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# The Jurisprudence of Denigration

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*In his opinion for the Court in United States v. Windsor, 133 S. Ct 2675 (2013), Justice Anthony Kennedy asserted that section 3 of the Defense of Marriage Act was unconstitutional because it was enacted from “a bare congressional desire to harm a politically unpopular group,” or from a “purpose . . . to demean,” “to injure,” and “to disparage.” Kennedy and the Court thereby in essence accused Congress — and, by implication, millions of Americans — of acting from pure malevolence.*

*Why might distinguished Justices put their names to such an extraordinary accusation? This article explores deficiencies, first, in contemporary constitutional discourse and, second, in contemporary moral discourse. These deficiencies have resulted in a situation in which, in some contexts, the only kind of admissible and potentially persuasive argument is one that attacks the character or motives of ones opponents. Windsor is a recent and egregious instance of this discursive pattern, or of what we may call the discourse of denigration.*

## TABLE OF CONTENTS

INTRODUCTION .....	677
I. WINDSOR’S EXTRAORDINARY INDICTMENT .....	678
II. THE DEGRADATION OF CONSTITUTIONAL DISCOURSE .....	686
III. DENIGRATION OF, AND IN, MORAL DISCOURSE .....	690
A. <i>The Pluralism of Moral and Meta-ethical Discourse</i> .....	691
B. <i>The Discourse of Denigration</i> .....	694
C. <i>Disparagement in the Courts</i> .....	696
CONCLUSION: CULTIVATING THE CULTURE WARS .....	698

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## INTRODUCTION

In a much commented on section in his majority opinion in *United States v. Windsor*,<sup>1</sup> Justice Anthony Kennedy asserted that section 3 of the Defense of Marriage Act (“DOMA”), limiting “marriage” for purposes of federal law to opposite-sex unions, was unconstitutional because it was enacted from “a bare congressional desire to harm a politically unpopular group,” or from a “purpose . . . to demean,” “to injure,” and “to disparage.”<sup>2</sup> Justice Kennedy and the Court thereby in essence accused Congress — and, by implication, millions of Americans — of acting from pure malevolence. The significance of this extraordinary claim extends beyond the specific case and indeed beyond the issue of same-sex marriage. That is because Kennedy’s accusation can best be understood, I will suggest, as one salient symptom of (and, unfortunately, contribution to) a debased and divisive constitutional and moral discourse. Precisely contrary to its irenic and inclusivist intentions, by maintaining and contributing to that destructive discourse, the Supreme Court aggravates the conflict that is often described, with increasing accuracy, as the “culture wars.”<sup>3</sup>

In this essay I will try to explain and defend this suggestion. Section I reflects on how extraordinary the Court’s assertion was — extraordinary in its offensiveness, its presumption, and its lack of evidentiary support. Stripped of the gravitas that pretty much automatically comes with the genre of a Supreme Court pronouncement replete with learned citations and ponderous prose, the accusation in its substance was the sort of thing normally associated with irresponsible and scurrilous pseudonymous comments on marginal political blogs. Why might distinguished Justices put their names to such an extraordinary accusation? Sections II and III address that question by considering the deficiencies, first, of contemporary constitutional discourse and, second, of contemporary moral discourse. These deficiencies have resulted in a situation in which, in some contexts, the only kind of admissible and potentially persuasive argument is one that attacks the character or motives of one’s opponents.

The Supreme Court is party to this predicament. Although its admirers and apologists sometimes like to portray the Court as the

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<sup>1</sup> 133 S. Ct. 2675 (2013).

<sup>2</sup> *Id.* at 2693-96.

<sup>3</sup> See E.J. Dionne Jr. & Michael Cromartie, JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?* (E.J. Dionne Jr. & Michael Cromartie eds., 2006).

embodiment of “reason” in public discourse<sup>4</sup> (a portrayal the Justices no doubt find gratifying), the reality is often quite different. Some years ago, citing “a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness,” Robert Nagel observed that “to a remarkable extent our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given a more acceptable, authoritative form.”<sup>5</sup> *Windsor* is a recent and egregious instance of this discursive pattern, or of what we may call the discourse of denigration.

### I. WINDSOR’S EXTRAORDINARY INDICTMENT

In the contemporary American context, it is entirely plausible to say (as the Court did in *Windsor*) that a law restricting marriage to opposite-sex couples has the effect of sending a message disapproving of same-sex unions, or at least treating those unions as different and of lesser dignity than the traditional unions classified as “marriages.” And on some constitutional theories, this message of diminishment would be enough to render such a law invalid.<sup>6</sup> The *Windsor* Court was not content, however, to make a plausible claim about DOMA’s expressive effect. Instead, the Court insisted that the law’s “purpose” (or “motive”) — indeed, its “bare” purpose — was to injure and disparage same-sex unions and the class of people who might form such unions.<sup>7</sup>

This claim about purpose was profoundly insulting. In essence, Justice Kennedy and a majority of justices accused the members of Congress who voted for DOMA of acting from nothing more than malevolence (or perhaps, depending on your theory of representation, of dutifully representing constituents who were acting from malevolence).<sup>8</sup> Since the majority of states had and have similar laws,

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<sup>4</sup> See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 235 (1993) (asserting that “the court’s role is . . . to give due and continuing effect to public reason by serving as its institutional exemplar. . . . It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone”).

<sup>5</sup> Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 199 (1993).

<sup>6</sup> See, e.g., Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1310-14 (2011); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1445-46 (2010). I am of course not endorsing those theories in this essay.

<sup>7</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013).

<sup>8</sup> Some supporters of the decision have tried to soften Kennedy’s accusation by suggesting that the “animus” ascribed to the DOMA Congress was “objective,” not “subjective.” See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*,

and since there is no reason to suppose that the purposes or motives of people in those states are any nobler than those of the members of Congress who enacted DOMA, Justice Kennedy by implication accused millions of Americans of being similarly malevolent.

The “animus” ascribed to these millions of Americans was of an especially vicious kind. There are of course situations in which a person or a political faction, in the pursuit of self-interest, selfishly and unjustly tramples on the rights and interests of others. A robber kills to get someone’s wallet. A political delegation acts to obtain some benefit for its constituents, even at the cost of harming multitudes of non-

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2013 SUP. CT. REV. 183, 189-90 (arguing that “the Court’s decisions suggest that the inquiry into legislative motive — or more often, purpose — is not a subjective one. Determining whether animus materially influenced the government’s act rests on a variety of considerations that are objective in the sense that they do not depend on discovering subjective legislative intent”); Andrew M. Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131, 133, 141 (2013) (stating that Justice Scalia’s method of determining legislative intent is discerning the objective purpose of a statute).

If it meant its attribution of animus to be “objective” rather than “subjective,” the Court certainly failed to make this clear. And indeed, most of Carpenter’s own discussion sounds as if he is finding animus in the actual beliefs and attitudes of members of Congress. In my view, this falling back into a subjective conception is pretty much inevitable. That is because qualities such as a “*desire to harm*” or a “*purpose to injure*” are by their nature features that are possessed by, and that we attribute to, subjective agents, not objects. They are in that sense inherently subjective and to talk of desires or purposes that are “objective” rather than “subjective” is as nonsensical — in a technical sense, see STEVEN D. SMITH, *LAW’S QUANDARY* 9-21, 108-09 (2004) — as to talk of immaterial matter, non-visible colors, or inaudible noises.

To be sure, we can (and legal discourse sometimes does) indulge fictions and presumptions that at least appear to transgress ordinary ontological categories. For example, we may say that “a man intends the natural consequences of his acts,” even if in a particular case a particular man neither desired nor even contemplated some particular set of consequences. One might say that in this usage we treat a naturally and ordinarily subjective fact (intent) as if it were in some sense “objective” (although this in my view is not a particularly helpful characterization). In addition, such fictions or presumptions may be useful — for example, if we think that in fact people usually (subjectively) intend the natural consequences of their acts and that it is not worth investigating whether particular cases might constitute exceptions to that generalization. Still, in this usage the distinction between the “subjective” fact of “intention” and the “objective” fact of “effects,” or at least of “natural” effects or consequences, collapses. And it becomes quite pointless and misleading then to say that “a man is liable for the natural effects of his acts only if he intends them.” In a similar vein, it is possible to argue, say, that laws that (objectively) harm a class such as gays and lesbians should be deemed unconstitutional. But then the conclusion of unconstitutionality is in reality grounded in the harm caused by the laws; to contend that such laws are unconstitutional *because* they are based on a “bare desire to harm” while also asserting that this desire need not be “subjective” would be merely deceptive and obfuscating.

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constituents. A nation goes to war, perhaps killing millions, in order to gain some economic advantage — access to a strategic port, maybe. These actions may all deserve and receive severe censure, but at least the offending party has acted on some *prima facie* legitimate and rational interest. By contrast, the Congress that enacted DOMA was not pursuing any legitimate interest at all; it was acting from pure malice — from “the bare desire to harm” or “to injure.”<sup>9</sup> Or so charged the Court.

This is a harsh charge, obviously, but then sometimes a charge can be harsh but also true: people or institutions *do* sometimes act from malicious motives. People dislike or hate other people — and sometimes commit violence against them — on all sorts of grounds, of varying degrees of irrationality. People sometimes hate other people on grounds of politics, or economic status, or religion, or race, or nationality. Giants fans sometimes hate — and, sadly, it seems, sometimes even kill — Dodgers fans.<sup>10</sup> I don’t think anyone doubts that people sometimes hate other people because of their sexual practices or proclivities.

So at least in the abstract, it is possible that Congress enacted DOMA from pure malevolence. But an abstract possibility of guilt is not enough to convict a person — or a Congress. And in this case, the Court’s scathing accusation went unsupported by any cogent evidence.

After all, the Congress that enacted DOMA, and the groups and people who support that and similar legislation, typically try to justify their position by giving reasons for it. Their reasons might be unpersuasive, of course, or unsupported by adequate evidence, or insufficiently weighty to justify the indignity that such a law inflicts on same-sex couples. But to act on a reason that proves upon examination to be mistaken or inadequate is emphatically *not* to act from “a bare desire to harm” or to “injure.”

It could be, of course, that the reasons offered in support of DOMA and of similar laws on the state level are not merely unpersuasive but also insincere or hypocritical — contrived pretexts for other more shameful or purely hateful motives.<sup>11</sup> At least in the abstract, once again, that is a possibility. But how could Justice Kennedy possibly know this to be so with respect to DOMA? Could he somehow look into the minds and hearts of the members of Congress, and of the millions of

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<sup>9</sup> *Windsor*, 133 S. Ct. at 2693-96.

<sup>10</sup> See Lisa Fernandez, Christie Smith & Shelby Hansen, *Police Arrest Suspect in Stabbing Death of Dodgers Fan*, NBC BAY AREA (Sept. 27, 2013, 7:11 AM), <http://www.nbcbayarea.com/news/local/Man-Stubbed-to-Death-at-Dodgers-Giants-Game-in-San-Francisco-225332042.html>.

<sup>11</sup> For discussion of this possibility, see Carpenter, *supra* note 8, at 259-62.

Americans who claim to believe that marriage should be between a man and woman, and know that all of these people were and are in fact lying or deceiving themselves, and that the various reasons offered in support of their position were and are merely pretextual?<sup>12</sup> Does appointment to the Supreme Court confer omniscience? Kennedy's charge seems ironic: although the charge is rooted in a widespread commitment to treating all people with something like "equal respect," it is arguably Kennedy and those who make similar accusations who are utterly unable or unwilling to treat those who disagree with them with respect — even with the minimal respect of allowing that those people might actually believe what they say they believe.

To be sure, Kennedy purported to adduce some evidence, but this evidence did not support but rather undermined his claim. Thus, Kennedy cited statements from congressional reports indicating that DOMA was intended: (a) to affirm traditional marriage; and (b) to express moral disapproval of homosexual conduct.<sup>13</sup> Both of these goals are contestable, obviously, on more than one ground, but neither is identical to a desire to harm anyone. Nor did Kennedy try to explain these particular rationales away as pretextual. So it would seem that the purposes articulated by Congress and recited by the Court in fact negate the claim that the law was driven by "a bare desire to harm."

So then why did Kennedy think these stated purposes supported his argument? The thought process by which Kennedy would equate, say, approval of traditional marriage with a "bare desire to harm" gays and lesbians is not easy to make out: it is as if someone who gives reasons for protecting property rights were deemed to have thereby openly confessed to being motivated simply by hatred of the poor. Kennedy's conclusion seems on its face a brazen non sequitur.

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<sup>12</sup> Dale Carpenter argues at length that the *Windsor* Court's charge of animus was based on the same "methodology" used in earlier cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996). Carpenter, *supra* note 8, at 204-15. Carpenter may well be right, but even if we assume the correctness of those earlier decisions, it is not clear what is gained by observing a similarity in methodologies. Against the argument that a conviction of guilt in a particular case was unsupported by sufficient evidence, a reply that the conviction was based on the same methodology used in other cases that resulted in convictions presumed to be valid — introducing testimony, cross-examining witnesses, making rhetorical appeals to the jury, etc. — is hardly responsive. Carpenter also believes and argues, of course, that there was sufficient basis for the attribution of animus in *Windsor*. *See id.* at 231-32. My point here is simply that this judgment is not assisted or secured by the observation of similar methodologies.

<sup>13</sup> *Windsor*, 133 S. Ct. at 2693.

Still, if we speculate and try to discern the reasoning or at least the train of thought that lay behind his conclusion, it seems likely that the conclusion arose from two implicit inferences. First, Kennedy may have inferred that to disapprove of homosexual conduct is to declare or deem persons prone to such conduct to be in some sense lesser or inferior human beings. Indeed, in its earlier decision in *Lawrence v. Texas*, the Court had explicitly indicated as much.<sup>14</sup> Second, the Court may have thought that if a legislature deems some group inferior and consciously acts in a way that disadvantages that group, the legislature must be acting with the *purpose* of harming that group.

The first of these inferences is familiar; it is also both logically fallacious and empirically false. From the fact that a person is inclined to some behavior deemed immoral — and is there any one of us who is *not* so inclined? — it simply does not follow that the person is a lesser or inferior human being. And while those who disapprove of some behavior as immoral *may* believe that people who engage in the behavior are lesser human beings, they *need not* believe any such thing. Many Americans who hold to traditional views of sexual morality have good friends, or colleagues, or siblings, or children, who are homosexual.<sup>15</sup> It is perfectly natural for these Americans to disapprove of homosexual conduct while respecting and indeed insisting on the full personhood of those who engage in such conduct (just as they may disapprove of many other kinds of conduct that others — or they themselves — engage in without in any way denying the full humanity of the people so involved). In this vein, in an essay arguing that *Windsor* reached the morally and legally required result, Michael Perry nonetheless observes that “[t]he claim that same-sex conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings.”<sup>16</sup>

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<sup>14</sup> The majority opinion, also by Justice Kennedy, equated prohibiting homosexual *conduct* with “demean[ing] their [i.e., homosexuals’] existence.” *Lawrence*, 539 U.S. at 578. Concurring, Justice O’Connor even more deliberately and explicitly rejected any distinction between prohibiting homosexual *conduct* and discriminating against a *class*. See *id.* at 583 (O’Connor, J., concurring).

<sup>15</sup> See David Gushee, *Change We Can All Support: The LGBT Issue, Part 3*, BAPTIST NEWS GLOBAL (July 21, 2014), <http://baptistnews.com/opinion/columns/item/28960-change-we-can-all-support-the-lgbt-issue-part-3> (“[M]ore and more traditionalist Christians have gay friends.”).

<sup>16</sup> Michael J. Perry, *David C. Baum Memorial Lecture: Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2352516](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352516).



The inference from moral disapproval to ascribed judgments of lesser personhood is not only a non sequitur; it is a pernicious non sequitur. That is because if we are to live peacefully and with mutual respect in a morally pluralistic society, it is imperative that we be able to approve or disapprove of different kinds of conduct, or even of different ways of life, without thereby being deemed to have depreciated the humanity of people who live in ways we disapprove. The invalid inference asserted by the Court in *Lawrence* and tacitly repeated in *Windsor* would effectively eliminate that possibility. Logically extended, the inference would inhibit judgments disapproving of racism, sexism, or other forms of bigotry: such judgments would violate the commitment to the “equal moral worth” of all human beings by implying that the people guilty of such offensive and irrational attitudes and actions are themselves somehow lesser or inferior persons.

For sake of argument, though, let us pass by this first non sequitur and suppose that supporters of DOMA, and of traditional marriage laws, *do* in fact regard the group that includes gays and lesbians as, in some sense, lesser human beings. It still would not follow that in enacting legislation that disadvantages that group, these supporters must be acting from a *desire to harm*. That is a possibility, of course, but if anything, a belief in the inferiority of the group would make an inference of such motivation seem *less* compelling. As an example, suppose that Ben, a Senator, holds the bizarre but sincere belief that people born under the sign of Gemini are inferior beings who are constitutionally lacking in ordinary human courage. And suppose that on the basis of this belief, Ben introduces legislation to exclude Geminis from service in the military. It is possible, of course, that Ben hates Geminis and wishes them harm. But no such attitude or motivation can be inferred from Ben’s legislative behavior. Given his beliefs, rather, Ben’s most obvious and likely motive is to protect the nation from a military weakened by the enlistment of cowards (as he bizarrely supposes). And indeed, he might actually have as a secondary motive a desire to *help* Geminis — constitutionally and incurably cowardly as he believes them to be — by preventing them from being inducted into a service for which they are ill-suited.

But then maybe all of this analysis is beside the point. Maybe we just somehow “know” (or at least those of us who are not blinded by privilege or prejudice or religion or whatever just “know”) that the only reason anyone today would ever support a measure like DOMA is that he or she is driven by animus or malevolence. In theory, there could be other, less offensive motives or purposes. And maybe a few people actually are so motivated. But we “know” that in the real world, hardly

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anybody ever acts on those other motives or purposes; nearly everyone who takes this position is driven by “a bare desire to harm.”

The problem is that we do not “know” this to be so. On the contrary, we know that this is *not* so. In this context it is easy (and perhaps rhetorically necessary) to smudge crucial distinctions. But we should consider how some plausible scenarios that are still profoundly unflattering to DOMA’s supporters would nonetheless fall well short of exhibiting “a bare desire to harm a politically unpopular group.” It might be that the supporters are instinctive and unreflective traditionalists who favor a conventional definition of marriage just because that is the way the institution has long been understood.<sup>17</sup> I know people like that; I expect that you do as well. Or it might be, as Judge Vaughn Walker suggested in the Proposition 8 case, that supporters of traditional marriage laws are acting on a misguided but sincere religious belief — a belief that on some interpretations cannot provide a legitimate basis for law — that God disapproves of same-sex marriages.<sup>18</sup> I know people like that; I expect you do too.<sup>19</sup> Or supporters might honestly believe what they often assert — that recognizing same-sex marriage will work to undermine the institution of marriage, and hence the family and society. For purposes of argument

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<sup>17</sup> Of course, supporters might also be self-conscious and reflective traditionalists (like Burke). For the present, though, I am only listing *unflattering* characterizations that nonetheless fall short of ascribing malevolence or animus.

<sup>18</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930, 945, 985 (N.D. Cal. 2010).

<sup>19</sup> Dale Carpenter acknowledges but does not, I think, actually answer this point. Carpenter explains:

To say that DOMA reflected animus is also not to say that those who hew closely to the traditional religious understanding of marriage in their own lives and within their own faith traditions are themselves hateful. Good people can do bad things for what they think are good reasons. The focus of animus doctrine is not on the bad nature of the person who supports legislation. The focus is on the inadmissibility of the reasons offered for supporting the legislation in a republic committed to the concept of equal protection for every citizen.

Carpenter, *supra* note 8 at 241. Let us stipulate for purposes of argument that Carpenter is correct in supposing that religious reasons supporting traditional marriage are inadmissible as bases for legislation. *But see* Steven D. Smith, *The Constitution and the Goods of Religion*, in *DIMENSIONS OF GOODNESS* 319, 321, 333 (Vittorio Hosle ed., 2013) (arguing that “religious” reasons are not inadmissible in this context). Even so, Carpenter’s explanation seems puzzling. To say that a religious reason is inadmissible is not to show that the religious person or legislator who acted on that reason is motivated by hatred or “animus;” indeed, Carpenter seems explicitly to concede that this is *not* so.

we can stipulate that these beliefs are mistaken; they might nonetheless be sincerely held.

I am not actually asserting, of course, that people so motivated are right or wrong. I am only asserting that they surely exist. We can assume for purposes of argument that they are wrong. On some versions of constitutional law, their errors would be enough to render the laws unconstitutional.<sup>20</sup> But on any of these interpretations, it would be manifestly false to say that the supporters were acting from “a bare desire to harm a politically unpopular group.”<sup>21</sup>

In sum, even if we assume that supporters of DOMA were in error, the evidence cited by Justice Kennedy wholly fails to support his accusation of malevolence against Congress, millions of his fellow citizens, and quite possibly some of his judicial colleagues. Indeed, although Kennedy accused Congress and many Americans of being mean-spirited, it is his accusation — his refusal even to acknowledge

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<sup>20</sup> Dorf, *supra* note 6, at 1310-14; Tebbe & Widiss, *supra* note 6, at 1445-46.

<sup>21</sup> In my judgment, Dale Carpenter’s sustained defense of the Court’s opinion, though impressive and careful in many respects, nonetheless elides these crucial distinctions in much the same way the Court does. Thus, Carpenter investigates the legislative history and extensively reports statements by members of Congress that he deems false, offensive, and even “hysterical.” Carpenter, *supra* note 8, at 262-83. For purposes of argument, I can accept Carpenter’s judgments in this respect: even so, it simply does not follow that the statements evince “a bare desire to harm” or a “purpose to injure.” On the contrary, the range of statements quoted by Carpenter mostly tend to show that members of Congress believed, and sometimes vigorously and colorfully expressed: (a) that same-sex marriage would be harmful to marriage and to society; and (b) that homosexual conduct is morally wrong. These are the same beliefs that the *Windsor* Court itself reported: Carpenter’s research mostly provides further supporting evidence. Let us stipulate for purposes of argument that Carpenter is right in supposing that the first of these beliefs is mistaken and that the second cannot count as a legitimate basis for legislation. Even so, to say that Congress acted on the basis of these beliefs is not to show that Congress acted from a “bare desire to harm,” but rather to exonerate Congress from that particular accusation.

Other facts reported by Carpenter — for example, that Congress gave little weight or sympathetic consideration to the interests of gays and lesbians in being able to marry, *see id.* at 273 — seem to me to be natural corollaries of these primary beliefs: legislators who regard same-sex marriage as harmful to society and morally wrong are unlikely to give sympathetic consideration to anyone’s interest in a practice deemed harmful and wrong. And when Carpenter describes Congress’s beliefs or motivations in terms that come closer to hatred, his evidence seems less supportive. For example, Carpenter asserts that “[g]ay people were described as sick, perverted, and dangerous,” and in support of this assertion he immediately quotes a statement by Representative Funderburk, who said that “[h]omosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies.” *Id.* at 266. But that statement, however contestable or misguided, hardly seems to support Carpenter’s stronger characterization.

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the possibility of a good faith disagreement about sexual morality and/or the meaning of marriage — that appears to be both mean-spirited and reckless.

Why then would Kennedy and a majority of the Justices make such a rash accusation? Two possibilities suggest themselves. Kennedy and his fellow Justices may actually believe the accusation, even though they could muster no cogent evidence in support of it. In that case, prudence would suggest that Justices ought not to be invalidating congressional legislation on the basis of ascribed malevolent motivations for which they can provide no cogent supporting evidence.

Or it may be that Kennedy does not really believe Congress was acting from malevolence and that he made his accusation because the rhetorical or justificatory demands of the situation required him to make it. He had to *say* it, maybe, but he didn't really *believe* it. Maybe he was simply reading from a pre-established cultural or judicial script, so to speak. Indeed, we may be inclined to excuse Kennedy for his vilifying charge on the supposition that although in terms he grossly defamed Congress and millions of Americans, he is basically a decent man who probably didn't really believe the vicious things he was obliged to say.

But then why would Kennedy and his colleagues in the *Windsor* majority have to say that Congress was acting maliciously if they didn't actually believe this? How might we have come to have a script that calls for such slanderous accusations? To answer that question, we need to consider the state of contemporary constitutional and moral discourse.

## II. THE DEGRADATION OF CONSTITUTIONAL DISCOURSE

In one respect, of course, *Windsor* was merely one among hundreds of instances in a pattern that has become so familiar as to be utterly unremarkable. A court declares that a law enacted by a democratically elected legislature is legally invalid because it violates “the Constitution.” Such exercises of judicial power are generally accepted as part of a practice going back at least to the celebrated decision in *Marbury v. Madison*.<sup>22</sup> In many cases, however, it is plain that by “the Constitution” the court cannot mean — or cannot *merely* mean — the *document* we call “the Constitution.”

There are to be sure imaginable situations in which a law *would* indisputably violate the plain meaning of a constitutional provision — a law declaring, for example, that California gets ten Senators and

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<sup>22</sup> 5 U.S. (1 Cranch) 137 (1803).

Wyoming only one. But such situations rarely if ever arise, in part because legislatures and other officials are unlikely to act in defiance of what the Constitution explicitly and indisputably says. For the issues that *are* litigated, and especially for those that make it all the way to the Supreme Court, it is usually obvious that alternative constructions of the constitutional text are possible; often one or more alternative readings will be favorably set forth in dissenting opinions. In cases like *Windsor*, it may be evident as well that the constitutional interpretation currently embraced by the Court would have seemed surprising, even unimaginable, a generation or so earlier. The *document* has not changed, but *the content of the law* — or the meaning and implications of “the Constitution” — may now be almost the opposite of what they once would have been. So it seems that in invoking “the Constitution,” the invalidating court must be referring to something beyond the document, or the static constitutional text.

Over the decades, of course, the courts have supplemented the bare text with an intimidating array of judge-devised constitutional *doctrines* — three-prong tests, tiers of scrutiny, canons and presumptions, and so forth.<sup>23</sup> Law students may memorize these doctrines and think that they have thereby learned the true meaning of “the Constitution” — a meaning that the document itself would never have disclosed. Like the document, however, these doctrines are themselves typically indeterminate and elastic. Hence it is perfectly common for both the majority and dissenting Justices in a case to invoke the same doctrines and yet derive opposite conclusions. So it seems that there must be something else beyond both text and doctrine that is working to determine the conclusions in such cases.

But what is that “something else?” Any singular answer to that question would surely be simplistic. One common observation, or criticism, suggests that the “something else” is politics, or the political views and commitments of the Justices. In this vein, Jed Rubenfeld has advocated “jettison[ing] the whole enterprise of taking constitutional doctrine seriously” because the doctrine is a manipulable cover for political purposes.<sup>24</sup> Instead, “the only kind of question really worth asking is whether the agenda pursued by a particular Court” is attractive.<sup>25</sup> But although politics may well be one influence on judicial decisions, it is probably not the only one. Judicial craft and the shaping

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<sup>23</sup> See generally Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 46 (2000).

<sup>24</sup> Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1177-78 (2002).

<sup>25</sup> *Id.*

influence of rhetoric likely play a role. Social movements — not quite the same thing as “politics” in a crude sense — are said to be important.<sup>26</sup> And constitutional theorists like Ronald Dworkin and Michael Perry have emphasized the significance of morality or moral reasoning in judicial decision-making;<sup>27</sup> we will say more about that possibility in a moment. All of these factors, and perhaps others as well, are thus swept into “the Constitution” that courts invoke as they declare legislation invalid.<sup>28</sup>

All of this has been the familiar and perhaps obsessive subject of constitutional theorizing for several generations now. But although judicial review that goes beyond the document itself has provided the material and impetus for sophisticated theorizing by scholars, it has not promoted the development of a satisfying constitutional discourse. One reason is that although there may be a consensus among Americans that courts should enforce the constitutional text, there is no comparable agreement about the other kinds of factors said to influence constitutional decision-making. Consequently, Supreme Court decisions tend to offer themselves as straightforward deductions from the text and the doctrines, eschewing acknowledgment of the extra-textual factors that may actually be causing the Justices to deploy the texts or doctrines in the ways they do.

To be sure, immediately after a major decision like *Windsor*, scholars and commentators typically rush to fill in the gap, elaborating on and examining and reinforcing (or criticizing) the reasons — political, moral, or sociological — that in their view *really* informed (or *should have* informed) the Court’s decision.<sup>29</sup> Even so, the decisions themselves are typically under-informative with respect to such considerations, and as a result the opinions often seem conclusory and, on their own terms, unconvincing. Indeed, the opinions may seem disingenuous. Thus, Ronald Dworkin argued that decisions should and even must turn on moral assessments; he admitted that judges often decline to

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<sup>26</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* 83-89 (2011).

<sup>27</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 378 (1986) [hereinafter *LAW’S EMPIRE*]; MICHAEL J. PERRY, *CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT* 9-34 (2009).

<sup>28</sup> Philip Bobbitt, in an influential approach, argues that constitutional law is composed of a variety of types of arguments: historical, textual, doctrinal, prudential, structural, and ethical. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-8 (1982).

<sup>29</sup> Much of the *Windsor* scholarship cited in this essay — the articles by Dale Carpenter, Daniel Conkle, Andrew Koppelman, and Michael Perry — is of this character.

acknowledge this decisive influence, but judges who so decline — most of them, in other words — are guilty of “a costly mendacity.”<sup>30</sup>

Critics sometimes find this situation unsatisfactory, of course, and they search for ways to connect constitutional decisions more closely to the Constitution, meaning the *document* we call “the Constitution.” The revival of originalism over the last several decades reflects one such effort.<sup>31</sup> And it is conceivable, just barely, that some version of originalism might be devised, and might come to command general support, that would render constitutional law acceptably determinate — and determinate on the basis of the actual “Constitution,” meaning the document. To date, however, no such version and consensus have developed. On the contrary: the relevant implication of Jack Balkin’s much-lauded work on originalism is that an approach to constitutional law that calls itself “originalist” can leave judges just as free as can non-originalist approaches to do as the judges think best.<sup>32</sup> Courts must respect the original meaning of constitutional provisions, Balkin agrees, but those meanings are defined in sufficiently abstract terms that they are compatible with just about any result a judge might be inclined to reach. Although Balkin purports to embrace originalism, therefore, the overall effect of his work on the subject is to deprive originalism of any distinctive contribution it has sought to make.<sup>33</sup>

It is hardly surprising, therefore, that scholars and others often express their consternation with the courts’ opinions. To be sure, many lawyers and scholars pore over these opinions intensely; they *are* after all “the law,” and they set the terms by which future cases will need to be argued. With respect to the intellectual content of the opinions, however, reviewers often give thumbs down. In this vein, Daniel Farber observed some years ago that Supreme Court opinions are “increasingly arid, formalistic, and lacking in intellectual value.”<sup>34</sup> The Court’s opinions “almost seem designed to wear the reader into submission as

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<sup>30</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 37 (1996) [hereinafter *FREEDOM’S LAW*].

<sup>31</sup> See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter *THE CHALLENGE OF ORIGINALISM*].

<sup>32</sup> See, e.g., BALKIN, *supra* note 26.

<sup>33</sup> For development of the point, see Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 31, at 223, 230-31.

<sup>34</sup> Daniel A. Farber, *Missing the “Play of Intelligence,”* 36 *WM. & MARY L. REV.* 147, 147 (1994).

much as actually to persuade.”<sup>35</sup> It seems unlikely that anything in the intervening years requires a more positive assessment.

However unsatisfying the opinions may be, though, they still govern us, and consequently they call for evaluation. And at least one important mode of evaluation makes reference to one of the principal extra-textual and extra-doctrinal considerations posited as a determinant of the decisions — namely, morality or moral reasoning. Although this mode of evaluation is pervasive, perhaps the outstanding exponent of this approach was the late Ronald Dworkin, who over a period of decades elaborated what he called “a moral reading” of the Constitution.<sup>36</sup> The Constitution should be interpreted, Dworkin argued, in the way that will make it “the best it can be” in light of the best available account of political morality.<sup>37</sup> Dworkin’s extensive commentary on Supreme Court decisions reflected his own attempt to do this.<sup>38</sup>

The appeal of this “moral” approach is understandable. If constitutional text and doctrine are indeterminate, then it seems, as noted, that we need to look to something else to determine what text and doctrine should mean. We might look to social movements, as Balkin and others argue, but of course there are numerous social movements traveling and pointing in different and often contradictory directions.<sup>39</sup> So which movements — the Tea Party or the Occupy movement, for example — should be looked to and which disregarded in interpreting the Constitution? It seems that this question will naturally point to something beyond the text and also beyond any particular social movement — to something we are accustomed to calling “morality.” And thus the insufficiencies of *constitutional* discourse push us to consider the current state of *moral* discourse.

### III. DENIGRATION OF, AND IN, MORAL DISCOURSE

In the previous section, we observed (as many have) that constitutional texts and doctrines are indeterminate: that is why, according to theorists like Dworkin, courts need to look beyond the formal legal materials to consider morality. But it turns out that

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<sup>35</sup> *Id.* at 157.

<sup>36</sup> See DWORKIN, *FREEDOM’S LAW*, *supra* note 30, at 37.

<sup>37</sup> See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 27, at 379.

<sup>38</sup> Some of these commentaries are collected in DWORKIN, *FREEDOM’S LAW*, *supra* note 30.

<sup>39</sup> See, e.g., BALKIN, *supra* note 26, at 81-93; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).



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contemporary moral discourse is indeterminate as well — on both the applied and “meta” levels. And this indeterminacy has the potential of pushing argumentation, especially in *public* discourse, in perverse and destructive directions.

A. *The Pluralism of Moral and Meta-ethical Discourse*

No citations should be needed for the proposition that on many concrete moral questions — particularly but surely not exclusively in the realm of sexual morality — Americans disagree radically; what some Americans view as profoundly wrong, other Americans regard as wholly acceptable and sometimes even virtuous. Abortion, homosexual conduct, same-sex marriage, and to a lesser extent contraception are probably the most currently conspicuous examples. But it is not only that ordinary or lay people disagree with respect to particular moral questions. Philosophers disagree as well; and both lay people and philosophers disagree not only about particular moral conclusions but also, more fundamentally, about *what morality even is*. As Michael Smith has remarked, “if one thing becomes clear by reading what philosophers writing in meta-ethics today have to say, it is surely that enormous gulfs exist between them, gulfs so wide that we must wonder whether they are talking about a common subject matter.”<sup>40</sup>

One influential diagnosis of this situation was offered a generation or so ago in Alasdair MacIntyre’s classic *After Virtue*. In the book’s early pages, MacIntyre pointed out the incommensurability manifest in so much moral argumentation today.<sup>41</sup> Reciting common pro and con arguments on issues including just war, abortion, and governmental support for equality, MacIntyre suggested that these various arguments may seem perfectly cogent and logical on their own terms and premises.<sup>42</sup> Paradoxically, though, while the pro and con arguments lead to opposite conclusions — abortion *is* permissible or abortion *isn’t* permissible, for example — the arguments themselves do not so much engage and clash as pass each other by like ships in the night. That is because they proceed from different beginning premises, and indeed from fundamentally different conceptions of what morality is even about. Consequently, the ostensible adversaries are talking *at* but not really *with* each other, and there is accordingly no way to achieve closure or resolution of the disagreements.<sup>43</sup>

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<sup>40</sup> MICHAEL SMITH, *THE MORAL PROBLEM* 3 (1994).

<sup>41</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 6-7 (2d ed. 1985).

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 8 (“Every one of the arguments is logically valid or can easily be

In the remainder of the book, MacIntyre went on to offer a lengthy and learned explanation of how moral discourse has arrived at this unhappy condition. But whether or not one accepts his explanation, the basic fact not merely of disagreement but of conceptual incommensurability in our moral discourse seems an observable fact.

This incommensurability need not preclude meaningful moral discussions within communities of like-minded people. Thus, economists or utilitarians can still communicate among themselves and discuss what are the best answers to particular moral or policy questions; so can Kantians, libertarians, or Catholic natural law theorists. But as we move into more general or public discourse, incommensurability becomes more troublesome. That is because in public discourse it comes to seem important that discussion proceed on *shared* premises. Although vocabulary differs, liberal political theorists argue that political morality requires public decisions (or at least some especially important decisions) to be made on “publicly accessible” grounds,<sup>44</sup> on the basis of “public reason,”<sup>45</sup> or on grounds that are not “sectarian.”<sup>46</sup> And even if this requirement is not a moral or constitutional imperative, it may nonetheless be a prudential and practical one. After all, how can people converse and debate profitably if they cannot agree on the fundamental premises or objectives? In such a situation, debate may not be impossible, but it is at least problematic.<sup>47</sup>

But the more people disagree not only over particular conclusions but also over what morality is and what premises to proceed from, the harder it is to find common ground from which to reason. What is needed, it seems, is some fundamental or general value or normative premise that people of various otherwise incompatible moral views can all embrace. But where is such a shared value or premise to be found?

The difficulty underlies some of the most characteristic but unsatisfactory forms of political-moral argument today. Thus, a great deal of argumentation consists of appeals to and ostensible derivations from the idea of equality. Equality happens to be an ideal that nearly

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expanded so as to be made so; the conclusions do indeed follow from the premises. But the rival premises are such that we possess no rational way of weighing the claims of one as against another. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds.”).

<sup>44</sup> For critical discussion, see KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 49-76 (1988).

<sup>45</sup> See RAWLS, *supra* note 4, at 133-72, 223-27.

<sup>46</sup> Perry, *supra* note 16, at 17.

<sup>47</sup> See STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 211-25 (2010) [hereinafter *DISENCHANTMENT*].

everyone in our society respects; more than that, it is an ideal that no one *can* sensibly reject. That is because, as Peter Westen's famous article in the *Harvard Law Review* explained, the normative ideal of equality merely means that "relevantly like cases should be treated alike" — a virtual tautology.<sup>48</sup> The unfortunate corollary, as Westen also explained, is that equality is substantively "empty."<sup>49</sup> Its content has to be imported from sources other than equality.<sup>50</sup> Consequently, when advocates purport to be deriving conclusions from the ideal of equality, they are likely engaging in a form of potentially artful and sophisticated question-begging.<sup>51</sup>

Much the same is true of arguments framed in terms of liberty — a value that would seem to command widespread support in our society. But the apparent consensus is largely illusory, covering over deep disagreements about what sort of liberty or freedom, and whose freedom, should be valued. Should we value your freedom to play loud music or your neighbor's freedom to enjoy peace and quiet? My freedom to live as I want to or your freedom to live in the sort of neighborhood that is conducive to your preferred lifestyle? Thus, Michael Klarman observes that "[f]reedom . . . is an empty concept. To say that one favors freedom is really to say nothing at all."<sup>52</sup> In much the same way, arguments framed in terms of the celebrated "harm principle" turn out, upon closer inspection, to be artful exercises in gerrymandering the concept of harm<sup>53</sup> so as to include the sorts of injuries that support regulations one favors and to exclude the sorts of injuries that would support regulations one does not favor.<sup>54</sup> Indeed, as Feinberg also acknowledged, without this sort of *a priori* disqualification of many real human concerns and grievances from the calculus, the harm principle

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<sup>48</sup> Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 548 n.36 (1982).

<sup>49</sup> *Id.* at 547.

<sup>50</sup> *Id.* at 547-48.

<sup>51</sup> For further discussion, see SMITH, *DISENCHANTMENT*, *supra* note 47, at 26-28. Perhaps the outstanding current example, as *Windsor* itself evidences, is the spectacularly successful political and cultural movement conducted under the tendentious and question-begging label of "marriage equality." See Steven D. Smith, *The Red Herring of "Marriage Equality,"* PUBLIC DISCOURSE (Mar. 27, 2013), <http://www.thepublicdiscourse.com/2013/03/7912/>.

<sup>52</sup> Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 270-71 (2000) (book review).

<sup>53</sup> For much lengthier discussion and support, see SMITH, *DISENCHANTMENT*, *supra* note 47, at 70-106.

<sup>54</sup> In his massive explication of the harm principle, Joel Feinberg classifies these injuries as "hurts" rather than "harms." JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 33-34 (1984).

would turn out to be not so much an instrument of liberty as a license for authoritarianism.<sup>55</sup>

### B. *The Discourse of Denigration*

Beyond the illusion of agreement about values such as equality and liberty, however, there is in fact widespread support for one value or proposition that is *not* “empty” but actually substantive. But it is a value or proposition that, paradoxically, is at the same time morally elevating and yet conducive to an ugly and destructive moral discourse.

Thus, a proposition that people of virtually all extant moral positions can endorse is that it is wrong to act from hatred or malevolence or ill-will toward others. This proposition is the converse or corollary of a proposition that can be stated more affirmatively, but that will then be articulated in different ways from different moral perspectives. Thus, Kantians may affirm that we are required to treat all people (or all rational agents) as *ends*, not *means*.<sup>56</sup> Liberal egalitarians assert that we must treat all people with equal *respect* or that we must recognize the human *dignity* of everyone.<sup>57</sup> Utilitarians insist that everyone is entitled to be counted in the utilitarian calculus: everyone’s pleasure, happiness, or preference-satisfaction counts as a good thing.<sup>58</sup> Christians teach that we should *love* everyone, even our enemies.<sup>59</sup> Devout Jews hold that every person is of infinite worth as a child of God.<sup>60</sup> These affirmative values are not identical. Respect is not the same thing as love; being an “end” is not equivalent to being a “child of God.” But however the affirmative value is conceived, a similar negative corollary seems to follow: it is wrong to act from hatred or ill-will toward others.<sup>61</sup>

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<sup>55</sup> *Id.* at 12 (explaining that the notion of “harm” must be refined because otherwise the principle “may be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others for better and worse to *some* degree, and thus would properly be the state’s business”).

<sup>56</sup> IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52 (Harold Weisberg ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

<sup>57</sup> See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 330 (2011); Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 905 (2010).

<sup>58</sup> See SIMON BLACKBURN, BEING GOOD: AN INTRODUCTION TO ETHICS 89 (2001).

<sup>59</sup> *Matthew* 5:38–48.

<sup>60</sup> MILTON STEINBERG, BASIC JUDAISM 75–76 (1947).

<sup>61</sup> In a utilitarian framework, it is theoretically possible that if a sadist received more pleasure from torturing victims than the pain he inflicted, torture would be morally indicated. But the factual conditions for such a conclusion seem very unlikely to be realized.

However sound and sensible this counsel may be, its effect on public discourse can be unfortunate, and counterproductive. If the one non-question-begging normative proposition that virtually everyone agrees on is that it is wrong to act from hatred or ill-will, then it follows that when debates over public issues occur, a potentially effective form of rhetoric will be to argue that your opponents are acting from . . . hatred or ill-will. That is the one kind of argument that, if persuasive, will speak to everyone. By contrast, appeals to utility, to universalizability, or to religiously informed conceptions of virtue and goodness, even if persuasive on their own terms, will fail to engage the views and premises of large sections of the public audience. But practically everyone will agree that if a position or party is motivated by hatred or ill-will towards others, then that position or party is ipso facto in the wrong.

This incentive to argue by ascribing malevolent motives or attitudes to one's adversaries is reinforced by the interpretation of political morality, noted above, which holds that in public discourse, advocates should proceed on the basis of shared commitments and argue within an area of "overlapping consensus."<sup>62</sup> That is because in hotly controverted areas, the one shared commitment about which there is consensus may be that it is wrong to act from ill-will. Hence, the only form of non-question-begging argument that may clearly qualify as admissible in public discourse over controverted issues may be an argument that one's opponents are acting hatefully or at least in a way that disrespects the full humanity or equal worth of their political adversaries.

To be sure, liberal theorists may not put the conclusion in exactly these terms. But a by-now wearisomely familiar form of liberal argument comes close to being a slightly more elegant version of the same thing. Thus, over and over again, liberal theorists argue that the fundamental moral axiom is that everyone should be treated with equal respect, or some similar quality, and then they try to show that the views or positions they disagree with are violating that axiom by demeaning some classes of persons or treating others with less than equal respect.<sup>63</sup> This is typically a contestable claim, to be sure.<sup>64</sup> And even if the claim is convincing, treating someone disrespectfully is not the same as acting

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<sup>62</sup> See, e.g., RAWLS, *supra* note 4, at 133-72 (developing the concept of "overlapping consensus" as essential to a stable society).

<sup>63</sup> See, e.g., Dorf, *supra* note 6, at 1298-1315.

<sup>64</sup> John Finnis criticizes these pervasive arguments, growing out of what he calls the "principle of disparagement," as "gratuitous and groundless, essentially sophistic fictions." 5 JOHN FINNIS, *RELIGION AND PUBLIC REASONS: COLLECTED ESSAYS* 30-31 (2011).

from hatred toward them, as discussed above. Even so, especially in the blurry context of public argument, the difference between disrespecting a class of people and hating them is easily elided.

### C. *Disparagement in the Courts*

It is hardly surprising, therefore, that reciprocal charges of hatred or bigotry (or “animus,” to use the Supreme Court’s slightly more technical-sounding term) are increasingly common in public arguments over issues like same-sex marriage or abortion. Political parties accuse each other of waging a “war on women” or, conversely, a “war on religion.”<sup>65</sup> Nor is it surprising that such rhetoric, usually in just barely more refined terms, has invaded Supreme Court opinions.

Indeed, courts might be expected to be peculiarly receptive to and suitable for ad hominem argumentation of this kind. After all, resolving disputes by convicting an accused party of wrongdoing often involving some sort of guilty mind or mens rea is something courts are routinely accustomed to doing — most obviously in criminal cases, but also to a lesser extent in many tort and other kinds of cases.

By contrast, there is no reason at all to think that courts would be institutionally equipped to perform other sorts of methods sometimes assigned to them. Ronald Dworkin proposed that courts should decide cases by doing moral philosophy,<sup>66</sup> for example, but what in the typical judge’s qualifications would prepare him or her to perform that abstruse task? Or it is often suggested that courts should resolve conflicts by “balancing” competing interests — and courts often purport to do just that — but as Alexander Aleinikoff demonstrated some years ago, judges and scholars have never even seriously attempted to address the factual and methodological questions that any honest attempt at balancing would immediately present.<sup>67</sup> Although lacking the qualifications for philosophizing or balancing, however, it is very much

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<sup>65</sup> See e.g., Lara Seligman, *New Romney Ad Accuses Obama of ‘War on Religion,’* NAT’L JOURNAL (Aug. 9, 2012), <http://www.nationaljournal.com/2012-presidential-campaign/new-romney-ad-accuses-obama-of-war-on-religion--20120809> (describing Republican candidate’s attack on Democrat incumbent rival); Abby Smith, *Poll: Dem ‘War on Women’ Attacks Potentially Key to Senate Control,* THE HILL (July 22, 2014), <http://thehill.com/blogs/ballot-box/senate-races/213025-poll-democratic-war-on-women-attacks-potentially-key-to-senate> (describing how Democrats in battleground states target unmarried women to retain political leads over Republicans).

<sup>66</sup> Dworkin’s most sustained development of this thesis was in *LAW’S EMPIRE*, *supra* note 27.

<sup>67</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-1005 (1987).

within the courts' usual mode of operation to resolve conflicts by declaring that one or another party has been guilty of acting badly and from a bad motive.<sup>68</sup>

Unsurprisingly, therefore, prominent constitutional doctrines not only permit but indeed demand this sort of *ad hominem* argumentation. The demand is most conspicuous in equal protection doctrine with respect to facially neutral laws that have a disparate impact on the basis of race or sex. The Supreme Court has ruled that disparate impact alone will not invalidate a law; in order to obtain a declaration of unconstitutionality, advocates must show that the law was adopted for a discriminatory purpose.<sup>69</sup> The requirement is understandable: if disparate impact alone were enough to invalidate a law, huge numbers of laws might go by the boards. Nonetheless, the effect of this doctrine is to force advocates challenging a law to argue that it was adopted for hateful or discriminatory purposes.<sup>70</sup>

The *Windsor* majority opinion is merely a recent and outstanding instance of this discourse of denigration. So it is entirely understandable that the *Windsor* Court would accuse Congress of acting from animus or a “bare desire to harm” — offensive and implausible though that accusation might be. After all, if the Court was resolved to strike the challenged law down, it needed to say something about why it was doing this; and what else could the Court have said?

To be sure, there were other things the Court *could* have said,<sup>71</sup> but these other possible rationales are typically vulnerable and

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<sup>68</sup> Cf. *Carpenter*, *supra* note 8, at 230-35 (defending competence of judiciary to implement anti-animus approach).

<sup>69</sup> E.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

<sup>70</sup> Even doctrines that call for “balancing” and that do not on their face focus on purposes may in practice turn on ascriptions of illicit purposes or motives. That is because a minimal requirement in such contexts is that the government has acted for a “legitimate” purpose or to secure a “legitimate” interest. But the Constitution nowhere lists which purposes or interests are legitimate and which are not. Nor is there any general cultural consensus regarding such lists: purposes and interests that “progressives” might regard as within government’s proper purview may be rejected by libertarians. Once again, though, and for the reasons discussed above, there is one purpose or interest that citizens of all persuasions will likely view as not legitimate — namely, a purpose of acting from hatred or from “a bare desire to harm” some disfavored person or group. Not surprisingly, therefore, even “rational interest” balancing decisions can turn into efforts to denigrate particular laws and their enactors as expressions of illicit purposes or motivations. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1704-27 (1984).

<sup>71</sup> See generally Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 30-38 (2014) (describing two alternative constitutional arguments for same-sex marriage: substantive due process and heightened scrutiny equal protection).

controversial, as well as unjudicial in appearance. Thus, the Court *could* have said (and might sincerely have believed) that any benefits brought about by DOMA were outweighed by the harms the law inflicted. Indeed, the Court did say as much.<sup>72</sup> But to say *only* that much would invite the familiar objection that courts are ill-equipped to measure such benefits and harms and that in any event this sort of assessment is constitutionally assigned to the legislative branch, not to the judiciary. Or the Court could have said (and may sincerely have believed) that regardless of the balance of benefits and harms, and regardless also of *purpose* or motivation, the *effect* of the law in stigmatizing same-sex unions was sufficient to invalidate it. As noted, constitutional scholars propose theories that would endorse this conclusion.<sup>73</sup> But those theories are controversial and, at least at this stage, still “academic” in their status.<sup>74</sup> In addition, they may rest on the same dubious inference that animated the Court’s own faulty reasoning — namely, that to disapprove of some kind of conduct is to deem the people who engage in this conduct to be of lesser moral worth.

A stronger rationale would be that the government has no legitimate interest at all in acting from mere hatred — from “a bare desire to harm a politically unpopular group.” The premise of that argument is virtually universally accepted: who after all would want to defend the contrary of that proposition — to argue, in other words, that it is just fine to act from a bare desire to harm? A further conspicuous advantage of this rationale is that no philosophizing and no balancing are required.

And so, untroubled by the small inconvenience that it could produce no cogent evidence to support the proposition in the actual case, that is what the Court said. In the end, the Court decided what it was going to do, and then said what it needed to say.

#### CONCLUSION: CULTIVATING THE CULTURE WARS

To say that a statement — or a form of discourse or a pattern of rhetoric — is understandable and natural is not to say that it is desirable or beneficial. The Court’s accusation in *Windsor* may have been received as welcome vindication by some — by many gays and lesbians, perhaps, and by supporters of same-sex marriage generally. Although even they

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<sup>72</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013).

<sup>73</sup> See Dorf, *supra* note 6, at 1310-14; Tebbe & Widiss, *supra* note 6, at 1445-46.

<sup>74</sup> In this respect, I think Dale Carpenter is correct that *Windsor*’s animus rationale was “the least aggressive or theoretically ambitious route the Court could have taken in striking down DOMA.” Carpenter, *supra* note 8, at 231.



may have preferred a different, more cogent or constructive rationale.<sup>75</sup> Conversely, the Court's rationale can hardly have been persuasive to others who dare to suppose that their own hearts and minds and motives are better known to themselves than to a distant, intensively coddled, curiously inflated jurist named Anthony Kennedy, and who are certain that they are *not* motivated by hatred or by "a bare desire to harm a politically unpopular group." If the Court's overall objective was to create a more inclusive community in which people of different moral perspectives and different modes of life can live together in mutual respect, then reckless and unsubstantiated charges of animus were hardly calculated to achieve that objective — even if the accusers did not themselves really believe their accusations.

In this respect, *Windsor* was merely one manifestation of a serious deficiency in a larger judicial strategy. In some areas of profound and divisive controversy (affirmative action, abortion, and public religious symbolism being perhaps the most obvious), the Court seems discernibly motivated by the purpose of achieving common ground and promoting a mutually respectful and inclusive community.<sup>76</sup> In part the Court pursues this agenda by putting its imprimatur on middle-ground positions that look suspiciously more like political compromises than principled applications of the Constitution.<sup>77</sup> On its face, *Windsor* itself seems to reflect a sort of compromise — albeit an untenable compromise, as more recent lower court decisions reflect<sup>78</sup> — in which

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<sup>75</sup> See, e.g., Conkle, *supra* note 71, at 30-42 (providing three alternative arguments the Court might have made); Perry, *supra* note 16 (offering alternative justification for *Windsor*'s result).

<sup>76</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 836-37 (1992). In its "no endorsement of religion" cases, for example, the Court's stated goal is to prevent anyone from feeling like an "outsider" or lesser member of the political community on the basis of religion. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

<sup>77</sup> For example, public universities can favor racial minorities in some ways (for twenty-five years anyway) but not in other ways that seem only cosmetically different from the methods the Court has approved. Compare *Grutter v. Bollinger*, 539 U.S. 306, 307, 309 (2003) (upholding race-conscious admissions program because school had compelling interest and admissions program was narrowly tailored), with *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (holding that a race-conscious admissions program violated the Equal Protection Clause because it was not narrowly tailored). Governments cannot endorse religion — except that the courts will strenuously decline to interpret many traditional and popular expressions that are obviously religious as endorsements. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring) (describing the Pledge of Allegiance as using religious "idiom for essentially secular purposes").

<sup>78</sup> The tension was between declaring the definition of marriage to be within the authority of the states and judging in effect that a prohibition of same-sex marriage is almost necessarily based on animus. The latter declaration would seem to entail that

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the definition of marriage would be left within the authority of the various states.<sup>79</sup> And yet, quite likely for the reasons discussed above, the rationales offered for these compromises often consist of accusing those whose positions are thereby rejected of “animus,” ill-will, bigotry, or a “bare desire to harm.”<sup>80</sup>

It is hard to imagine a jurisprudence better calculated to undermine inclusiveness, destroy mutual respect, and promote cultural division. After all, the winners in the Court’s cases are not taught to respect: how can they be expected to respect people who have been officially convicted of acting hatefully and with a “bare desire to harm” them? The losers in these controversies are not taught to respect: how can they respect a system that peremptorily dismisses and marginalizes them with unsubstantiated (and in their own knowledge false) charges of hatefulness? And citizens who might look to the Court itself for any sort of example of civility will discern not respect, but rather a reckless, accusatory dismissiveness of those people and groups the Justices choose to disdain. Citizens of an inclusive pluralistic community presumably need to accept that on sensitive and controversial issues (like marriage) reasonable people can hold different moral positions in good faith. A decision like *Windsor* works to negate that possibility.

It would be implausible to give the Supreme Court full credit or full blame for the development — because, fortunately, and despite occasional hubristic expressions to the contrary,<sup>81</sup> the Court has only limited power over the political culture — but it is nonetheless a fact that the term “culture wars” that achieved notoriety in the early 1990s seems more alarmingly apt today than it did then.<sup>82</sup> And the destructive discourse of denigration — a discourse that the Supreme Court did not

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states *cannot* prohibit same-sex marriage. Several lower courts have recently concluded as much. *See, e.g., De Leon v. Perry*, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014) (holding Texas’s prohibition on same-sex marriage unconstitutional); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014) (holding Virginia’s prohibition on same-sex marriage unconstitutional); *Kitchen v. Herbert*, 961 F. Supp. 2d, 1181, 1188 (D. Utah 2013) (holding Utah’s prohibition on same-sex marriage unconstitutional).

<sup>79</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013).

<sup>80</sup> *See id.* at 2693-96.

<sup>81</sup> *See, e.g., Casey*, 505 U.S. at 867 (plurality purporting to “call[] the contending sides of a national controversy to end their national division”). Robert Nagel has described the Joint Opinion in *Casey* as an “extravagant expression of . . . hubris.” ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER* 138 (1994).

<sup>82</sup> *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC* (2014), available at <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

invent but that it ratifies, practices, and models for the nation — has surely contributed to that unfortunate development.