. As step one in the Eskridge-Merin-Waaldijk theory, the gesture from *Lawrence* elevated the worth of sexual minorities from being potential criminals or restricting their lives based on a private, otherwise autonomous behavior indicative of sexual orientation. What decriminalizing consensual sodomy in *Lawrence* did was recast identities for subsequent milestones in the marriage equality movement by beginning to remove the legal stigma traditionally placed upon the gay identity. As we shall see next, what *Lawrence* started was then extended by the repeal of the military's separation policies against sexual minorities in Don't Ask, Don't Tell.

B. Anti-discrimination in the Repeal of Don't Ask, Don't Tell

If, by decriminalizing consensual sodomy, *Lawrence* had recast the gay identity by not allowing certain previously-essentialized expressions of identity to trigger criminal status, then the 2011 repeal of Don't Ask, Don't Tell ("DADT")[185] added to

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[183] Lawrence v. Texas, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting).

[184] *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) (using differences between civil and criminal law systems to distinguish *Lawrence* in adoption case); United States v. Marcum, 60 M.J. 198, 207-08 (Ct. App. A.F. 2004) (finding that senior-subordinate same-sex activity in the military was unlike consensual sodomy protected under *Lawrence*); L.A.M. v. B.M., 906 So. 2d 942 (Ala. 2004) (finding that *Lawrence* would not protect lesbian mother from having her custody arrangement with ex-husband modified); State v. Limon, 83 P.3d 229, 234 (Kan. Ct. App. 2004) (distinguishing *Lawrence* in criminal case involving underage same-sex activity).

[185] In this Article, "Don't Ask, Don't Tell" and the accompanying acronym DADT refers in shorthand not only to the Clinton compromise of no longer permitting the military to ask affirmatively if a servicemember was a sexual minority, but as shorthand to describe the

Lawrence by not allowing sexual conduct and other expressions to become the basis for discrimination either—fulfilling the second step in Eskridge-Merin-Waaldijk incrementalism. *Lawrence* had given efforts to repeal DADT a certain momentum. Even Antony Barone Kolenc, a critic of the repeal, has noted that

> [b]y the time of the 2000 Presidential election, it seemed the battle had been fought and won for the DADT policy. Storm clouds appeared on the horizon, however, when in 2003 the Supreme Court struck down a Texas law criminalizing homosexual conduct in the landmark case *Lawrence v. Texas*. Justice Anthony Kennedy penned a decision for the Court that created uncertainty about the constitutional status of homosexuals as a protected class. Reinvigorated opponents of DADT saw the possibility for renewed challenges in the courts. [186]

Kolenc's "storm cloud" imagery here characterizing the improvements in gay rights echoes that NOM's metaphoric portrayal of the gathering nimbus of same-sex marriage (nearly as an inciting motif for same-sex marriage opponents).[187] In a negative way, this comparison to a portentous storm does truthfully relay the resonance that *Lawrence* possessed.

1. DADT's Rise

On the more specific level of expressive liberty in the military, the period between *Lawrence*'s decriminalization of consensual same-sex intimacy and the repeal could be seen as a struggle between post-*Lawrence* views on sexual orientation and privacy, and the keenness of courts to defer to the military. Homosexuality and the U.S. military have always had an interesting history intertwined with identity expression and social visibility—much like anti-sodomy laws. From the early twentieth century, the military had established a longstanding policy of singling out sexual minorities, and like the anti-sodomy laws at issue in *Lawrence* and in *Bowers*, the DADT policy marginalized LGBT identities in the military through conduct—specifically via express self-referential conduct, conduct that is sexual and conduct that would otherwise tip off a likelihood of a homosexual orientation.[188] In fact, one contributing historical genesis that fueled the military's approach to discrimination was based on the criminalization of consensual sodomy in the military during the 1920s.[189] Once the military criminalized consensual

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underlying legislation of separating LGBT servicemembers from the military in which the Congress enacted in 1993. *See* 10 U.S.C. § 654 (2006) (repealed).

[186] Antony Barone Kolenc, *Pretend to Defend: Executive Duty and the Demise of "Don't Ask, Don't Tell"*,48 GONZ. L. REV. 107, 112 (2012) (footnotes omitted).

[187] See *Gathering Storm*, supra note 1.

[188] Daniel Ryan Koslosky, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N.D. L. REV. 175, 195 (2008) ("Don't Ask, Don't Tell also functionally replicates sodomy laws within the military context in that it criminalizes same-sex intimacy. Pre-*Lawrence* sodomy laws did, like Don't Ask, Don't Tell, contain a message of societal disapproval of homosexual intimacy.").

[189] Fred L. Borch III, *The History of "Don't Ask, Don't Tell" in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189, 190 (2010) ("History shows that the Army did not have much official interest in homosexuals and homosexual conduct until the 1920s, when *consensual* sodomy was criminalized for the first time in the AW [(Articles of War)], and the Army began administratively discharging gay Soldiers regardless of conduct." (footnotes omitted)).

sodomy, a transference took place from criminalization of conduct that could externalize the identity of sexual minorities to actual exclusion of those who were homosexual, on the basis that homosexuality was an illness.[190] At the time, homosexuality as pathology was a prevalent subscription, and in the military, this notion became a pretext that homosexuals were individuals who were "ill" and could not then serve in the military because that illness placed "afflicted" individuals below the mandated standards of health and well-being.[191] Again, biology was placed behind the differentiation—with same-sex attraction now classified as a sickness. Once the American Psychological Association abandoned the notion of homosexuality as pathology in 1973, the military switched its reason for discriminating against homosexuals from illness to another essentialized hetero-normative sentiment that homosexuality was just not compatible in the armed forces, specifically a threat to unit cohesion.[192] But the continuation of sexual minorities serving in the military prompted the Clinton administration in 1993 to consider an executive order to lift the discrimination; before that happened, Congress passed legislation, essentially DADT, that met Clinton halfway—not banning sexual minority from service outright, just banning the openness of the perceived identity expression and existence of sexual minorities.[193] In this legislation, expressions of LGBT identities in the military would have prompted investigation and possible separation from service.[194] Expressions included conduct that would indicate self-identification with the gay, lesbian, bisexual, or transgendered identity—i.e. sexual behavior indicative of the lifestyle—or a self-identifying pronouncement—i.e. someone uttering the words, "I am gay."[195]

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[190] *Id.* at 193 ("Shortly after the Congress criminalized consensual sodomy in the military, the Army also began using its medical regulations to bar gay men from enlisting. . . . This was a remarkable historical shift in the sense that homosexuality was now viewed—at least by the Army—as an illness rather than a sin or a crime.") (footnotes omitted).

[191] *Id.* (noting that "[t]he presence of gays in the Army could not be tolerated because, as a 1923 Medical Department regulation stated, homosexuality was 'sexual psychopathy,' and, as sexual deviants, homosexuals were unfit for military service" (footnotes omitted)).

[192] *See id.* at 199-200 ("Empirical research by psychologists and psychiatrists, changing societal views on the morality of sexual behavior, and the rise of a politically active GLBT community caused the American Psychiatric Association to declassify homosexuality as a mental disorder and removed it from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) II (2nd edition) in 1973. Some psychiatrists and psychoanalysts opposed to the declassification of homosexuality as a mental illness forced the Association's membership to vote on the issue the following year, but their view was rejected. As a result, by the late-1970s the prevailing view in the medical community was that gays and lesbians were not sexual deviants and that there was no medical basis to exclude them from the Army. While the Army had long abandoned any claim that it was excluding gays and lesbians from its ranks for medical reasons, the lack of any credible medical support for discrimination against homosexuals in uniform meant that the Army now relied completely on good order and discipline as a rationale." (footnotes omitted)).

[193] Mark Thompson, *"Don't Ask, Don't Tell" Turns 15*, TIME (Jan. 28, 2008), http://www.time.com/time/nation/article/0,8599,1707545,00.html.

[194] *See* 10 U.S.C. § 654 (2006) (repealed).

[195] *See id.* § 654(b)(2).

Once sexual minorities were allowed to serve in the military, the discriminatory effect of the policy shifted from one of excluding sexual minorities to regulating how such identities were expressed. This shift affected how identity expression became more narrowly the isolated target of military separation actions. Again, this result of regulating identity expression had antigay essentialist roots. The DADT policy, up until its repeal, hindered the expression of identity by pressuring LGBT military members to hide their identities as sexual minorities if they intended to serve in the military.[196] With the inclusion of these "silenced" homosexuals in the military, the continued justification to discriminate based on how sexual minorities would disrupt unit cohesion took on an even more nuanced layer as the policy now seemed to say it would not just be the homosexual who would disrupt unit cohesion, just the one who "practiced" or "flaunted" his or her homosexuality who would.[197] And ultimately, all of this rejection and reaction by the military was externally manifested by the regulation of conduct including the practice of consensual sodomy and sexual practices possibly indicative of LGBT identities, but difficult and problematic to link to the breaking of unit cohesion, which made the justification a pretense.

By regulating identity expression, DADT's preference for the silent homosexual over the openly-practicing homosexual implied several important things. First, hetero-normative traits were favored over perceived "homosexual" traits, which created a "compulsory heterosexuality."[198] This implication, in turn, suggested secondarily that hetero-normative traits in this sense could be "performed."[199] If DADT worked within a compulsion and presumption of heterosexuality, the hidden encouragement for a LGBT servicemember would not just be to keep silent about his or her sexual identity but to play into that heterosexual presumption because doing so would decrease potential of detection. The observation that gays in the military had to pass as straight if they wanted to avoid being persecuted is not novel by

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[196] *See* Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1192-93 (1997) ("By forbidding expressions of gay identity in any form, at any time, and with any individual—including a servicemember's family and friends—the policy compels servicemembers constantly and affirmatively to express a sexual identity of the military's choosing. . . . Since sexual orientation was made a matter of active concern in the military while the new policy was being debated, they have suggested, servicemembers are now more anxious to proclaim their heterosexuality loudly—and to put pressure on those around them to do the same—than they were under the blanket exclusion. Whether or not this observation holds true as a general proposition, it remains the case that the Don't Ask, Don't Tell policy capitalizes upon the heterosexual presumption to enforce a direct regulation of the sexual identities of gay and lesbian servicemembers." (footnotes omitted)).

[197] *Id.*

[198] *Id.* at 1158 ("Whether gay and lesbian servicemembers must affirm a heterosexual identity in words—as, frequently, they must—or whether their enforced silence is loud enough to claim the "default characterization" of heterosexual identity that most conversations offer, the background of social relations in the military, as in most other contexts, is one of presumptive, compulsory heterosexuality." (footnote omitted)).

[199] *See id.* at 1192 ("Similarly, although the Don't Ask, Don't Tell policy contemplates that gay people will serve among the ranks of the armed forces, it relies upon the ideological imperative of the heterosexual presumption to place its brand upon them.").

DADT standards, nor new prior to DADT. But DADT's explicitness raised questions of performativity: that to remain safe from possible military inquiry and separation, a LGBT member must marginalize self-identification in order to perform or pass under mainstream hetero-normative scrutiny. This demand not only reflected an implication that self-expression more indicative of a LGBT identity was plainly undesirable but that hetero-normative traits are linked more closely to perceived essentialist assumptions of how a "good" soldier behaves or what characteristics a "good" soldier should embody.[200] This discriminatory aspect becomes clearer when we see that, under DADT, only the "non-practicing," "straight-acting," and closeted LGBT servicemember would have prevailed (but of course, at great costs to his or her own identity expression) while non-gay servicemembers could talk about their relationships and romantic lives without persecution.[201] This shows how the disapproval of sexual identities other than hetero-normative ones relegated LGBT servicemembers into a position of having to play safe.

2. Challenging Essentialism and Deference

Cases challenging DADT prior to *Lawrence* were, for the most part, abysmally unsuccessful to overcoming judicial deference to the military for adhering to unit cohesion and to other reasons open homosexuality was purportedly a threat.[202] Post-

[200] *See* Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don't Ask, Don't Tell and the Trap of Tolerance*, 18 WM. & MARY J. WOMEN & L. 87, 109-10 (2011) ("The arguments against gays in the military not only claim gays will disrupt unit morale and effectiveness (by their very difference, their free-floating and unmoored desires, their effeminate or-alternately-their manly nature), but also claim they are not 'fit for service.' Underlying both these objections is an argument about performance: gays cannot perform soldiering because they are not heterosexual, because they are aberrant, because they are unmanly, because they are too manly, or because they are morally corrupt. And the 'pro' arguments generally respond in kind: gays are indeed fit for service. They may not be heterosexual but they are fighting machines-ready to die for God and country like any other normal, red-blooded American who signs up to serve. 'Pro' arguments are filled with tales of brave gay servicemembers and hetero servicemembers supporting their brethren because they have seen first-hand how very soldierly they actually are. Because the military is seen as a 'special' institution-not one open to all on a democratic basis but rather the few, the chosen, the Marines-the basic equality claims are invoked less frequently than, say, around marriage or employment rights. 'Just as long as he is a good fighter/soldier' is the dominant supportive trope in DADT repeal discourse and one that simply cannot work the same way for the marriage question. . . . Indeed, DADT hinges precisely on this status/conduct distinction: that one can 'be' gay without 'acting' (performing) gayness. But what is often ignored in this discussion is that acting 'not gay' (but being gay) requires a performance of another kind, and not simply the performance of the closet or of dissimulation. If gayness is conduct unbecoming an officer, then straightness is conduct becoming an officer, and straightness is not just marked through sexual acts but through the displacements of those acts into soldiering, into killing, into male bonding, and into brotherhood." (footnotes omitted)); *see also* Wolff, *supra* note 196, at 1169-70 ("The military is the primary site for the definition of manhood in American culture, and military service is the most important opportunity for citizens to attain that virtue. . . . The military's definition of masculine virtue—a definition that has played a unique role in setting standards for citizenship status in America—has repeatedly found expression in discriminatory restrictions on the qualifications for military service." (footnotes omitted)).

[201] Wolff, *supra* note 196, at 1163.

[202] *See, e.g.*, Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) (finding servicemember's discharge did not violate equal protection or First Amendment rights); Richenberg v. Perry, 97

Lawrence cases achieved some progress in using *Lawrence*'s incremental impact on privacy, seeing some elevation in scrutiny review standards, but judicial results were generally mixed during this period in recognizing disapproval of gays that emanated from antigay essentialism to restrictions on identity expression.[203] Unlike *Lawrence*, litigants in these cases hit against a wall of judicial deference to the military trying to find the kind of animus against sexual minorities that would have otherwise established unconstitutionality.

Success came with the interesting translation of *Lawrence* into the gays in the military context through claims against the policy's infringement on free speech expression in *Log Cabin Republicans v. U.S.*,[204] which bolstered identity expression implications. The idea that DADT had infringed on the expressive rights of gay servicemembers has existed since its 1993 adoption. Relying on the *Lawrence*'s impact on the expression of identity to diminish the usual deference to the military by seeing that *Lawrence* as "recognizing the fundamental right to 'an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"[205] the District Court in *Log Cabin Republicans* finally refused to defer to the military and held that self-referential statements—such as "I am gay"—amounted not to merely evidentiary proof of actionable conduct under DADT, which is what other courts had held,[206] but rather directly violating First Amendment free speech.[207]

The impetus for DADT's repeal, however, would not result from *Log Cabin Republicans* directly. Rather within the same year, efforts going toward the repeal would be accomplished by the Executive and Legislative branches in full swing. Eventually, in a move that bore similar sentiment to *Log Cabin Republicans*, President Obama, who had vowed to repeal DADT, and Congress moved to repeal the ban on open sexuality in the military[208]—a move that was incremental because it obtained the antidiscrimination within Eskridge-Merin-Waaldijk theory, post-decriminalization of sodomy. Several extensive reports and surveys commissioned to study a possible repeal reflected the specific regulatory consequences of DADT on identity expression, concluding that "repeal of the Don't Ask, Don't Tell will not

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F.3d 256 (8th Cir. 1996) (finding DADT's policy reasoning survived rationality); Selland v. Perry, 100 F.3d 950 (4th Cir. 1996) (finding DADT constitutional); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (upholding DADT via rationality).

[203] *See* Witt v. Dep't of Air Force, 527 F.3d. 806, 817-22 (9th Cir. 2008) (finding that *Lawrence* provided a higher level of scrutiny than traditional rationality for plaintiff's due process claim, but not finding such elevation in review in plaintiff's equal protection claim); *see also* Cook v. Gates, 528 F.3d 42, 49-52, 60 (1st Cir. 2008) (finding also that *Lawrence* allowed a higher level scrutiny of than rationality but that plaintiff's challenges were unsuccessful against military deference).

[204] Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

[205] *Log Cabin Republicans*, 716 F. Supp. 2d at 911.

[206] *See Cook*, 528 F.3d at 62-63.

[207] *Log Cabin Republicans*, 716 F. Supp. 2d at 926.

[208] U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 27-28 (2010) [hereinafter DOD REPORT].

have a negative impact on their ability to conduct their military mission"[209] and that "the concern with repeal among many is with open service"[210]—in other words expressive liberty.

The *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"* (*DOD Report*) elaborated on just what "open service" meant with what seemed like a subtle nod to both *Romer* and *Lawrence*:

In today's civilian society, where there is no law that requires gay men and lesbians to conceal their sexual orientation in order to keep their job, most gay men and lesbians still tend to be discrete about their personal lives, and guarded about the people with whom they share information about their sexual orientation.[211]

Later in another passage, the *DOD Report* acknowledged more explicitly the influence of anti-sodomy laws in the historical regulation of sexual identities in the military: "Prior to 1993, there was no Congressional statute that expressly regulated homosexuality in the U.S. military: homosexuality in the military was regulated and restricted through a combination of sodomy prohibitions in military law and military personnel regulations."[212] When the *DOD Report* recited the litigation history of DADT after its enactment in 1993, it revisited the influence of anti-sodomy laws on *Bowers* on DADT cases before *Lawrence*, noting that "[t]hese early Don't Ask, Don't Tell cases were decided against a backdrop of the Supreme Court's 1986 decision in *Bowers v. Hardwick*."[213] However, the *DOD Report* then acknowledged the incongruity posed by the change in expressive privacy interests when *Lawrence* overruled *Bowers* and the existence of DADT in the face of *Lawrence*, and summarized *Lawrence*'s incremental impact on the case law post-2003.[214]

The *DOD Report* was finally most demonstrative in rejecting the unit cohesion, effectiveness, and readiness arguments lurking at the opposing end of discriminatory arguments that litigants losing against DADT faced when courts reached to defer to the military—reasons that had previously by effect encouraged LGBT servicemembers not only to hide their sexual identities but play safe by emphasizing hetero-normative traits that aligned with how the military thought "a good soldier" might act.[215] Relying on its extensive surveying, empirical assessments, and social science research, the *DOD Report* relayed that based on servicemembers' "actual past and present experiences in a unit with someone they believed to be gay"[216] in Marine combat units, Army combat units, and otherwise, the consensus for a positive rating on a unit's cohesive ability to work together with individuals who were perceived to be gay or lesbian were substantially high—ranging the lowest from the 84% of Marine servicemembers in combat arms units surveyed approving, to 89% of Army servicemembers in combat arms units surveyed approving, to 92%

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[209] *Id.* at 3.

[210] *Id.* at 4.

[211] *Id.* at 5.

[212] *Id.* at 20.

[213] *Id.* at 26.

[214] *See id.* at 26-27.

[215] *See id.* at 119.

[216] *Id.* at 125.

of overall military servicemembers surveyed approving, which as the *DOD Report*, touted were "all very high percentages."[217] More profoundly, the *DOD Report* surmised the hetero-normative implications of these responses—that "[t]hese survey results reveal to us a misperception that a gay man does not fit the image of a good war fighter, a misperception that is almost completely erased when a gay Servicemember is allowed to prove himself alongside fellow war fighters."[218] As an amusing anecdote, the *DOD Report* excerpted the words of one special ops servicemember in regards to misperceptions of sexual identity: "We have a gay guy [in the unit]. He's big. He's mean, and he kills lots of bad guys. No one cared that he was gay."[219] In one huge empirical gesture, the *DOD Report* refuted the prediction of negative impact by openly-LGBT servicemembers on unit cohesion and underscored how that prediction revealed the military's preference of hetero-normative traits.

Similarly, the RAND Update to its 1993 report, *Sexual Orientation in the U.S. Military Personnel Policy*[220] (*Update*) which was commissioned as part of the 2010 study on a possible DADT repeal, also heavily criticized the misperceptions and preferences of identity expression DADT reinforced, perpetuated, and regulated. The *Update* drew on comprehensive surveys as well,[221] and in one section detailing the presence and awareness of LGBT servicemembers in the military, the *Update* noted that of the LGBT servicemembers surveyed about their "own behavior in disclosing their orientation within their units," an aggregate of "two-thirds of respondents reported that they either pretend to be heterosexual or hide their orientation from other unit members, and most others are selective in deciding to whom and in what circumstances they disclose their sexual orientations."[222]

Bowing toward incrementalism, the *Update* briefly mentioned *Lawrence* and how decriminalizing same-sex intimacy ten years after DADT's enactment had changed the context in which the previous RAND research was based, particularly in summarizing identity expression.[223] At the midpoint of this chapter on the personnel disclosures of sexual orientation, the *Update*'s assessment subtly implicates a rudimentary assumption of sexual orientation that DADT and the historical military policies had on LGBT individuals.[224] Repeatedly, the *Update* noted that sexual *orientation*—although possibly expressed through sexual behavior—and sexual *behavior*—although possibly expressive of sexual orientation—were not always mutually inclusive *nor conclusive* of one another, that self-identification of orientation, whether heterosexual or not, does not in every case necessarily lead to sexual behavior that corresponds to that identification and vice versa: "Shifts in

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[217] *Id.* at 125-26.

[218] *Id.* at 126.

[219] *Id.*

[220] NAT'L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY 27 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1056.pdf.

[221] *Id.* at 233-37, 255-56.

[222] *Id.* at 264.

[223] *Id.* at 92.

[224] *See generally id.*

orientation are particularly likely as a consequence of maturation—a process referred to as sexual-identity development."[225] If read against DADT, this observation seems to point out the limits to the military's previously-powerful, animus-driven directive to exclude gays in the military—that homosexuality is not now a pathology, as it was once historically considered; not a threat for excluding sexual minorities, as it was believed; not a basis for criminalization, but rather a seemingly non-threatening part of human maturation: "Given that enlisted personnel are typically young adults, some individuals who do not see themselves as gay or do not engage in same-sex activity before they enter the military may do so some time after enlisting."[226] Again, essentialist notions of sexual orientation had been used as a pretextual justification of a policy hindering identity expression.

In commenting on DADT's attempt to reinforce fixed traits amongst military personnel, the *Update* showed data suggesting that many LGBT servicemembers not only "pretend[ed] to be heterosexual" but did so in ways that resulted in exhibiting traits of "good soldiers"[227]—traits that were stereotypically subsumed under the military's outlook on gender characteristic preferences, traits that have been utilized in contrast to a characterized and stigmatized view of non-heterosexual identities.[228] Such data point to the fluidity of sexual identity and direct the harm of DADT's categorization of sexual identity back to an abridged personal autonomy shared by *Lawrence*.[229] As discussed above, although *Lawrence* was facially concerned with the intrusion into personal privacy and autonomy that anti-sodomy laws effected, one of the broader undertow of *Lawrence* was situated within the way that states fixated upon criminalizing sodomy as a way to curtail identity expression. Similarly, regulating behavior and self-identifying speech in DADT intruded upon personal autonomy rights through suppressing expression in LGBT servicemembers, but the experience of DADT facially added upon *Lawrence* because of the way DADT invaded not only sexual behavior, but other everyday conduct that would be indicative of a LGBT identity—including identity speech.[230] This spill-over into other kinds of conduct juxtaposed with the fluidity of identities and the performance of identities within the military exposed the difficulty and inconsistencies of regulating the social visibility of homosexuality. The extension from *Lawrence* of violations within personal autonomy indicate the level of struggle of LGBT individuals when confronted by this policy in the military—where perhaps as *Lawrence* had mandated that such identities could no longer be criminalized, the

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[225] *Id.* at 105.

[226] *Id.*

[227] *See id.* at 264.

[228] *See* Koslosky, *supra* note 188, at 193.

[229] *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.").

[230] "[O]n its face, the Act discriminates based on the content of the speech being regulated. It distinguishes between speech regarding sexual orientation, and inevitably, family relationships and daily activities, by and about gay and lesbian servicemembers, which is banned, and speech on those subjects by and about heterosexual servicemembers, which is permitted." Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 926 (C.D. Cal 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

sentiment did not foreclose the idea that such identities could still be selectively marginalized into inconspicuousness. In fact, the incrementalist impact of *Lawrence*'s decriminalization of same-sex intimacy and what it meant for identity expression could be noted in the acknowledgment of *Lawrence* in the 2010 congressional findings on repealing of the DADT policy.[231]

The about-face toward the perceived threat to unit cohesion and military readiness and disapproval of LGBT identities could be partly attributed to the change in perception in the way sexual identities have been allowed expressive liberty and visibility in the social fabric since *Bowers* and even since *Lawrence*. The repeal officially took place in late September 2011.[232] The *DOD Report* and *Update* have suggested little or minimal impact on unit cohesion or negligible levels of interruption in operations.[233] Studies since the repeal have continuously bolstered such conclusions.[234] These commissioned studies harnessed the changing attitudes regarding the characterization of sexual minorities in the military and the burgeoning disconnect between open presence of their identities and optimum operational benefits shook the military's traditional belief that only a certain kind of sexual identity should be imprinted and preferred amongst the ranks. Once this animus dislodged the rational relationship between the DADT policy and its goals, the judicial deference that courts used in the past appeared less relevant and the discriminatory aspects of DADT were, for the most part, finally clarified and realized. What the repeal did bring was antidiscrimination for LGB servicemembers so that such identities could be asked about and told without that traditional hindrance. And that change, despite some limitations, helped propel the incrementalist journey for the next step federally: the legal recognition of same-sex couples.

C. Bond over Biology in U.S. v. Windsor

In late February 2013, a month before the *Hollingsworth* and *Windsor* arguments at the Supreme Court, another video about same-sex marriage descended upon the cultural airwaves. This time, however, unlike NOM's "Gathering Storm," the message was set on a lush, paradisiac beach resort rather than before a computer-generated storm.[235] The scenario started simply: two young, fairly-attractive strangers of the opposite sex are each sitting in adjacent beach chairs on the grassy knoll of a beach resort, and each with a tablet in hand. Bright sunlight and the churning of waves consistently highlight the backdrop.[236] The woman, trim in a

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[231] *See* JODY FEDER, CONG. RESEARCH SERV., RL 40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS 8-14 (2013).

[232] *Repeal Day: The End of "Don't Ask, Don't Tell"*, N.Y. TIMES: AT WAR (Sept. 20, 2011, 01:50 PM EST), http://atwar.blogs.nytimes.com/2011/09/20/repeal-day-the-end-of-dont-ask-dont-tell/.

[233] *See* DOD REPORT, *supra* note 208, at 119.

[234] *See, e.g.*, AARON BELKIN ET AL., PALM CENTER, *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness* (Sept. 20, 2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf.

[235] *Kindle Paperwhite: Perfect at the Beach—Amazon TV Commercial*, YOUTUBE (Feb. 20, 2013), http://www.youtube.com/watch?feature=player_embedded&v=lS3t9reE364.

[236] *Id.*

black swimsuit with her hair slicked back as if she had just finished a swim, effortlessly reads off her Kindle tablet, when the man, in shorts and a beach shirt and struggling with the unavoidable glare of sunlight on his iPad, interrupts the woman and asks her about the functionality of her Kindle; she responds favorably, noting its features, and how perfect it is for the beach.[237] The man then turns back to the screen of his iPad and, with much satisfaction, navigates his finger on his iPad screen to buy a Kindle as well.[238] When he smilingly turns over to look at the woman and suggests, "We should celebrate," in an ambiguous tone, friendly enough to frame his suggestion as a pick-up line, the woman rejects him: "My husband's bringing me a drink right now."[239] What adds complexity to the scene is the man's unexpected response, "So is *mine*," as they both gesture over to the resort bar behind them to show each other that their husbands are, in a mirror-like image, on common ground, each fetching drinks.[240] The man's celebratory suggestion was not nearly as amorous as the woman (and likely the TV audience) had assumed. It was genuinely celebratory.

This advertisement—promulgated by internet retailing giant Amazon.com to promote its tablet[241]—aired several months after the Obama re-election and just weeks after Obama's presidential inaugural address had vowed to bring equal rights to sexual minorities.[242] The country was heating up dramatically with more fervor toward marriage equality and any possibility of a gathering storm was dissipating; and instead, momentum was surging for same-sex couples more than ever before. Although the visibility of wedded same-sex couples vacationing on sandy beach resorts alongside their different-sex counterparts remains slight, the Kindle ad, like the man gesturing toward his husband at the bar, was itself gesturing toward an ideal and a possible norm if the laws were to extend marriage rights to gay couples. Again, as the ad itself concluded with a camera pan toward a lucid blue sky—that very anti-thesis of an impending storm—the ad also conveys the message that something far beyond Kindle tablets and same-sex marriages perpetuates here. This reading is especially possible after the ad's protagonists had motioned to their respective husbands at the bar and a moment passes where it is difficult to tell which husband at the bar belonged with which of the two speaking characters of the ad.[243] The commercial emphasizes similarities to a point where the differences between the gay and straight characters seemed insignificant and slightly surprising.

As previously seen, this focus on the similarities between sexual minorities and the mainstream in areas other than marriage has not always been so forthright. States

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[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Glennisha Morgan, *Amazon Kindle Backs Gay Marriage with New Commercial*, HUFFINGTON POST (Feb. 21, 2013, 10:41 AM EST), http://www.huffingtonpost.com/2013/02/21/amazon-kindle-gay-marriage-commercial-_n_2732827.html.

[242] *Id.*; Barack Obama, U.S. President, Inaugural Address (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[243] *Kindle Paperwhite*, *supra* note 235.

characterized biological differences within sex acts to criminalize sodomy and the military used essentialized and stereotypical traits between sexual minorities and heterosexuals to distinguish between "good" and "bad" soldiers for purposes of exclusion.[244] These approaches thrived within the law generally and laws surrounding marriage also reiterated the antigay essentialism used to marginalize the relationships between same-sex and different-sex couples. Conventionally, in fact, essentialism, in aiding natural law and religious morality, has continuously influenced state refusal to recognize same-sex couples for the purposes of marriage—and in much the same manner to differentiate and then marginalize sexual minorities as with anti-sodomy laws and military exclusion.

1. DOMA's Natural Teleology

The most glaring example of how antigay essentialism buttressed the marriage issue on the federal level is through the Defense of Marriage Act (DOMA) passed in 1996.[245] In discerning how the Supreme Court's review of the *Windsor* case fulfills our normatively revised step three of the Eskridge-Merin-Waaldijk theory of incrementalism—where same-sex marriage can be part of the legal recognition of same-sex couples—our enquiry first starts with the essentialist approach within marriage laws that has helped exclude sexual minorities. As the Court has destabilized that approach after the 2012-2013 term, we again will see with *Windsor* that the same-sex marriage debate is more than just about the concept of same-sex marriage and that it is the social visibility and the expression of sexual orientation that is ultimately at stake.

Prior to *Windsor*, Section 3 of DOMA had fixed the definition of marriage so that federally, "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[246] Within the congressional thought-process leading up to DOMA's passage, biology was again raised as the reason why marriage has traditionally been fixed as a union between different-sex individuals and why same-sex unions could not be recognized under that label.[247] The House of Representatives report exuded heterosexism in its accounts toward "defending" marriage in an essentialist configuration when it deferred, at length, to Hadley Arkes' testimony for authority on the subject matter:

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[244] *See* Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH & LEE. L. REV. 393, 459 (2007) ("Marriage traditionalists routinely appeal to natural law arguments in order to justify both what the current legal regime is and what it should be. Moreover, like the nineteenth-century essentialists, they also suggest that a positive law that recognizes same-sex marriage is (or would be) fraudulent because it contravenes natural law." (footnote omitted)); *see also* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." (referencing Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942))).

[245] Defense of Marriage Act (DOMA), 1 U.S.C.A. § 7 (West 2011).

[246] *Id.*

[247] H.R. REP. NO. 104-664, at 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918.

> Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. 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 woman, can beget a child.[248]

Procreation was the proclaimed goal of marriage between different-sex couples and by consequence, the House concluded that "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and childrearing. Simply put, government has an interest in marriage because it has an interest in children."[249] The permanency of this "natural teleology of the body" was assembled—if not by implying at first procreation itself and the biological tie-in to the "body"—by a quote used in the House report from the Council on Families in America that underscored that marriage exists as "our most universal social institution, found prominently in virtually every known society"[250] because of "the irreplaceable role that marriage plays in childrearing and generational continuity."[251] By falsely reaching toward the universal, the interest of procreation and childrearing was propped as the biological and natural reason why marriage has been exclusively for different-sex couples.

This hetero-normative tautology (or "teleology") leads easily to an implicit dichotomy that excludes unions not biologically embodying that "natural teleology of the body" to qualify for the marriage label: ones that also exist in the world but did not historically procreate. That differentiation stands exactly for why DOMA secured the marriage label for different-sex unions but not same-sex ones; the artificial focus on biology spotlights the reproductive potential of different-sex couples as the prominent reason for keeping marriage from same-sex couples when other reasons why marriages exist are possible—reasons that could allow for including other relationship configurations within marriage. Most patent in its use of essentialism as a shield to prop up the exclusion of same-sex couples in marriage was the House's anticipation and rejection of two possible rebuttals to its essentialist tautology, rebuttals that would quash constructionist sentiments to marriage. First, the House claimed that the fact that the law allows different-sex couples to marry without indicating their intent to have children was a negligible one because the underlying procreative policy of marriage reserves the institution for those couples who do: "[S]ociety has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children."[252] Similarly, the House also raised the "divorce revolution" as an argued threat to marriage that overshadowed the changes that same-sex couples might bring to the institution.[253] Although the report

[248] *Id.* at 13.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 13-14.

[252] *Id.* at 14.

[253] *Id.*

acknowledged the disruption to childrearing that divorce brought to the traditional nuclear family—which could have been interpreted to signify that procreation likely was not the underlying teleology of the body that bodes essential for marriage—the House, nevertheless, found that because threats already existed in marriages between different-sex individuals, it would be imperative to protect marriage from other perceived threats including that of same-sex couples gathering and readying to storm across the gates of marriage to push that natural teleology off its course: "[T]he fact that marriage is embattled is surely no argument for opening a new front in the war."[254] The House's rhetorical responses to both of these rebuttals revealed how essentialism was harnessed to prolong an exclusion that would never envision the hypothetical couple in the Kindle commercial, but align itself rather with the sentiments of NOM's looming, tempestuously hyperbolic panic over same-sex marriage. The opponents are always seemingly spotting a brewing storm somewhere.

This kind of strategy behind DOMA for keeping marriage restricted to same-sex couples falls squarely in line with the classic paradigms of the marriage institution used to hinder legal recognition of same-sex marriages. Early litigation of marriage equality in the 1970s upheld the exclusion of marriage from same-sex couples based on the finding that historically marriage between different-sex couples was "uniquely involving the procreation and rearing of children within a family"[255] and saw this consequence as permanent and "as old as the book of Genesis."[256] Often this biological difference was then intertwined with natural law and Judeo-Christian arguments to create a wall of reasoning that excluded same-sex couples based on procreation and childrearing to swallow up other existing justifications for marriage that would focus the attention toward a constructivist notion of marriage.[257] Marta Nussbaum has criticized this focus on the biological aspect by attempting to define marriage more broadly, observing that "[t]he institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and

[254] *Id.* at 15.

[255] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

[256] *Id.*

[257] *See* Jeffrey A. Kershaw, *Towards an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 556-57 (2005) ("The Catholic Church remains, like so many institutions, troubled by its inability to explain the origins of homosexuality. In the face of its confusion, the Church has justified continuing condemnation of gays, lesbians, and bisexuals as living in opposition to 'natural law.' It was the Church itself, led by figures such as Augustine, that popularized a natural law outlook in medieval Western society and originated the view that engaging in sexual activity is immoral unless it occurs within the confines of marriage to an opposite-sex partner and for the purpose of procreation. A significant proportion of Americans today share this 'natural law' stance; a majority, while eschewing a distinction between procreative and nonprocreative sex, disapprove of homosexual sex under any circumstances. Such views can be justified in part because homosexuality's 'genesis remains largely unexplained' despite the fact that various disciplines, including biology, psychology, and sociology, have had more than one hundred years to wrestle with the issue. The inability to answer these questions, however, stems more from cultural assumptions and biases rooted in the United States' Judeo-Christian tradition, which obscure genuine scientific understanding. These biases have also played a role in the development of our legal tradition, although it was not until the last century that legislators in many jurisdictions shifted their focus from general sexual immorality to the regulation of homosexual conduct. This shift corresponded with the 'invention' of homosexuality as a 'distinct category of person.'" (footnotes omitted)).

companionship, love, conversation, procreation and child rearing, mutual responsibility. Marriages can exist without each of these."[258] By cataloging other justifications for marriage, Nussbaum raises the idea of marriage as a construct that includes essentialist goals, and sheds light on how it is a construct that has been hijacked by marriage equality opponents, such as those who have advocated successfully for the passing of DOMA and campaigned for Proposition 8 in ways that molded that construction with a false sense of fixed biology, rather than allowing marriage to be "plural in both content and meaning."[259]

For sexual minorities specifically, a definition based on false teleology has had a regulatory effect on the identity expression. Analogous to how civil unions and domestic partnerships could be seen as laws that can classify same-sex couples as second-class citizens, the refusal to extend marriage to same-sex couples, as a result of defining marriage according to teleology, is another similar way in which the law can brand sexual minorities as the lesser. And this result arises directly from hindering the identities of sexual minorities again—like the instances noted from *Bowers* and DADT—from being expressed in any meaningful and comparable way that heterosexual identities are expressed. Scholars have noted this type of performativity for sexual orientation within the personal relationships that people cultivate that could end up as marriages.[260] According to Douglas NeJaime recently, "[s]exual orientation by its very nature includes an active, relational component. Sexual orientation identity is linked to (both actual and contemplated) relationships with other bodies."[261] The social, relationship (or relational) aspect of one's life can be the tip-off—so to speak—of one's sexual orientation. NeJaime cites and synthesizes the works of others such as Kenji Yoshino, Janet Halley, Hau-ling Lau, and Mary Anne Case, as well, to show that others have made the particular observation that in the public and social sphere one could externalize one's sexual identity via the image of a couple.[262] His emphasis is on the visible "enactment" of orientation through relationships:

> Conduct, in the form of same-sex relationships, enacts lesbian or gay identity. Entering, performing, and publicly showing a same-sex relationship serves as a central way of embracing and maintain one's lesbian or gay identity. This goes beyond the idea that intimate relationships are important to selfhood and identity, instead explicitly linking a certain type of relationship to a specific identity. Same-sex relationships, in this sense, publicly enact lesbian and gay identity.[263]

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[258] MARTA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 128 (2010).

[259] *Id.*

[260] *See* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) [hereinafter Case, *Couples and Coupling*]; Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012).

[261] *Id.* at 1197-98.

[262] *Id.* at 1196-99.

[263] *Id.* at 1199.

As Mary Anne Case writes compatibly, "[t]he couple is a mediating term between status and conduct, private and public, sameness and difference, and the sexual and nonsexual aspects of gay identity. Just as 'couple is both a noun and a verb, and in a gay couple conduct and status slip ineluctably into one another."[264] An individual's sexual orientation is observable distinctly through relationships. And as Case observes further, the visibility of relationships and coupling behavior is hard to deny since slippage between the grammatical definitions of the word also translates to how "[t]he couple can be simultaneously the situs for the most private of intimate relationships and the most public representation of it. And in a gay couple the signs of sameness and difference with respect to heterosexual pairs are both clearly visible."[265] Thus, in some ways similar to how skin color could express race, relationships are part of how sexual identity is expressed and how different sexual identities can be differentiated.

And within inequalities of power and social visibility, that differentiation for sexual identities has led to marginalization. From behind the bench, Judge Stephen Reinhardt, writing for the Ninth Circuit in the majority decision in *Perry v. Brown*,[266] articulated a sentiment similar to Case's notion of differentiation but furthers it even more in the realm of social and legal visibility when he recounted the visible performativity of orientation in the context of heterosexual coupling behavior and marriage in order to raise consciousness to the existing inequality that the law (and society) has placed on same-sex coupling behavior:

> We are regularly given forms to complete that ask us whether we are "single" or "married." Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, "Will you marry me?", whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see "Will you enter into a registered domestic partnership with me?".[267]

Reinhart illustrates how the law restricts the expressive acts of couples and how that restriction is tied to sexual identity. Because of the restriction on relationships, none of these expressive acts of coupling has as much visibility for sexual minorities as they are commonplace for different-sex couples—although they could. Within the context of domestic partnerships, the outline of a second-class citizen connotation is clearly drawn in the subtext of Reinhart's illustration. Reinhart intimates that ubiquitously different-sex couples can and do propose marriage on Jumbotrons at sports games; it is a spectacle when it happens because it celebrates and reifies marriage, and it is also likely a bit mundane since every different-sex couple more easily possess that option.[268] Same-sex couples are precluded from having that frequent opportunity, and any proposal for an alternative to marriage exhibited on

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[264] Case, *Couples and Coupling*, *supra* note 260, at 1644.

[265] *Id.*

[266] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013).

[267] *Id.* at 1078.

[268] *Id.*

Jumbotrons just seem symbolically lesser.[269] This marginalization of identity expression stems from the law and its value judgments on same-sex relationships.

If marriage is, as Nussbaum describes, a construct, and if coupling behavior, including marital status, is an expression of sexual orientation, then the marriage restriction to only opposite sex couples and not same-sex couples regulate—with much the same result as anti-sodomy laws and DADT—the identity expression of sexual minorities. Essentializing the differences between sexual orientations lies at the core of refusing to extend marriage to same-sex couples. And federally, in progressing onto the revised final step in the Eskridge-Merin-Waaldijk theory—the legal recognition of same-sex relationships, including marriage equality itself—the Supreme Court's review of DOMA in *Windsor* unfastens that entanglement with antigay essentialism in order to surmount another transition away from essentialist approach to sexual identity.

2. *Windsor* and the Legal Recognition of Same-Sex Relationships

As if almost an acknowledgment of incrementalism, it was ten years to the day of the *Lawrence* decision when the Supreme Court released its opinion in *Windsor*.[270] Again, Kennedy authored another gay rights decision this time; and instead of dealing with sexual conduct between consensual adults, he would find the federal definition of marriage in section 3 of DOMA unconstitutional.[271] Specifically, *Windsor*'s rejection of the definition of marriage as exclusively reserved for different-sex couples was premised on an approach that moved dramatically away from the negative essentializing of sexual orientation—but does not yet fully endorse a pro-gay constructivist approach to sexual orientation, despite focusing on marriage as a bond in *Windsor* in similar fashion to Nussbaum. *Windsor* does account for the conduct and significance behind marriage for the purposes of broadening the definition, rather than place a heavy reliance on biology. But it must be carefully noted that there was no simultaneous adoption of constructivism in any real capacity. The plaintiff, Edith Windsor, and her deceased spouse, Thea Spyer, had been a couple since 1963 and were formally domestic partners in New York City in 1993 before later marrying in 2007 in Canada.[272] After marriage, they continued their lives in New York City, and New York State legally recognized their Canadian marriage.[273] When Spyer passed away in 2009, she left her entire estate to Windsor, but because DOMA did not recognize same-sex marriages, Windsor was not qualified for the marital exemption under federal estate taxes.[274] After paying $363,053 in estate taxes from the IRS, she subsequently sought a refund, but was

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[269] *See id.* ("We are excited to see someone ask, 'Will you marry me?', whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see 'Will you enter into a registered domestic partnership with me?'").

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

[271] *Id.*

[272] *Id.* at 2683.

[273] *Id.*

[274] *Id.*

denied the request.[275] Windsor then brought the suit that would eventually invalidate Section 3 of DOMA.[276]

The Court's disapproval of DOMA was two-fold: first it offended federalism principles and secondly it discriminated against same-sex couples.[277] Both of DOMA's harsh results were accomplished in some way via the essentialization of marriage. In illustrating the unconstitutionality of Section 3 of DOMA, *Windsor* focused on how the federal definition of marriage as between man and woman overstepped the boundaries of states' prerogatives in determining their own definitions—specifically addressing the intervention that DOMA conceived against the ability for states to participate in the process of patchwork incrementalism as Jane Schacter had observed in which states are already engaged.[278] And what *Windsor* found was that such intervention struck at states' ability to define the marital relationship.[279] As a result, the Court saw DOMA's intervention created "injury and indignity"[280] in the form of "a deprivation of an essential part of the liberty protected by the Fifth Amendment"[281]—especially when DOMA removed a right federally from a class of people that New York state specifically empowers: the right of same-sex individuals to have their coupling behavior be expressed as a lawful marriage, or in essence, the expression of sexual identity for sexual minorities on the state level to be consistent with the federal.[282] This deprivation was also on top of the other deprivations the majority noticed resided in other realms including, *inter alia*, taxes, benefits, housing, criminality, and intellectual property.[283] The deprivation reflected conflicts between federal and state incrementalisms; DOMA did not deprive different-sex married couples from New York from recognition on the federal level, but did so against same-sex couples who were also married by New York law. These effects demonstrated both federalism and also discriminatory results.

In gearing up to apply an enhanced rational basis analysis to DOMA, Kennedy shed light on that injury and indignity by finding that the definition of marriage need not be predicated on biology: "In acting first to recognize and then allow same-sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.' "[284] Rather than relying on the "natural teleology of the body," the Court approached the purpose of marriage as less biologically or essentially determined, underlining the constructive element of

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[275] *Id.*

[276] *Id.*

[277] *Id.* at 2695-96.

[278] Schacter, *supra* note 115, at 74.

[279] *See Windsor*, 133 S. Ct. at 2692 ("DOMA, because of its reach and extent, departs from the history and tradition of reliance on state law to define marriage.").

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.* at 2694.

[284] *Id.* at 2692 (citing Bond v. United States, 131 S. Ct. 2355, 2359 (2011)).

marriage where the union could have the different meanings that Nussbaum has articulated, meanings tied to the person, and that perhaps the policy of regulating marriage should reflect that concept of marriage. In viewing marriage, the Court reconstructed the definition in order to see it as "a far-reaching legal acknowledgment of the intimate relationships between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages."[285] When the Court placed New York State's recognition of same-sex marriages within "far-reaching,"[286] the description, "far-reaching," implies more than a fixed biology. And the Court did not want to disturb that "far-reaching" approach because "[i]t reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[287] Marriage is an institution that is not fixed in meaning but historically ever-evolving to service the social context in which it reflects, which means it can embrace cultural pluralist views about the institution.[288] Intrinsically, the *Windsor* majority viewed marriage in a less essentialist way than those who stood behind a "natural" teleology to propagate DOMA.

The Court could have included and merely subordinated essentialist views of marriage as just *one* of the myriad of justifications within a constructivist spectrum of marriage. Yet, *Windsor* found in its enhanced rational basis analysis how essentialism was isolated and manipulated into a construction of its own that made salient and viable the natural law and religious arguments against extending marriage to same-sex couples, but also allowed enough severe approbation against sexual minorities to amount to legislative animus. Here is where animus-focused jurisprudence has its continuation from *Romer* and maturation in *Windsor* as the Court now unleashed it in the issue of same-sex marriage. Kennedy wrote 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.' "[289] In order to reach that moral disapproval and defend marriage, the House first had to argue for that natural teleology of the body, it had to go toward biology and use it to draw up differences between same-sex couples and different-sex couples—homosexuals and heterosexuals—that could be used to marginalize the way that identity could be expressed and ultimately regulated it in a discriminatory way.[290] The Court mentioned, *inter alia*, "stigma,"[291] "second-class,"[292] and "second-tier,"[293] to characterize how DOMA visualized the

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[285] *Id.*

[286] *Id.*

[287] *Id.* at 2692–93.

[288] *See* Kramer, *supra* note 130, at 153.

[289] United States v. Windsor, 133 S. Ct. 2675 (2013) (quoting H.R. REP. NO. 104-664, at 16 (1996)).

[290] *See* H.R. REP. NO. 104-664, at 12-14 (1996); *see also Windsor*, 133 S. Ct. at 2693-94 ("The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions would be treated as second-class marriages for purposes of federal law. This raises a most serious question the Constitution's 5th Amendment.").

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

[292] *Id.*

relationships of sexual minorities—and perhaps, by extension, sexual minorities themselves—on the federal level, and the result was multi-faceted; not only did the exclusion have significance within marriage itself on a general wave but it also resonated in the apparent conflict between New York and federal laws.[294] The Court opined that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal" and illustrated in a conflated way just how DOMA interfered with state law and at the same time discriminated against same-sex couples. Not only that but "[b]y this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. . . . The differentiation demeans the couple[.]"[295] The Court remarked that this marginalization had significance for children of same-sex families,[296] which stretched the social visibility impact of DOMA even further, and echoed Kennedy's remarks at oral arguments.[297] Ultimately, all of this differentiation, all of this indignity, all of this moral disapproval by DOMA had a starting point: the misappropriation of essentialism to dominate a discriminatory viewpoint. In *Windsor*, the Court abandoned that old essentialist approach of viewing marriage and moved toward a commonalities approach that recognizes that the bond of marriage needs more consideration than biological differences between same-sex and different-sex relationships.[298] This view differs from the us-versus-them dichotomy that the NOM's "Gathering Storm" ad stressed, and situates us all getting drinks at the beach bar in the Amazon.com ad. It is a broader approach that would permit—though the Court did not declaratively endorse here—constructivist readings of marriage, and possibly, by extension, constructivist approaches to sexual identity. And as step three of Eskridge-Merin-Waaldijk theory was being met on the federal level by the review of the marriage equality issue in *Windsor*, the recognition that the past discrimination has violated the dignity of sexual minorities by subordinating and regulating their identities also ushers in another moment where an antigay essentialism was detached from this realm of sexual orientation law.

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[293] *Id.* at 2694.

[294] *See id.*

[295] *Id.*

[296] *Id.*

[297] *See* Transcript of the Oral Argument, *Windsor*, 133 S. Ct. 2675 (No. 12-307) ("We're helping the States do—if they do what we want them to, which is—which is not consistent with the historic commitment of marriage and—and of questions of—of the rights of children to the State.").

[298] *Windsor*, 133 S. Ct. at 2692-93 ("By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.").

3. *Windsor* and Revised Step Three in the Eskridge-Merin-Waaldijk Incrementalism

Throughout *Windsor*, the notion of incrementalism is apparent. The Court's acknowledgment "that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage,"[299] that different-sex relationships have "no doubt had been thought of by most people as essential to the very definition of the term,"[300] and that within the recent challenges "came the beginnings of a new perspective, a new insight,"[301] illustrates stratagems of slow, incremental negotiations in the decision-making process that has led up to the moment in *Windsor*. Likewise, the Court noted incrementalist decision-making in New York's adoption of same-sex marriage—through piecemeal steps over a period of time:

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage.[302]

And it was "[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."[303] In both passages, the Court drew the endgame of the incrementalist unit here with the law of New York allowing same-sex couples to express their relationships—their same-sex relationships—in the same light as possibly different-sex relationships, avoiding the previous injustices. And the process was through deliberate and gradual thought indicative of Lindblom's incrementalism.

Additionally, the acknowledgement toward incrementalism is reflected substantively in *Windsor* by Kennedy's reference to *Lawrence* during the moments where the majority weakened DOMA's authority over regulating relationships. Both instances where the Court explicitly mentioned *Lawrence*, that muddled protection over consensual same-sex intimacy was converted into the protected privacy of consenting adult relationships—including same-sex ones—that could be used to dislodge DOMA's regulatory command over same-sex couples. *Windsor* builds incrementally from the significance of *Lawrence* on privacy and relationships, but interestingly, the Court also used *Lawrence* to gesture away from essentialism. In the first quotation of *Lawrence*, the Court used *Lawrence* to focus on the commitment aspect of a relationship rather than biology: "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'"[304] The Court's

[299] *Id.* at 2698.

[300] *Id.* at 2689.

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at 2692 (quoting Lawrence v. Texas, 539 U.S. 558, 576 (2003)).