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Windsor Beyond Marriage: Due Process, Equality & Undocumented Immigration

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WINDSOR BEYOND MARRIAGE: DUE PROCESS, EQUALITY & UNDOCUMENTED IMMIGRATION

ANTHONY O'ROURKE*

ABSTRACT

The Supreme Court's recent decision in United States v. Windsor*, invalidating part of the federal Defense of Marriage Act, presents a significant interpretive challenge. Early commentators have criticized the majority opinion's lack of analytical rigor, and expressed doubt that* Windsor *can serve as a meaningful precedent with respect to constitutional questions outside the area of same-sex marriage. This Article offers a more rehabilitative reading of* Windsor *and shows how the decision can be used to analyze a significant constitutional question concerning the use of state criminal procedure to regulate immigration.*

From Windsor*'s holding, the Article distills two concrete doctrinal propositions concerning the Due Process Clause's application in cases that have significant equality dimensions. It then shows how one can use these propositions to evaluate the constitutionality of state laws that categorically deny bail to undocumented immigrants. The Article thereby makes a significant practical contribution to the burgeoning constitutional "dignity" literature. Furthermore, it offers an interpretation of* Windsor *that will be welcomed by those who applaud the recent triumphs of gay rights advocates in the Supreme Court but lament the stagnation and regression of constitutional protections for other groups.*

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* Associate Professor of Law, SUNY Buffalo Law School. This Article was inspired by, and draws upon, an amici curiae brief I authored on behalf of a number of constitutional law and immigration law professors. I am grateful to all of them. For helpful comments on early drafts of this Article, I am indebted to Michael Boucai, Meredith Kolsky, Joseph Landau, Matthew Steilen, Christine Varnado, and participants of the SUNY Buffalo Law School Junior Faculty Forum. Thanks also to Alex Lott and the staff of the *William & Mary Law Review* for their excellent editorial work.

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INTRODUCTION

The Supreme Court's merits holding in *United States v. Windsor*[1] is unquestionably significant, but nobody is quite sure how so. Few have described the majority's decision striking down Section 3 of the federal Defense of Marriage Act (DOMA)[2] as uncharitably—or as memorably—as Justice Scalia when he called it a "disappearing trail of ... legalistic argle-bargle."[3] Even among those who celebrate *Windsor*'s outcome, however, the case's holding and doctrinal implications are subjects of sharp disagreement.[4]

Of particular interest to legal observers is this passage from the majority opinion: "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[5] To quote Justice Scalia, "what can *that* mean?"[6]

This Article suggests what "*that*" might mean, and shows in concrete terms how one can apply *Windsor* to clarify other doctrinally confused areas of due process law.[7] The majority opinion in *Windsor*, I contend, articulated a conception of due process that is informed by, but analytically distinct from, the Court's equal protection jurisprudence. So interpreted, *Windsor*'s holding is consistent with the theory developed by Laurence Tribe and Kenji Yoshino, among others,[8] that the Court is gradually synthesizing

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

2. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7) (defining marriage for purposes of federal law as "a legal union between one man and one woman as husband and wife").

3. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

4. *See infra* Part I.A.

5. *Windsor*, 133 S. Ct. at 2695.

6. *Id.* at 2706 (Scalia, J., dissenting).

7. *Windsor* also held that, notwithstanding the Executive's decision not to defend DOMA in court, the United States had Article III standing, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives had Article III standing, and BLAG's participation in the case assuaged any prudential concerns that would counsel against deciding the case on the merits. *See id.* at 2683-89. Discussion of this holding is beyond the scope of this Article.

8. *See, e.g.*, William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000); Kenneth L. Karst, *The Liberties of Equal*

its due process and equal protection doctrines to recognize what Yoshino calls "liberty-based dignity claim[s]" rooted in the Due Process Clauses.[9] Indeed, early commentators were quick to recognize that *Windsor* easily reads as a "dignity" case.[10] There has been little discussion, however, of how *Windsor*'s holding might clarify the doctrinal stakes of the dignity framework.

Windsor offers an occasion for a much-needed practical contribution to the burgeoning dignity literature. While Tribe and Yoshino have created a theoretically rich and intellectually generative framework for understanding the Court's liberty/equality jurisprudence, scholars have done little to show how legal practitioners can apply that jurisprudence. For lawyers who cannot simply discard earlier precedents in favor of a more satisfying dignity framework—that is to say, for any lawyer not sitting on the United States Supreme Court—the current scholarship offers little guidance. Indeed, Jack Balkin has raised the possibility that, in *Windsor*, the Supreme Court dispensed with any predictable conception of due process or equal protection and signaled that it "will simply proceed on a case-by-case basis, relying on the unifying concept of dignity, which straddles liberty and equality concerns."[11] Such doctrinal slipperiness should alarm those who applaud recent triumphs of gay rights advocates in the Supreme Court,[12] but lament the stagnation and regression of constitutional protections for other groups.[13]

Citizens: Groups and the Due Process Clause, 55 UCLA L. REV. 99, 137-38 (2007); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1741-45 (2008); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902-07 (2004); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

9. Yoshino, *supra* note 8, at 750.

10. *See infra* notes 50-52 and accompanying text.

11. Jack Balkin, *Teaching Materials for the Marriage Cases*, BALKINIZATION (July 26, 2013, 9:00 AM), http://balkin.blogspot.com/2013/07/teaching-materials-for-marriage-cases.html.

12. *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating state sodomy statute); Romer v. Evans, 517 U.S. 620, 632 (1997) (invalidating a state constitutional provision that barred municipalities from passing laws that prohibit discrimination based on sexual orientation).

13. I am grateful to Michael Boucai for the turn of phrase. For examples of the stagnation and regression, see Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating Section 4 of the Voting Rights Act); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007) (invalidating school districts' race-conscious desegregation

But *Windsor*'s holding, I argue, can do more than simply advance the interests, on a case-by-case basis, of groups that find favor with Justice Kennedy. To be sure, the *Windsor* majority offered little guidance as to how its decision should be prospectively applied. Indeed, although the majority states that DOMA violates both "due process and equal protection principles," its reasoning has left some confused as to how these principles informed the Court's decision.[14] But while *Windsor* cannot be used to predict how the Supreme Court will decide constitutional questions beyond same-sex marriage, one can distill principles from the majority opinion that can be used to independently analyze and resolve such questions.[15] To do so, one must look beyond what the *Windsor* majority *said* about the constitutional principles it relied upon and examine the logic of what the majority *did* in striking down § 3 of DOMA.[16]

By adopting such an approach, this Article constructs a rehabilitative reading of *Windsor* that builds upon the theoretical insights of the dignity literature, but can be applied in other due process contexts to advance the interests of other subordinated groups. The argument proceeds in three Parts. In Part I, I distill two practical, doctrinal propositions from *Windsor*'s synthesis of due process and equal protection doctrine. In Part II, I set the stage for extending *Windsor*'s holding beyond gay rights by describing a constitutional problem that has received little judicial or scholarly attention

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programs); Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (upholding the federal Partial-Birth Abortion Act of 2003); *see also* Yoshino, *supra* note 8, at 799 (citing the decision in *Gonzales v. Carhart* as "a cautionary tale against the dangers of a liberty-based dignity jurisprudence").

14. *Windsor*, 133 S. Ct. at 2693; *see, e.g.*, William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 N.Y.U. J.L. & LIBERTY 150, 154 (2013) (asserting that the majority in *Windsor* "does not even clarify whether the decision is ultimately rooted in 'equal protection' principles or in so-called 'substantive due process' principles").

15. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 661-71 (1995) (contrasting the "prediction model" of legal decision making with an "elaboration model" of legal decision making); *cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 147 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing that officials should interpret vague legal sources "in the way which best harmonizes with more basic principles and policies of law").

16. This phrasing is inspired by Laurence Tribe's criticism of Justice Scalia's *Windsor* dissent. *See* Larry Tribe, *DOMA, Prop 8, and Justice Scalia's Intemperate Dissent*, SCOTUSBLOG (June 26, 2013, 2:24 PM), http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/ ("[Scalia's dissent] suggests to [lower courts] that they ought to feel free to track what the Supreme Court *says* rather than to fathom, and then do their best to follow, the logic of what it *does*.").

concerning the use of state criminal procedure to regulate immigration.[17] In Part III, I show how the doctrinal propositions I distill from *Windsor* can be used to address this problem.

As to *Windsor*'s doctrinal propositions, the case offers two pieces of guidance for courts evaluating due process claims that have a significant equality dimension. First, a law that threatens a liberty interest is more likely to violate due process if it selectively imposes a historically novel burden on a subordinated group.[18] This proposition, if correct, suggests that a modest revision to the dignity literature is in order. Specifically, Yoshino has argued that, in recognizing a "liberty-based dignity" claim in *Lawrence v. Texas*, the Court embraced a conception of due process that "struck the chains of history from due process jurisprudence."[19] Such end-of-history claims may be premature, however. *Windsor*'s holding is predicated on a historical analysis of how power has been allocated between the federal government and the states with respect to regulating marriage.[20] In evaluating DOMA's constitutionality, the majority examines both the states' historical role in defining the marital relation and the federal government's historical restraint in this area of law. This examination yields two interrelated doctrinal innovations with respect to how the Court uses history to evaluate due process claims. First, in areas of law that states have traditionally regulated, a state may legislate in ways that strengthen its citizens' constitutionally protected liberty interests.[21] Second, and relatedly, if the government infringes a liberty interest by intervening in an area of law that it has not traditionally regulated, courts will be particularly skeptical of the government's justifications if the intervention happens to harm a politically subordinated group.[22]

But what does it mean to say that a court will be "particularly skeptical" of a government's asserted justification? The second

17. For a notable exception to the relative lack of scholarly attention to the constitutional problems related to this area of law, see Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011).

18. *See infra* Part I.C.

19. Yoshino, *supra* note 8, at 779-80.

20. *See* United States v. Windsor, 133 S. Ct. 2675, 2689-92 (2013).

21. *See infra* notes 87-90 and accompanying text.

22. *See infra* notes 91-94 and accompanying text.

proposition this Article distills from *Windsor* speaks to that issue. Specifically, if a law selectively targets a subordinated group, courts should assign significant weight to evidence in the legislative record suggesting that the law was enacted for a purpose that violates due process.[23] The relevance of legislative history as to whether a law violates the Constitution's due process or equal protection guarantees has long been unclear.[24] One question that has triggered particular confusion is the extent to which the constitutionally impermissible motivations of individual legislators should be ascribed to the legislature as a whole.[25] *Windsor* helps resolve this question by showing that when a due process claim has a significant equality dimension, individuals' motivations matter.[26]

As for a serious constitutional problem that *Windsor*'s holding can help resolve: three states have recently enacted laws that categorically deny bail to undocumented immigrants who have been arrested for a broad range of felonies.[27] These laws raise obvious equality concerns, as they forbid courts from granting bail to undocumented immigrants, but permit (and, for most cases, require) them to make individualized bail determinations for all other defendants. It is difficult, however, to evaluate the constitutionality of these laws under the Court's equal protection doctrine with any degree of analytical rigor.[28] The Court's due process jurisprudence, by contrast, offers a relatively tractable framework for analyzing the laws.[29] Specifically, under *United States v. Salerno*, a bail restriction violates due process if Congress expressly intended for it to be punitive;[30] otherwise the restriction will satisfy due process if it has a "legitimate regulatory goal" and is not "excessive in relation" to that goal.[31]

However, several questions concerning *Salerno*'s scope caused confusion for the only federal appellate court that has reviewed one

23. *See infra* Part I.D.

24. *See infra* notes 95-105 and accompanying text.

25. *See infra* notes 102-05 and accompanying text.

26. *See infra* notes 109-10 and accompanying text.

27. ARIZ. CONST. art. II, § 22(A)(4); ALA. CODE § 31-13-18 (2012); MO. REV. STAT. § 544.470(2) (2008).

28. *See infra* Part II.A.

29. *See infra* Part II.B.

30. 481 U.S. 739, 747 (1987).

31. *Id.*

of these laws. In a recent opinion,[32] which is being reconsidered en banc as this Article goes to print,[33] the Ninth Circuit upheld a provision of the Arizona constitution that categorically denies bail to any undocumented immigrant arrested for a broad range of felonies,[34] some of which are relatively trivial.[35] Applying the doctrinal propositions identified in Part I of this Article, one can clarify *Salerno*'s due process doctrine and construct a more analytically satisfying account than the Ninth Circuit panel was able to provide as to whether the Arizona bail law satisfies due process.[36]

As the analysis in this Article shows, one does not need to break new constitutional ground to show how laws that categorically deny bail to undocumented immigrants run afoul of the Due Process Clause. I do not argue, for example, that the Ninth Circuit faced a constitutional problem it could not solve without recourse to a controversial dignity doctrine that is taking root in the Supreme Court's gay rights jurisprudence. Indeed, the objective of this Article is to show how lawyers and judges can use *Windsor* to clarify and refine even very basic and traditional due process claims. By carefully attending to *Windsor*'s holding and analyzing how it coheres with due process doctrines in other subareas of constitutional law, one can construct orthodox arguments for a wide range of constitutional claims beyond the area of gay rights.

32. *See* Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054 (9th Cir. 2013).

33. *See Status of Pending En Banc Cases*, U.S. CTS. FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/enbanc/ (last updated Apr. 8, 2014).

34. *See* ARIZ. CONST. art. II, § 22(A)(4); *Lopez-Valenzuela*, 719 F.3d at 1059-60, 1064.

35. *See infra* notes 131-35 and accompanying text.

36. The Ninth Circuit panel's decision in *Lopez-Valenzuela* was released just eight days before *Windsor* was decided. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2675 (2013) (published June 26, 2013); *Lopez-Valenzuela*, 719 F.3d at 1054 (published June 18, 2013).

I. WHAT *WINDSOR* SAYS

A. Windsor*'s Liberty/Equality Framework*

Even among those who celebrated *Windsor*'s outcome, some found its holding confused at best[37] and nonsensical at worst.[38] Though it may be more coherent than some attackers suggest, *Windsor* undeniably presents an interpretive challenge. Writing for the majority, Justice Kennedy declared DOMA invalid because it "violates basic due process and equal protection principles applicable to the Federal Government."[39] Early commentators hotly contest the meaning and doctrinal basis of this statement. Some agree with Chief Justice Roberts that the majority's decision is "based on federalism"[40] or on some combination of federalism, due process, and equal protection principles.[41] Others seem to interpret the majority opinion as a conventional application of the Court's equal protection doctrine as it is incorporated against the federal government under

37. *See, e.g.*, Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in* Windsor, BALKINIZATION (June 26, 2013, 11:50 PM), http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html ("Already there is some ... nit-picking about the doctrinal problems with *Windsor*.").

38. *E.g.*, Gerard N. Magliocca, *This Pudding Lacks a Theme*, BALKINIZATION (June 26, 2013, 11:10 AM), http://balkin.blogspot.com/2013/06/this-pudding-lacks-theme.html (stating that "the Court's rationale for why [*Windsor*'s] holding applies only to DOMA is nonsensical" and finding "Justice Kennedy's opinion hard to understand").

39. *Windsor*, 133 S. Ct. at 2693.

40. *Id.* at 2697 (Roberts, C.J., dissenting).

41. *See, e.g.*, Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/; Rick Pildes, *Why Justice Kennedy's DOMA Opinion Has the Unique Legal Structure It Has*, BALKINIZATION (June 26, 2013, 1:34 PM), http://balkin.blogspot.com/2013/06/why-justice-kennedys-doma-opinion-has.html; Tribe, *supra* note 16. For a contrary view, see Deborah Hellman, *Scalia Is Right: Justice Kennedy's Opinion in* Windsor *Doesn't Rest on Federalism*, BALKINIZATION (June 27, 2013, 5:29 PM), http://balkin.blogspot.com/2013/06/normal-0-false-false-false-en-us-x-none.html?m=0.

Bolling v. Sharpe.[42] Doubtless other competing interpretations of *Windsor*'s doctrinal basis will soon be forthcoming.

Particularly striking, however, is how well *Windsor*'s holding was forecasted by those who argue that the Court is gradually synthesizing its equality and liberty jurisprudence to recognize new constitutional "dignity" claims. Laurence Tribe was among the first to develop this theory with his influential reading of *Lawrence v. Texas* as a case that "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty."[43] Building on this insight, Kenji Yoshino has argued that, "[i]n practice, the Court does not abide by" the distinction between "the equality claims made under the [Constitution's] equal protection guarantees and the liberty claims made under the due process or other guarantees."[44] The Court, Yoshino contends, often uses "the Due Process Clauses to further equality concerns."[45] In cases involving the rights of sexual minorities,[46] abortion,[47] and the scope of Congress's lawmaking power under § 5 of the Fourteenth Amendment,[48] the Court has shifted its equality jurisprudence away from the Equal Protection Clause and toward "liberty-based dignity claims" grounded in the Due Process Clauses.[49]

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42. 347 U.S. 497 (1954); *see, e.g.*, Mike Dorf, *A Publicity Update and Then Three Thoughts on Justice Scalia's Dissent in* Windsor, DORF ON LAW (June 28, 2013, 10:37 AM), http://www.dorfonlaw.org/2013/06/a-publicity-update-and-then-three.html ("[T]here is much to regret about the fact that in *Romer* [*v. Evans*, 517 U.S. 620 (1996)], *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)] and now *Windsor*, the Court has failed to specify the level of scrutiny it is applying as a matter of equal protection doctrine (in *Romer* and *Windsor*) or substantive due process doctrine (in *Lawrence*)."); Suzanne Goldberg, *A One-Two Punch to the Nation's Most Prominent Antigay Laws*, SCOTUSBLOG (June 26, 2013, 2:07 PM), http://www.scotusblog.com/2013/06/a-one-two-punch-to-the-nations-most-prominent-antigay-laws/ ("In essence, ... even when DOMA first arrived, the Court's equality jurisprudence contained the seeds of its demise.").

43. Tribe, *supra* note 8, at 1898.

44. Yoshino, *supra* note 8, at 749. Yoshino's central thesis is that the Court's doctrinal shift toward "dignity" claims reflects the nation's growing "pluralism anxiety," which he defines as "an apprehension of and about" the nation's "demographic diversity." *Id.* at 751.

45. *Id.*

46. Lawrence v. Texas, 539 U.S. 558 (2003).

47. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

48. Tennessee v. Lane, 541 U.S. 509 (2004).

49. *See* Yoshino, *supra* note 8, at 776-85.

Commentators quickly identified the majority's opinion as an instance of this dignity jurisprudence. As Deborah Hellman observed, the words "dignity" and "indignity" together appear ten times in the relatively short majority opinion.[50] Moreover, as Justice Scalia bitterly observed in dissent, the majority failed to articulate a standard of review conforming to the tiered system that was, for a few decades, a hallmark of the Court's equal protection doctrine.[51] Regarding this omission, Jack Balkin proffered the following discussion question for those seeking to teach *Windsor*:

> *Dignity*. Kennedy's opinion repeatedly speaks of liberty. Sometimes he seems to mean that a guarantee of equal protection is contained within the Fifth Amendment's guarantee of liberty with due process. At other times he seems to speak of the liberty protected by the Fifth Amendment as more than simply a guarantee of equal protection. Thus, another possibility is that the Court has abandoned the tiered standards of review—as evidenced by *Casey*, *Romer*, and *Lawrence*—and will simply proceed on a case-by-case basis, relying on the unifying concept of dignity, which straddles liberty and equality concerns.[52]

While the scholarly consensus as to the best interpretation of *Windsor* remains to be settled, this one will certainly be a contender.

But observing that *Windsor*'s holding synthesizes equality and liberty principles into a dignity jurisprudence is one thing. Applying that observation is quite another. Unfortunately, the current dignity literature contains little doctrinal guidance for lawyers, appellate court judges, and others who must take stare decisis seriously. While much has been written about the blending of dignity and equality principles in constitutional law, this scholarship has focused on the one institution that can disregard precedent in favor of a more satisfying conception of equality: the Supreme Court.[53]

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50. Hellman, *supra* note 41.

51. United States v. Windsor, 133 S. Ct. 2675, 2706 (Scalia, J., dissenting) ("In accord with my previously expressed skepticism about the Court's 'tiers of scrutiny' approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases .... But the Court certainly does not *apply* anything that resembles that deferential framework.") (citations omitted).

52. Balkin, *supra* note 11.

53. *See* sources cited *supra* note 8.

This approach to constitutional doctrine yields important theoretical insights but offers little to practitioners who must frame their claims in conventional doctrinal terms. Yoshino, for example, characterizes his analysis of the "new equal protection" as an exercise in "look[ing] past doctrinal categories to see that the rights secured within those categories are often hybrid rights."[54] Similarly, Balkin has suggested that *Windsor* can best be understood by "look[ing] behind the doctrinal superstructure, which explains little, and see[ing] the deeper principles at stake, principles that have a long history in American constitutional thought."[55]

This does not mean, however, that a theoretical analysis of the Court's dignity jurisprudence cannot produce specific doctrinal propositions that lawyers and judges can operationalize when evaluating new constitutional claims. Commenting on the dignity reading of *Lawrence v. Texas*, Michael Boucai has observed that the Court's blending of due process and equality principles is "not ... an invitation to collapse one value into the other, as if personal freedom were a mere instrumentality of social parity."[56] Likewise, *Windsor*'s synthesis of equal protection and due process jurisprudence does not preclude practitioners from maintaining a distinction between equal protection and due process claims, all the while using one set of doctrines to inform the other. Accordingly, this Article offers two simple doctrinal propositions based on how the *Windsor* majority uses equal protection cases to clarify the liberty interests protected under the Constitution's Due Process Clauses.

B. The Liberty Interest in Windsor

The majority opinion in *Windsor* undoubtedly synthesizes equal protection and due process doctrine in ways that are both novel and difficult to untangle. Nevertheless, it is possible to reconstruct Justice Kennedy's analysis in conventionally doctrinal terms, and to thus relate *Windsor*'s holding to constitutional problems beyond

54. Yoshino, *supra* note 8, at 750.

55. Jack Balkin, Windsor *and the Constitutional Prohibition Against Class Legislation*, BALKINIZATION (June 26, 2013, 1:05 PM), http://balkin.blogspot.com/2013/06/windsor-and-constitutional-prohibition.html.

56. Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 423 (2012).

same-sex marriage. One way of making sense of *Windsor* is to show the ways in which the majority used equal protection principles to identify and define the scope of the constitutionally protected liberty interest. This reading of *Windsor*, however, is not self-evident. Granted, the Court expressly stated that DOMA "violates basic due process *and* equal protection principles,"[57] but should this statement be taken at face value? As Douglas NeJaime has observed, the complaint in *Windsor* raised only an equal protection claim, and "Edi[th] Windsor did not assert a claim based on the fundamental right to marry."[58] This litigation posture quite sensibly leads NeJaime to conclude that the Court's decision rests on equal protection grounds, and that the Court postpones any consideration of whether laws prohibiting same-sex marriage violate substantive due process.[59] On this reading, *Windsor* is best read as an opinion granting what Kenji Yoshino calls an "equality-based dignity claim" grounded in equal protection principles that the Fifth Amendment's Due Process Clause makes applicable to the federal government.[60]

Undeniably, *Windsor* has reshaped the doctrinal landscape for equal protection claims based on sexual orientation.[61] A close reading of *Windsor*, however, reveals not only that the majority opinion identifies a liberty interest protected under the Due Process Clauses, but that this liberty interest is integral to the Court's holding. Specifically, the majority focuses on the effect that laws regulating marriage have on the intimate (and, the Court assumes, dyadic) "bond" that forms between those who undertake a lifelong sexual commitment to one another.[62] In *Lawrence v. Texas*,[63] the

57. United States v. Windsor, 133 S. Ct. 2675, 2963 (2013) (emphasis added).

58. Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 219 (2013); *see also* Windsor v. United States, 833 F. Supp. 2d 394, 399 (S.D.N.Y. 2012) ("Windsor does not argue that DOMA affects the fundamental right to marry."); Amended Complaint ¶¶ 84-85, *Windsor*, 833 F. Supp. 2d 394 (No. 10 Civ. 8435 (BSJ)).

59. According to NeJaime, *Windsor* was not decided on substantive due process grounds, but the majority opinion nevertheless "elaborates a model" of marriage that is "consistent with the Court's fundamental rights jurisprudence." NeJaime, *supra* note 58, at 231.

60. Yoshino, *supra* note 8, at 749.

61. For example, the Ninth Circuit has recently held that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) (holding that it is a *Batson* violation to strike a juror on the basis of sexual orientation).

62. *Windsor*, 133 S. Ct. at 2962.

63. 539 U.S. 558 (2003).

Court identified this bond—or, more precisely, the *choice* whether to enter this bond—as the source of the substantive due process interest that is violated by a criminal sodomy statute:

> [A]dults may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make *this choice*.[64]

One can reframe this passage as a syllogism, the conclusion of which is that sexual conduct is constitutionally protected:

> Premise (1): There is a constitutionally protected liberty interest in the choice to enter a sexual "bond" with another individual (irrespective of that individual's sex).
>
> Premise (2): Sexual conduct is partially constitutive of a sexual bond between two persons.
>
> Conclusion: There is a constitutionally protected interest in sexual conduct.

Thus, as Katherine Franke observed in her influential critique of *Lawrence*, the idea of a domestic "bond" between two persons "does important normative work in the opinion."[65] Rather than articulating "a robust conception of sexual freedom,"[66] *Lawrence* deems sexual conduct to be constitutionally protected because it is instrumental toward the development of a "bond that is more enduring."

In *Windsor*, the Court further develops the idea of a constitutionally protected, domestic bond that individuals may choose to enter without unwarranted state interference. For Kennedy, just as sex

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64. *Id.* at 567 (emphasis added).

65. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004).

66. *Id.* at 1400.

plays a constitutive role in shaping that bond, so too does marital status:

> Private, consensual sexual intimacy between two adult persons of the same sex ... can form "but one element in a personal bond that is more enduring." 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.[67]

Thus, as a federal law that "interfere[s] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power,"[68] DOMA presents a special constitutional threat. Like any law that was enacted for the purpose of stigmatizing gays and lesbians, it constitutes an equal protection violation.[69] This would be true, even of a federal law that interfered with a "routine [state] classification for purposes of certain statutory benefits."[70] Kennedy makes clear, however, that DOMA interferes with state laws that help to shape a liberty interest that is protected under the Due Process Clauses. DOMA thus enacts a constitutional injury beyond the denial of equal protection.

It is therefore inaccurate to characterize *Windsor* exclusively as an equal protection case. The Court certainly makes clear that § 3 of DOMA violates the equal protection principles that apply to the federal government by virtue of the Fifth Amendment's Due Process Clause. The Court also emphasizes, however, that DOMA interferes with a state legal classification that is constitutive of a constitutionally protected domestic bond. In doing so, DOMA maligns that bond, and thus infringes a liberty interest that underpins the Court's holding in *Lawrence v. Texas*.

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67. *Windsor*, 133 S. Ct. at 2692 (quoting *Lawrence*, 539 U.S. at 567) (citation omitted).

68. *Id.* at 2693.

69. *See id.* ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group.... DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973))).

70. *Id.* at 2692.

This substantive due process reading of *Windsor*, while descriptively correct, is normatively problematic for those who wish for courts to embrace a robust idea of sexual liberty. As described here, *Windsor* further entrenches the conception of liberty that animated the Court's holding in *Lawrence*—a conception that treats basic social choices (sex and marriage among them) as instrumentally valuable insofar as they help cultivate dyadic, domestic bonds.[71] But however impoverished the constitutionally protected liberty interest in *Windsor* might be, it is nevertheless a constitutionally protected liberty interest. And, by identifying that liberty interest, one can use *Windsor* to distill doctrinal propositions that could prove valuable to advocates operating outside the area of same-sex marriage.

Here are two such doctrinal positions.

C. Proposition One: The Relevance of Unusual Discrimination

First, *Windsor* suggests that a law that threatens a liberty interest is more likely to violate due process if it selectively imposes a historically novel burden on a subordinated group. In *Windsor*, the majority cited *Romer v. Evans*, an equal protection decision,[72] for the proposition that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" at issue.[73] Consistent with this principle, the majority examined the "extent of the state power and authority over marriage as a matter of history and tradition."[74] The Court observed that the "the Federal Government, throughout our history, has deferred to state-law policy decisions with respect to domestic relations."[75] DOMA, however, established a federal definition of marriage that is uniform across states, and thus "depart[ed] from this history and tradition of reliance on state law to define marriage."[76]

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71. *See* Franke, *supra* note 65, at 1417.
72. 517 U.S. 620, 623 (1996).
73. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633).
74. *Id.* at 2691.
75. *Id.*
76. *Id.* at 2692.

Some early commentators cited this historical examination to argue that the majority's decision was predicated on federalism.[77] The majority asserted, however, that the "State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."[78] Instead, the Court deemed the historical allocation of federal and state power to define marriage relevant to whether DOMA impermissibly "impose[d] restrictions and disabilities" on a constitutionally protected liberty interest.[79]

The Court thus made a subtly different use of history in *Windsor* than is common in its substantive due process jurisprudence. Conventionally, the Court has relied on history to resolve the threshold question of whether a liberty interest is sufficiently "fundamental" to be protected under the Due Process Clauses.[80] Specifically, whether a right is "fundamental to our scheme of ordered liberty,"[81] and thus merits recognition under the Constitution's Due Process Clauses, depends on whether it is "deeply rooted in th[e] Nation's history and tradition."[82] Yoshino has argued that this historical requirement has often constrained the recognition of new due process rights but plays a diminished role in the Court's new dignity jurisprudence.[83] Specifically, Yoshino reads *Lawrence* as embracing a conception of the Due Process Clauses under which the Framers "intended to leave the content of the rights they guaranteed to the intelligence of successive generations."[84] By adopting this understanding of due process, Yoshino contends, the majority opinion in *Lawrence* "struck the chains of history from due process jurisprudence."[85]

With *Windsor*, the Court reintroduced history into its substantive due process analysis. It did so, however, by borrowing from its

77. *See supra* notes 40-41 and accompanying text.

78. *Windsor*, 133 S. Ct. at 2692.

79. *See id.*

80. *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (declining to recognize physician-assisted suicide as a constitutionally protected right); *see also* McDonald v. City of Chic., 130 S. Ct. 3020, 3036, 3042 (2010) (holding that an individual's Second Amendment right to possess firearms is incorporated under the Fourteenth Amendment's Due Process Clause).

81. *McDonald*, 130 S. Ct. at 3036 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

82. *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

83. *See* Yoshino, *supra* note 8, at 780.

84. *Id.*

85. *Id.*

equal protection jurisprudence.[86] Writing for the majority in *Windsor*, Justice Kennedy used history in two interrelated ways. First, Kennedy concluded that the states' traditional power to define marriage has made them the gatekeepers of a dignity interest that, once conferred, deserves constitutional protection:

> Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.[87]

This is a slight twist on the traditional due process inquiry articulated in *Washington v. Glucksberg*.[88] There, the Court held that a liberty interest may be constitutionally protected under the Fourteenth Amendment's Due Process Clause if it is "deeply rooted in th[e] Nation's history and tradition."[89] In *Windsor*, the Court did not inquire into the "deeply rooted" nature of the liberty interest at stake, but instead examined the state's historical role in shaping and protecting that liberty interest through marital law. The fact that states traditionally regulated marital relations, the Court reasoned, gives such regulation constitutional significance when it serves to validate a choice that is protected under the Due Process Clauses. Here, the state of New York gave legal recognition to its citizens' constitutionally protected choice to enter into an intimate pairwise bond with a person of the same sex. By doing so, the state was able to "enhance[] the recognition, dignity, and protection" of those who made this choice, and thereby strengthened the liberty interest in the choice itself.[90] Thus, *Windsor* suggested that history is relevant not only to whether a liberty interest deserves constitutional protection, but whether states are able to strengthen that interest through regulation.

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86. For a detailed examination and defense of this type of doctrinal borrowing, see Tebbe & Tsai, *supra* note 8.

87. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

88. 521 U.S. 702 (1997).

89. *Id.* at 721 (internal quotation marks omitted).

90. *Windsor*, 133 S. Ct. at 2692; *see supra* Part I.B.

Justice Kennedy's second use of history involved an even more significant departure from the conventional approach to historical inquiry in due process cases, and a more explicit borrowing from the Court's equal protection jurisprudence. While due process cases commonly focus on the history of a particular liberty interest, Kennedy also considered the history of the government's efforts to infringe upon a liberty interest in a way that harms politically subordinated groups. Specifically, Kennedy found the historically exceptional nature of DOMA relevant to whether the government had an adequate justification for invading the interest that New York has strengthened by permitting same-sex marriage. Whereas New York broadened its definition of marriage to "enhance[ ] the recognition, dignity, and protection" of a subordinated group, "[t]he Federal Government uses this state-defined class ... to impose restrictions and disabilities" on them.[91] This was, Justice Kennedy observed, an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," and "operate[d] to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."[92] Because this constitutes a "[d]iscrimination[ ] of an unusual character," the Court gave particularly "careful consideration" to DOMA's effect on a constitutionally protected dignity right.[93] It may be premature to equate this "careful consideration" with the traditional heightened scrutiny standard that Justice Alito accused the majority of applying.[94] At the very least, however, *Windsor*'s holding confirms that a law's effect on a politically subordinated group carries some evidentiary weight with respect to whether the law violates due process.

The majority's use of history in *Windsor* thus follows a line of reasoning that can be extended to other contexts. Specifically, the majority deems history relevant both to whether the government can strengthen a liberty interest through regulation, and to whether the government may enact regulation that infringes upon that interest. If the government exercises a well-established historical power to strengthen a liberty interest, then its action will also

91. *Windsor*, 133 S. Ct. at 2692.
92. *Id.* at 2693.
93. *Id.* at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
94. *See id.* at 2716 (Alito, J., dissenting).

strengthen the degree to which the Constitution protects that interest. If, however, the government breaks from historical practice to infringe on that interest in a way that harms a subordinated group, then the Court will be particularly cautious in evaluating whether the infringement is justified.

D. Proposition Two: The Relevance of Legislators' Motivations

The second doctrinal proposition one can distill from *Windsor*'s holding builds on the first: if a law selectively targets a subordinated group, significant weight should be assigned to evidence in the legislative record suggesting that the law was enacted for a purpose that violates due process. According to one traditional view of equal protection and due process, animus toward a protected group is fatal under the Equal Protection Clause, whereas "there is nothing specifically objectionable about that animus under the Due Process ... Clauses."[95] The majority opinion in *Windsor*, however, appears to reject a rigid distinction between animus's relevance in equal protection and due process contexts. In *Windsor*, the majority concluded that DOMA violated the Fifth Amendment's Due Process Clause because its "principal purpose was to impose inequality" and additionally that the law was not enacted "for other reasons like governmental efficiency."[96] In support of these conclusions, the *Windsor* majority offered the following account of the House Report on DOMA:

> The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." ... The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral

95. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 67 (1996).

96. *Windsor*, 133 S. Ct. at 2694. By contrast, Justices Scalia and Roberts both argued that DOMA served the legitimate regulatory purposes of ensuring stability, *see id.* at 2696 (Roberts, J., dissenting), and "avoid[ing] difficult choice-of-law issues that will now arise absent a uniform federal jurisdiction of marriage," *id.* at 2708 (Scalia, J., dissenting).

> conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." ... The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." ... Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.[97]

Based largely on these statements, the Court concluded that DOMA's purpose was to ensure that state-recognized same-sex unions would be "treated as second-class marriages for purposes of federal law."[98] Thus, DOMA's impact on same-sex couples appears to have motivated the Court to place significant weight on legislative statements evincing an unconstitutional purpose.[99]

Windsor's holding therefore helps to clarify a longstanding confusion in the Court's due process jurisprudence. In its modern substantive due process jurisprudence, the Court has repeatedly stressed that a law encroaching on a fundamental right is unconstitutional if it was enacted for an improper purpose.[100] In placing dispositive weight on whether DOMA's impact on same-sex couples was merely an "incidental effect of the federal statute" or its "essence,"[101] the *Windsor* majority reaffirmed this approach. Before *Windsor*, however, the Court was rarely clear about the relevance

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97. *Id.* at 2693 (first alteration in original) (citations omitted) (quoting H.R. REP. NO. 104-664, at 12-13, 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916, 2920).

98. *Id.* at 2693-94. The Court also reached its conclusion based on arguments the Bipartisan Legal Advisory Group of the House of Representatives made in defense of DOMA and on how DOMA operates in practice. *See id.*

99. The Ninth Circuit recently recognized that *Windsor*'s holding rested on an examination of DOMA's purpose, and concluded from the Court's analysis that heightened scrutiny now applies to equal protection claims based on sexual orientation. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481-82, 484 (9th Cir. 2014). The Ninth Circuit's holding in *SmithKline Beecham*, however, does not bar it from also recognizing that *Windsor*'s holding is partially grounded in substantive due process principles, *see supra* Part I.B, and accordingly that *Windsor* can be applied to clarify the scope of rights protected under the Due Process Clause.

100. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (holding that a law enacted for the "purpose ... of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus ... is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it"); United States v. Salerno, 481 U.S. 739, 747 (1987) (holding that a pretrial detention law violates substantive due process if the legislature "expressly intended" for the law "to impose punitive restrictions").

101. *Windsor*, 133 S. Ct. at 2693.

of individual statements by legislators suggesting that their support for a law was motivated by an invidious purpose.[102] As Justice Scalia's dissent illustrates, one can easily invoke authorities that condemn inquiry into the legislative motivations behind a statute that serves a constitutionally legitimate purpose.[103] Just as easily, however, one can point to equal protection cases involving strict scrutiny in which the Court considers "statements made by decisionmakers or referendum sponsors" to be "relevant evidence of discriminatory intent."[104] Moreover, one can identify "rational-basis" equal protection cases in which the Court appears to have "invalidated laws on the basis of wrongful actual motivations, without seriously exploring the possibility that another rightful purpose might justify the statute."[105] In *Windsor*, the Court adopted this last, actual intent approach to evaluate whether DOMA was intended to deprive those in same-sex marriages of "the liberty of the person protected by the Fifth Amendment of the Constitution."[106]

The *Windsor* majority's analysis, however, also suggests a limitation to this actual intent approach to evaluating whether a statute violates due process. In *Romer v. Evans*, the Court applied rational basis review to invalidate a Colorado law based on evidence that it was motivated by "animus" against a politically unpopular

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102. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 500 (6th ed. 2009) ("Neither the Court nor individual justices have been altogether consistent on the issue of review based on actual purpose.").

103. *See Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968))); *see also, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress's action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' ... because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))).

104. *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 196-97 (2003); *see also, e.g.*, Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 (1977) ("[L]egislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").

105. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1765 n.798 (2001) (citing Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

106. *Windsor*, 133 S. Ct. at 2695.

group.[107] Cass Sunstein offered a persuasive limiting principle for this holding, according to which the Court will "look behind enactments" for the narrow purpose of determining whether they were motivated by "animus" toward a politically unpopular group.[108] Similarly, Justice Kennedy's opinion used animus against a subordinated group as the trigger for skeptically examining the motivations behind DOMA.[109] *Windsor* thus establishes a subtle, but important corollary to the limiting principle Sunstein identified: if a law appears to selectively target a politically unpopular group, courts will "look behind enactments" to determine whether the law was motivated by a purpose that is impermissible under the Due Process Clauses.

By linking its examination of DOMA's purpose to the law's effect on a subordinated group, the *Windsor* majority overcame a significant normative obstacle to considering legislators' motivations in substantive due process cases: the long shadow of *Lochner v. New York*.[110] As discussed above, the Court has been notably unclear as to the role that legislative history should play in evaluating whether a law violates due process because it was enacted for an improper purpose.[111] By contrast, in constitutional cases that do not turn on substantive due process, the Court "rarely hesitate[s]" to "consider[] legislative history and other information about the legislature's inner workings."[112] This discrepancy may owe in part to the *Lochner* Court's ill-supported speculation as to the motivations behind a New York law regulating the hours of bakery workers. In striking down the law, the *Lochner* Court rejected the state's contention that the law was enacted to protect workers' health, asserting: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the

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107. *Romer*, 517 U.S. at 632.

108. Sunstein, *supra* note 95, at 10.

109. *See, e.g.*, *Windsor*, 133 S. Ct. at 2692 ("The Federal Government uses this state-defined class ... to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.").

110. 198 U.S. 45 (1905).

111. *See supra* notes 100-03 and accompanying text.

112. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1855 (2008); *see id.* at 1855-56 (providing examples from the First Amendment, Commerce Clause, Ex Post Facto Clause, and Bill of Attainder Clause cases).

police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[113] Given *Lochner*'s notoriety, it is unsurprising courts have been equivocal about whether to consider legislators' motivations in contemporary substantive due process cases.[114]

The majority's approach in *Windsor*, however, offers a way to consider legislative purpose in substantive due process cases without inviting comparisons to *Lochner*. Specifically, the majority declines to endorse an unmoored investigation into legislative motivations in *any* substantive due process case. Instead it suggests that such a search should be limited to cases in which the challenged law selectively burdens a subordinated group. In advancing such a limitation, the majority echoes the work of process-based theorists, who seek to constrain judicial discretion by arguing that judicial review should primarily serve to correct defects in political decision making.[115] The *Windsor* majority, however, offers a way to apply the insights of process theory to substantive due process—a doctrine that process theorists have famously criticized.[116] Specifically, the *Windsor* majority links its substantive due process intervention to a concern that motivated John Ely: the systematic disadvantage of subordinated minorities in the political process.[117] Whether or not the majority's approach is plausible as a strategy for cabining judicial discretion,[118] it is certainly an important doctrinal

113. *Id.*

114. *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417-19 (2011) (discussing *Lochner*'s position in the "anticanon" as an exemplar of judicial error).

115. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

116. *See* ELY, *supra* note 115, at 18; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); *see also* Dorf & Issacharoff, *supra* note 115, at 929 (discussing the influence of Ely's arguments concerning substantive due process on the Supreme Court).

117. *See* ELY, *supra* note 115, at 135-79 (defending the Warren Court's equal protection cases as legitimate interventions in cases where subordinated minorities were excluded from the political process).

118. *Compare* Dorf & Issacharoff, *supra* note 115 (arguing that process theory offers a viable way of constraining judicial discretion), *with* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1055-57 (1980) (arguing that Ely's theory fails to offer the determinacy necessary to constrain judicial behavior).

innovation that could be applied in other substantive due process contexts.

In summary, *Windsor*'s holding shows that laws that appear to selectively target a subordinated group may be examined more carefully than those that have no obvious equality dimension. The majority opinion makes use of, and legitimizes, two interrelated types of doctrinal borrowing from the Court's equal protection cases in its due process jurisprudence. First, the opinion suggests that courts should examine a law's historical context to determine whether it selectively imposes a novel burden on a politically unpopular group. Second, if the law does impose such a burden, courts should assign significant weight to evidence that the law was enacted for a constitutionally prohibited motive.

I have no doubt that, by translating *Windsor* into these terms, I am presenting an overly sanguine portrayal of the majority opinion's clarity and analytical rigor. Such portrayals, however, are sometimes necessary in order to treat legal opinions as binding sources of law from which one can reason to resolve new legal questions.[119] By distilling concrete doctrinal propositions from the majority's analysis, one can use *Windsor* to help solve doctrinal puzzles as well as create them.

II. DUE PROCESS AND UNDOCUMENTED IMMIGRANTS' BAIL

To illustrate how *Windsor*'s holding can help resolve other due process questions that have significant equality dimensions, I turn to an emerging constitutional problem that has received little judicial attention. In recent years, three states have enacted laws that require judges to deny bail to undocumented immigrants who are arrested for a range of felonies.[120] Traditionally, in noncapital criminal cases, judges are required to make an individualized determination of whether a defendant should be released on bail pending trial.[121] However, under an Alabama statute enacted in

119. *See supra* notes 15-16 and accompanying text.

120. *See* ARIZ. CONST. art. II, § 22(A)(4); ALA. CODE § 31-13-18 (2012); MO. REV. STAT. § 544.470(2) (2008).

121. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."); *see also* Caleb Foote, *The Coming Constitutional*

2011 as part of a comprehensive anti-immigration bill,[122] judges are forbidden from granting bail to any person "who is determined to be an alien unlawfully present in the United States."[123] Similarly, a Missouri statute enacted in 2008 forbids judges from granting bail to defendants whom they "reasonably believe[]" to be "an alien unlawfully present in the United States."[124] If the defendant is later unable to "prove his or her lawful presence," he or she must "continue to be committed to the jail and remain until discharged by due course of law."[125] To date, no court has considered whether these statutes violate the Constitution's equal protection or due process guarantees.[126]

Arizona, however, enacted not only the first of these three laws, but also the most detailed and the only one that courts have addressed.[127] In 2006, the state amended its constitution by means of a ballot initiative known as "Proposition 100."[128] As amended, Arizona's constitution establishes a presumption that "[a]ll persons charged with crime shall be bailable" but carves out an exception to this rule if a person has been arrested "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge."[129] The Arizona

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Crisis in Bail: I, 113 U. PA. L. REV. 959, 975-78 (1965) (discussing founding era bail laws according defendants the right to an individualized bail determination in noncapital cases).

122. *See* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535.

123. ALA. CODE § 31-13-18.

124. MO. REV. STAT. § 544.470(2).

125. *Id.*

126. In a case brought by the United States, a federal district court enjoined several provisions of the Alabama bill that categorically denied bail to undocumented immigrants. *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1293 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, *dismissed in part*, 691 F.3d 1269 (2012), *cert. denied*, 133 S. Ct. 2012 (2013). The Eleventh Circuit upheld most of these injunctions. *See Alabama*, 691 F.3d at 1301. However, the United States did not challenge the bill's bail provision, ALA. CODE § 31-13-18, and the district and appellate courts thus did not have the occasion to address its constitutionality.

127. *See* Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054 (9th Cir. 2013); Hernandez v. Lynch, 167 P.3d 1264 (Ariz. 2007). In addition to challenging the Arizona law on due process grounds, the petitioners in *Lopez-Valenzuela* raised constitutional preemption, excessive bail, and right to counsel claims—all of which the court rejected. *Lopez-Valenzuela*, 719 F.3d at 1057.

128. *Lopez-Valenzuela*, 719 F.3d at 1057. This Article's description of Proposition 100 closely follows the Ninth Circuit panel's account of the law in *Lopez-Valenzuela*.

129. ARIZ. CONST. art. II, § 22(A)(4). The constitutional provision also carves out exceptions

legislature has enacted several laws implementing this provision, including a rule forbidding judges from releasing a defendant on bail "if the court finds (1) that the proof is evident or the presumption great that the person committed a serious offense, and (2) probable cause that the person entered or remained in the United States illegally."[130] While Arizona's constitution does not define "serious felony offense," the state's legislature has defined it by statute as "any Class 1, 2, 3, or 4 felony or aggravated driving-under-the-influence offense."[131] Thus defined, Proposition 100 covers a broad range of nonviolent felonies, including unlawfully copying or selling sound recordings,[132] altering a lottery ticket with intent to defraud,[133] and computer tampering with intent to defraud.[134] "Non-custodial sentences are possible for several of these crimes."[135]

A. The Insights and Limitations of Equal Protection

Proposition 100, like its Missouri and Alabama counterparts, would seem to raise obvious equal protection concerns. Under the Arizona law, courts are constitutionally forbidden to grant pretrial release to undocumented immigrants arrested for some felonies, but are constitutionally required to make individualized bail determinations for all other defendants arrested for those offenses. The group this law selectively burdens, undocumented immigrants, is undoubtedly subordinated and politically marginalized.[136] Moreover,

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to the general bailability rule for defendants charged with capital offenses and certain sex offenses, *id.* § 22(A)(1), defendants charged with felonies while released on bail, *id.* § 22(A)(2), and defendants who pose a substantial public danger, *id.* § 22(A)(3).

130. ARIZ. R. CRIM. P. 7.2(b).

131. *Lopez-Valenzuela*, 719 F.3d at 1057; *see also* ARIZ. REV. STAT. ANN. § 13-3961(A)(5)(b) (2013).

132. *See* ARIZ. REV. STAT. ANN. § 13-3705.

133. *Id.* § 5-566.

134. *Id.* § 13-2316.

135. *Lopez-Valenzuela*, 719 F.3d at 1078 n.7 (Fisher, J., dissenting).

136. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority." (quoting United States v. Carolene Prods., Co., 304 U.S. 144, 152-53 n.4 (1938))); Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 2 (2008) (citing evidence of public animus toward undocumented immigrants).

alienage is one of only five classifications to which the Supreme Court has formally applied heightened scrutiny.[137]

However, while no court has analyzed whether Proposition 100 violates the Equal Protection Clause,[138] such a claim could face several doctrinal hurdles. The Court's decision in *Graham v. Richardson*, applying strict scrutiny to classifications based on alienage,[139] is typically regarded as the "high-water mark of judicial protection of aliens."[140] Since then, the Court has applied rational basis review to federal alienage laws in recognition of Congress's constitutional authority over immigration and naturalization issues.[141] Although the Court has continued applying heightened scrutiny to state laws targeting aliens,[142] whether this level of review would apply to laws targeting undocumented immigrants in criminal cases is unclear. First, the case law is unclear as to which standard of review should apply to state laws regulating undocumented (as opposed to "legal") aliens. In *Plyler v. Doe*, the Court applied intermediate scrutiny to invalidate a Texas statute excluding undocumented immigrants from public schools,[143] but at the same time cautioned that "[u]ndocumented aliens cannot be treated

137. *See Graham*, 403 U.S. at 372 (applying heightened scrutiny to a statute conditioning welfare benefits on citizenship). The other four classifications to which the Court has formally applied heightened scrutiny are race, *see* Loving v. Virginia, 388 U.S. 1, 11 (1967); national origin, *see* Korematsu v. United States, 323 U.S. 214, 215-16 (1944); sex, *see* Craig v. Boren, 429 U.S. 190, 197 (1976); and the marital status of one's parents, *see* Trimble v. Gordon, 430 U.S. 762, 766-67, 769 (1977). *See also* Yoshino, *supra* note 8, at 756 & nn. 63-71 (identifying the five heightened scrutiny classifications and observing that "[a]ll classifications based on other characteristics—including age, disability, and sexual orientation—currently receive rational basis review") (citations omitted).

138. The plaintiffs-appellants did not bring an equal protection claim in the Ninth Circuit case reviewing Proposition 100. *See Lopez-Valenzuela*, 719 F.3d at 1057. In the Arizona case challenging Proposition 100, the petitioners did in fact raise an equal protection claim. *See* Hernandez v. Lynch, 167 P.3d 1264, 1270 (Ariz. 2007). The Arizona Supreme Court declined to "subject Proposition 100 to an independent equal protection analysis," however, based on the bizarre assumption that "[s]uch an analysis is unnecessary because its result will be identical to the result of the inquiry ... [one] must undertake to determine whether Proposition 100 comports with due process." *Id.*

139. *Graham*, 403 U.S. at 372.

140. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1548 (2d ed. 1988).

141. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81-82, 86-87 (1976).

142. *See* Adam Bryan Wall, *Justice for All? The Equal Protection Clause and Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 766-67 (2010).

143. 457 U.S. 202, 205 (1982) (describing the statute); *id.* at 223-24 (holding that the Texas statute "can hardly be considered rational unless it furthers some substantial goal of the State").

as a suspect class because their presence in this county in violation of the law is not a 'constitutional irrelevancy.'"[144] Second, the Court has applied rational basis review to state laws that restrict aliens from participating in activities that are central to the state's sovereign functioning.[145] While these laws are easily distinguishable from provisions that deny bail to undocumented immigrants,[146] they nonetheless demonstrate the Court's reluctance to intervene in functions it deems central to a state's "right to govern."[147]

Thus, with regard to state laws governing undocumented immigrants, the Court's equal protection doctrine is complicated at best, contradictory at worst. This is not to suggest that equal protection doctrine cannot, or should not, be used to challenge laws that categorically deny bail to undocumented immigrants. However, given the Court's steady retrenchment of protections afforded under the Equal Protection Clause,[148] the drawbacks of such a strategy are considerable.

B. The Insights and Limitations of Due Process

In contrast to the challenges of analyzing bail laws targeting undocumented immigrants under the Equal Protection Clause, the

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144. *Id.* at 223.

145. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982) (upholding a California law requiring state "peace officers" to be U.S. citizens); Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (upholding a New York statute requiring public school teachers to be U.S. citizens); Foley v. Connelie, 435 U.S. 291, 297, 299-300 (1978) (upholding a New York law restricting membership in the state police force to U.S. citizens).

146. The Court has been quick to uphold state laws that make citizenship a requirement for public positions that involve "the basic functions of government," *Foley*, 435 U.S. at 297, but it has not applied rational basis to laws that target aliens for special burdens. Furthermore, in *Foley*, the Court concluded that state classifications based on alienage merit heightened scrutiny if they threaten "the noncitizens' ability to exist in the community." *Id.* at 295. State bail laws that categorically prevent undocumented immigrants from being released into the community pending trial would thus seem to be a prime example of a law that should merit heightened scrutiny.

147. *Id.* at 297; *see also Plyler*, 457 U.S. at 228 n.23 ("Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.").

148. *See, e.g.*, Yoshino, *supra* note 8, at 757-76 (describing how the Court has limited its equal protection jurisprudence by limiting the number of classifications that receive heightened scrutiny, reducing protections for those groups that fall within a protected class, and invalidating legislation designed to remedy discrimination).

Court's due process doctrine provides a relatively clear framework for evaluating their constitutionality. The governing standard for pretrial detention laws was established in *United States v. Salerno*.[149] Under the federal Bail Reform Act of 1984 challenged in *Salerno*, judges are empowered to deny pretrial release to defendants charged with certain serious felonies[150] upon finding that "no condition[s]" of pretrial release can "reasonably assure ... the safety of any other person and the community."[151] The Court rejected arguments that the Bail Reform Act violates the Eighth Amendment's Excessive Bail Clause[152] and that the law violates substantive due process.[153]

Although it rejected the petitioner's due process challenge, the Court affirmed that pretrial detention laws implicate a fundamental right.[154] *Salerno* and related cases thus make clear that heightened scrutiny applies to any state pretrial detention law.[155] This height

149. 481 U.S. 739, 747 (1987). In addition to the substantive claims addressed in *Salerno*, the Court also articulated the standard for raising a facial constitutional challenge to a statute. *See id.* at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). *But see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 919 (2011) (arguing that in practice the Court's standard for evaluating facial challenges is not as stringent as this language suggests).

150. Specifically, under the Bail Reform Act, pretrial detention is authorized in cases involving crimes of violence, offenses punishable by death or life imprisonment, drug offenses punishable by more than ten year's imprisonment, certain offenses involving a minor victim, and offenses committed by a person who has previously been convicted of two or more serious felonies. *See* 18 U.S.C. § 3142(f)(1) (2012).

151. *Id.* § 3142(e); *see Salerno*, 481 U.S. at 742.

152. *See Salerno*, 481 U.S. at 752-55. While a full discussion of the Court's Excessive Bail Clause analysis is beyond this Article's scope, *Salerno* contains dicta that makes challenging categorical denial of bail under this provision difficult. *See id.* at 752 ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all."); *cf.* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

153. *See Salerno*, 481 U.S. at 746-52.

154. *See id.* at 750; *see also* Foucha v. Louisiana, 504 U.S. 71, 93 (1992) (invalidating a state law that allowed for the continued confinement of defendants acquitted on an insanity defense regardless of whether examining doctors recommended release and stating that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action").

155. Interestingly, Justices have cited *Salerno*'s heightened scrutiny standard when condemning what they perceive to be unwarranted extensions of the standard to other due process contexts. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting)

ened scrutiny standard requires a threefold inquiry into whether a pretrial detention law "constitutes impermissible punishment or permissible regulation."[156] As a threshold matter, a pretrial detention law violates due process if the legislature "expressly intended to impose punitive restrictions."[157] If the detention law survives this examination of legislative intent, it will satisfy due process if (1) "an alternative purpose to which the restriction may rationally be connected is rationally assignable to it"—that is, the law serves "a legitimate regulatory goal"—and (2) the law does not "appear[ ] excessive in relation to the alternative purpose assigned to it."[158] The Court subsequently confirmed that this twofold inquiry is equivalent to the more conventional heightened scrutiny examination into whether a law that infringes a "fundamental" liberty interest "is narrowly tailored to serve a compelling state interest."[159]

Salerno's application of this heightened scrutiny standard provides further guidance as to what safeguards must exist for a pretrial detention provision to satisfy due process. First, the Court held that "[t]he legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention

("We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for ... so-called heightened scrutiny protection—that is, rights which are deeply rooted in this Nation's history and tradition." (citing, inter alia, *Salerno*, 481 U.S. at 751)) (internal quotation marks omitted); *see also Foucha*, 504 U.S. at 93 (Kennedy, J., dissenting) ("We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard." (citing *Salerno*, 481 U.S. at 750-51)).

156. *Salerno*, 481 U.S. at 747; *see also* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished.").

157. *Salerno*, 481 U.S. at 747.

158. *Id.* (alterations and internal quotation marks omitted).

159. *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (citing *Salerno* among a "line of cases" that applies this standard). In its decision upholding Proposition 100, the Ninth Circuit failed to recognize that *Salerno* required this heightened scrutiny standard; the *Lopez-Valenzuela* court frequently misstated the applicable standard of review and conflated the analytically distinct inquiries that *Salerno* requires. Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1061 (9th Cir. 2013) ("[T]he correct inquiry under *Salerno* is whether Proposition 100 is reasonably related to the legitimate governmental objective of controlling the flight risk.") (alterations and internal quotation marks omitted); *id.* at 1064 ("To strike down Proposition 100 ... would require us to find that Proposition 100 'is not reasonably related to a legitimate goal' and is 'arbitrary and purposeless' such that we 'may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted.' " (quoting *Bell*, 441 U.S. at 539)); *id.* ("Because Proposition 100 is reasonably related to the legitimate goal of controlling flight risk, we hold that it is not excessive in violation of substantive due process under the Constitution of the United States.").

provisions as punishment for dangerous individuals."[160] Next, the Court affirmed that the law's purpose was to "prevent[] danger to the community," and that this purpose is doubtless a "legitimate regulatory goal."[161] Finally, the Court identified several limiting features of the law that ensured it was not "excessive in relation" to its regulatory goal:

> The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes.... The arrestee is entitled to a prompt detention hearing, ... and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act. Moreover, ... the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government.... [T]he statute at issue here requires that detainees be housed in a facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.[162]

The Court further emphasized that the Bail Reform Act entitled individuals to a "full-blown adversary hearing" on their eligibility for pretrial release[163] and permitted judges to deny release only if they found that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[164] In light of these safeguards, the Court held that the law was adequately tailored to its goal of ensuring public safety.

As the dissenting opinions illustrate, *Salerno*'s holding is not beyond criticism.[165] Whatever its vices, however, *Salerno* possesses

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160. *Salerno*, 481 U.S. at 747. In reaching this conclusion, the Court relied on the detailed Senate Judiciary Committee Report on the Bail Reform Act, which emphasized that the bill's purpose was to empower courts to deny pretrial release to a "small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons." S. REP. NO. 98-225, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189.

161. *Salerno*, 481 U.S. at 747.

162. *Id.* at 747-48 (citations and internal quotation marks omitted).

163. *Id.* at 750.

164. *Id.* at 742 (quoting 18 U.S.C. § 3142(e)(1) (2012)).

165. *See id.* at 755-56 (Marshall, J., dissenting); *id.* at 767-68 (Stevens, J., dissenting). One of the principal objections is that, by authorizing judges to determine a defendant's future danger, the Bail Reform Act requires courts to treat untried indictments as evidence, and thereby threatens the presumption of innocence. *See id.* at 762-66 (Marshall, J., dissenting);

the virtue of clarity relative to the Court's equal protection cases concerning alienage. Accordingly, *Salerno* offers a useful due process tool for addressing equality concerns that arise from states' treatment of undocumented immigrants.[166] There are, however, at least two underdeveloped dimensions of *Salerno*'s holding that appear to have been a source of confusion to those courts that have evaluated the constitutionality of Arizona's bail law.

First, courts have struggled to identify the correct historical inquiry with respect to whether a bail law targeting undocumented immigrants violates due process. The Supreme Court has made clear that, in due process cases, a "universal and long-established tradition" may create a "strong presumption" that a particular liberty restriction is constitutional.[167] Less clear, however, is the level of precision with which one should define a particular historical "tradition" of restricting liberty. As both the Ninth Circuit and the Arizona Supreme Court have observed, many states have enacted laws that restrict the right to bail for serious felonies.[168] For example, a longstanding, but limited, exception to the general rule requiring an individualized assessment of flight risk applies to capital cases.[169] There are, however, at least two ways of framing the relevance of this information.

One could simply treat the historical existence of these bail restrictions as evidence that a state does not infringe on a right that is "deeply rooted in this Nation's history and tradition"[170] by

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see also Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 23-24 n.4 (2010) (providing a survey of the academic debate concerning *Salerno* and cases that uphold civil detention laws).

166. *Cf.* Yoshino, *supra* note 8, at 750-51 ("The Court has long used the Due Process Clauses to further equality concerns.").

167. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347-48 (2011) (quoting Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002)).

168. *See* Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1062-63 (9th Cir. 2013); Hernandez v. Lynch, 167 P.3d 1264, 1274 (Ariz. 2007).

169. *See Salerno*, 481 U.S. at 753 (observing that a court may "refuse bail in capital cases"). This capital felony exception has roots in English common law. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *298-300; *see also* United States v. Melendez-Carrion, 790 F.2d 984, 997 (2d Cir. 1986) (discussing the history of discretionary bail determinations in capital cases). Consistent with this tradition, the Judiciary Act of 1789 permitted, but did not require, judges to deny bail in capital cases based on "the nature and circumstances of the offence, and of the evidence, and the usages of law." Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

170. McDonald v. City of Chi., 130 S. Ct. 3020, 3036 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

enacting new laws that categorically deny bail to certain classes of defendants. The Ninth Circuit panel, for example, appears to have adopted this approach in holding that Arizona's bail law is "neither unprecedented nor unique" and that Proposition 100 is "nothing more than an extension of Arizona's existing pretrial detention scheme."[171] Under this approach, if states have traditionally been empowered to create statutory exceptions to the right to an individualized bail determination, then nothing is problematic about Arizona creating another such exception.

An alternative approach, however, is to examine whether a bail law is historically exceptional in terms of who it targets for unequal treatment. Under this approach, courts would accord significance to the fact that a law appears to impose a novel form of discrimination. The salient question would therefore be whether Proposition 100 is novel in terms of classifying defendants based on a characteristic unrelated to the severity of the felony for which they have been charged. If one adopts the conventional position that "[t]he Equal Protection and Due Process Clauses have very different offices,"[172] this information would be of little relevance. With respect to bail laws targeting illegal immigrants, however, the fact that a law imposes a novel form of discrimination seems obviously relevant both to whether a bail law is "excessive in relation" to a legitimate regulatory goal, and to whether the legislature "expressly intended" for the law to be a form of punishment.[173]

Unfortunately, there is little case law clarifying which of these approaches is correct. The Court has often stressed the relevance of historical inquiry to the determination of *whether* a right should be recognized as sufficiently fundamental to be protected under the Due Process Clauses.[174] In undertaking this inquiry, courts should define the right with enough specificity for history to provide a meaningful constraint on judicial law making under the Due Process Clauses.[175] It is already settled, however, that state bail

171. *Lopez-Valenzuela*, 719 F.3d at 1062-63.

172. Sunstein, *supra* note 95, at 67.

173. *Salerno*, 481 U.S. at 747.

174. *See supra* notes 80-82 and accompanying text.

175. *See Glucksberg*, 521 U.S. at 721 ("[W]e have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.") (citations and internal

laws implicate a fundamental right to be free from bodily restraint.[176] Therefore, in evaluating laws denying bail to undocumented immigrants, the role of historical inquiry is to determine whether the laws are adequately tailored to a legitimate regulatory interest. As to this question, the Court's due process cases do not explicitly address the level of generality at which a historical inquiry should be framed.

The second underdeveloped dimension of *Salerno*'s holding concerns the relevance of legislative history to whether the legislature "expressly intended" for a detention law to be punitive. Generally, the function of heightened scrutiny is to "smoke out" improperly motivated government action.[177] The Court has been unclear, however, as to what evidentiary weight should be placed on statements in the legislative record suggesting that particular legislators had improper motivations for supporting the law.[178] In *Salerno*, the Court relied on statements and findings in the legislative record to conclude that Congress did *not* intend for the Bail Reform Act to be punitive.[179] However, there appears to be little case law applying *Salerno* in which courts have identified statements in the legislative record suggesting that the law was intended to be punitive.[180]

In another context in which a statute's punitive intent is constitutionally fatal—bill of attainder claims[181]—federal appellate courts have declined to conclude that the legislature possessed

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quotation marks omitted).

176. *See supra* note 154 and accompanying text.

177. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) ("[T]he purpose of strict scrutiny [in equal protection cases] is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989))); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that First Amendment law is structured to ferret out improper government motives).

178. *See supra* notes 102-105 and accompanying text.

179. United States v. Salerno, 481 U.S. 739, 747 (1987).

180. Indeed, the Ninth Circuit panel's decision upholding Proposition 100 is the only case I have identified in which the court addressed such statements. Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1059-62 (9th Cir. 2013).

181. *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846-47 (1984) (defining a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial").

punitive intent based on individual statements in the legislative record.[182] Such an approach sits uncomfortably, however, with the realities underlying Arizona's enactment of Proposition 100. To be sure, Proposition 100's legislative history includes statements that the law is justified because undocumented immigrants pose a greater flight risk than other individuals.[183] Particularly striking, however, is the number of statements arguing that the law was justified to punish, in the words of State Representative Ray Barnes, a crime "that ... has already been committed" when defendants entered the country illegally.[184] To cite just a few of the examples identified in the dissenting opinion of *Lopez-Valenzuela v. County of Maricopa*, one of the bill's sponsors, State Representative Russell Pearce, explained that the Arizona law

> bridges the gap, a loophole in the law that would allow people who are not in this country [ ]legally who have no business to be released if they commit any crime, they have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally.[185]

Pearce further urged Proposition 100's enactment "on the ground that 'all illegal aliens in this country ought to be detained, debriefed and deported.'"[186] Similarly, State Senator Jack Harper said, "[W]hat part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything."[187]

Thus, when reviewing Proposition 100, the Ninth Circuit confronted a legislative record demonstrating that at least some of

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182. *See, e.g.*, ACORN v. United States, 618 F.3d 125, 141 (2d Cir. 2010) ("The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish."); Foretich v. United States, 351 F.3d 1198, 1225 (D.C. Cir. 2003) ("Several isolated statements are not sufficient to evince punitive intent ... and cannot render a statute a bill of attainder without any other indicia of punishment. Evidence in the legislative history can bolster our conclusion, however, where other factors suggest punitiveness.") (citations omitted) (alterations and internal quotation marks omitted).

183. *See Lopez-Valenzuela*, 719 F.3d at 1060-61.

184. *Id.* at 1075 (Fisher, J., dissenting).

185. *Id.* at 1074 (alterations in original).

186. *Id.*

187. *Id.* As Judge Fisher's dissenting opinion observed, *see id.*, these legislators failed to recognize that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

the bill's sponsors and supporters were motivated by a desire to punish undocumented immigrants. Operating without clear guidance as to how to evaluate these statements, the Ninth Circuit panel split the difference between declining to consider them and giving them significant weight. Citing an equal protection case,[188] the panel majority acknowledged the relevance of statements demonstrating individual legislators' punitive motivations. It concluded, however, that a "fair reading" of the record as a whole "does not support ... [the] argument that Proposition 100's primary purpose is to punish and deter immigration offenses."[189] In a dissenting opinion, Judge Fisher plausibly argued that "*Salerno* does not require the plaintiffs to prove that punishment was the sole or even the predominant purpose of the legislation,"[190] and that "the record plainly shows that lawmakers designed Proposition 100—at least in large part—to punish undocumented immigrants for being in the United States unlawfully."[191] The Ninth Circuit panel was therefore split not only by conflicting interpretations of the record, but by different views of what evidentiary weight one should assign to "bad motivation" statements.

III. APPLYING *WINDSOR*

If *Windsor* is to offer more than a vague-but-promising vision of "dignity," practitioners must be capable of using it to address other constitutional problems in which liberty and equality concerns are deeply interrelated. State laws denying bail to undocumented immigrants present precisely this type of problem. As explained above, these laws raise obvious equality concerns, but are not easily susceptible to an equal protection analysis.[192] And although substantive due process offers a tractable framework for analyzing

188. City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 196-97 (2003).

189. *Lopez-Valenzuela*, 719 F.3d at 1060; *see also id.* at 1059-60 ("Having reviewed all of the evidence, we are convinced[ ] ... that the record as a whole does not show that Proposition 100 was motivated by an improper punitive purpose.").

190. *Id.* at 1075 n.2 (Fisher, J., dissenting). Judge Fisher further argued that, even if *Salerno* required plaintiffs to prove that "punishment was the sole or even the predominant purpose of the legislation," the plaintiffs would have satisfied the requirement with respect to Proposition 100. *See id.*

191. *Id.* at 1074.

192. *See supra* Part II.A.

these laws, some areas of the doctrine that concern equality-related issues are underdeveloped.[193] If there were ever an area of law for which equal protection doctrine could make the Due Process Clause "all the more specific and all the better understood and preserved,"[194] this would seem to be it.

To demonstrate that *Windsor* can be taken more seriously, or at least deployed more usefully, than its detractors suggest, this Part applies its holding to analyze whether Proposition 100, the Arizona bail law, violates due process. Specifically, I will use the two doctrinal propositions distilled from *Windsor*'s holding in Part I[195] to address the due process issues that appear to have created confusion for the Ninth Circuit panel in *Lopez-Valenzuela*.[196] My goal in doing so is to show that *Windsor*'s holding can be situated within conventional due process doctrine and can be used to refine and clarify due process claims that are plausible even without recourse to *Windsor*. More broadly, I aim to show that *Windsor*'s holding can be extended beyond the area of gay rights and used by lawyers and judges who might otherwise be reluctant to invoke what they perceive to be a controversial and confusing opinion.

A. Searching for Unusual Discrimination

First, *Windsor*'s holding can help clarify the historical inquiry courts should undertake in deciding whether the Due Process Clause permits laws categorically denying bail to undocumented immigrants. In *Lopez-Valenzuela*, the panel correctly assumed that historical inquiry is relevant to whether a bail law is sufficiently tailored to a legitimate regulatory purpose.[197] The panel framed its historical inquiry, however, at a high level of generality. Specifically, it concluded that Proposition 100 was "neither unprecedented nor unique" because state laws traditionally restricted bail for defendants charged with capital offenses, and some states have extended these laws to restrict bail for other particularly serious

193. *See supra* Part II.B.
194. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).
195. *See supra* Part I.C-D.
196. *See supra* Part II.
197. *See supra* notes 170-71 and accompanying text.

felonies.[198] *Windsor*'s holding, however, suggests that the court should have framed its inquiry more precisely.

Under *Windsor*, I have argued, a law that threatens a liberty interest is more likely to violate due process if it selectively imposes a historically novel burden on a subordinated group.[199] From this proposition, it follows that in evaluating the constitutionality of Proposition 100, one should undertake a historical inquiry that is sufficiently precise to reveal any "[d]iscriminations of an unusual character."[200] Such an inquiry must be more precise than the Ninth Circuit panel's in terms of examining both the type of classification that Proposition 100 makes and the burdens that the law imposes.

First, one should evaluate whether state bail laws have traditionally included classifications based on alienage or, for that matter, any other factors unrelated to the severity of the offense for which a defendant was arrested. In recent years, such classifications have begun to appear.[201] For at least a few decades, some states' case law has permitted judges to consider alienage as a bail factor,[202] and some federal courts have followed suit.[203] Only recently, however, have states begun to make statutory classifications based on alienage. A few states have enacted statutes permitting judges to consider a defendant's immigration status when determining bail.[204] Moreover, since Proposition 100's enactment, two states passed laws categorically denying bail to undocumented immigrants,[205] and several others enacted statutes

198. Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1063 (9th Cir. 2013); *see supra* notes 168-73 and accompanying text.

199. *See supra* Part I.C.

200. *See Windsor*, 133 S. Ct. at 2692 (citation omitted); *see supra* Part I.C.

201. *See* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1423-24 (2011) (surveying state bail laws that make classifications based on immigration status).

202. *See id.* at 1424 (citing cases from California, Florida, Georgia, Kentucky, New Jersey, New York, Ohio, and Texas). The earliest case Chin identifies is *Van Atta v. Scott*, 613 P.2d 210, 216 (Cal. 1980).

203. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1791 n.238 (2013) (citing United States v. Salas-Urenas, 430 F. App'x 721, 723 (10th Cir. 2011); United States v. Miguel-Pascual, 608 F. Supp. 2d 83, 86 (D.D.C. 2009); United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 968-69 (E.D. Wis. 2008)).

204. *See* 725 ILL. COMP. STAT. ANN. 5/110-5(a) (2013); S.C. CODE ANN. § 17-15-30(B)(4) (2012).

205. *See* ALA. CODE § 31-13-18 (2012); MO. REV. STAT. § 544.470(2) (2008).

creating a rebuttable presumption that undocumented immigrants should be denied bail.[206]

Traditionally, however, state laws restrict bail based on the severity of the offense for which a defendant has been arrested rather than on the characteristics of the offender.[207] A few states carve out exceptions to this rule of general applicability for defendants who are (1) charged with specific, serious offenses for which they have previously been convicted,[208] or (2) charged with a crime committed while the defendant was released on bail, probation, or parole.[209] But typically, if a state chooses to categorically deny bail in certain cases, it will restrict bail for *any* defendant charged with a particularly serious (usually capital) offense.

By contrast, Proposition 100 appears to have been the first statute to selectively deny bail to undocumented immigrants. The Arizona law thus departs from traditional, generally applicable bail laws by making a classification that is not predicated on a defendant's prior conviction and is not based on a defendant's demonstrated propensity to flee. This alone makes Proposition 100 significantly different from traditional state bail laws and should therefore eliminate any historically rooted presumption that the liberty infringement is constitutional.[210] More striking, however, is the fact that Proposition 100 classifies individuals based on their membership in a subordinated and politically unpopular group.[211]

Moreover, Proposition 100 is unusual in terms of the severity of the restriction it imposes. Traditionally, states *permitted*, but did

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206. *See* MISS. CODE ANN. § 71-11-3(8)(c)(ii) (2008); UTAH CODE ANN. § 17-22-9.5(4) (2009); VA. CODE ANN. § 19.2-120.1 (2008).

207. *See supra* note 121 and accompanying text.

208. *See, e.g.*, R.I. CONST. art. I, § 9 (permitting denial of bail "for offenses involving the use or threat of use of a dangerous weapon" if the defendant has previously been convicted of such an offense, serious drug offenses, or a felony punishable by life imprisonment).

209. *See, e.g.*, MICH. CONST. art. I, § 15 (permitting denial of bail to a defendant charged with a "violent felony" if it was committed while on bail, probation, or parole, or if the defendant had previously been convicted of two or more such felonies).

210. *Cf.* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347-48 (2011) ("A universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." (quoting Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002)) (alterations and internal quotation marks omitted)).

211. *See supra* note 136 and accompanying text.

not *require*, judges to deny bail in capital cases based on a defendant's likely guilt.[212] This tradition is reflected in the language of state constitutions that entitle prisoners to be released on bail upon sufficient security "except for capital offenses, where the proof is evident, or the presumption great."[213] Of the state supreme courts that have interpreted such language in their constitutions, most appear to have accepted its original understanding and concluded that judges have the discretion to grant bail in capital cases.[214] Moreover, in at least three states that have abolished the death penalty, courts have held that there is now a right to bail in all felony cases.[215] Additionally, some states have adopted constitutional language clarifying that bail may be granted as a matter of discretion in capital cases,[216] while others have interpreted state statutes to grant such discretion.[217]

Some state bail laws are indeed stricter than the traditional capital felony exception in terms of both restricting bail in some noncapital cases and forbidding judges to grant bail in those cases.[218] Compared to these laws, however, Proposition 100 restricts bail for an exceptionally broad range of felonies—provided that the defendant is an undocumented immigrant. With few exceptions,

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212. *See* United States v. Melendez-Carrion, 790 F.2d 984, 997 (2d Cir. 1986) (discussing the history of bail determinations in capital cases).

213. *Id.* (quoting CONN. CONST. art. I, § 14); *see also* Foote, *supra* note 121, at 975-76 (explaining that the language in eighteenth-century constitutions was understood to preserve judicial discretion to grant bail in capital cases); Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 284 (2009) (identifying thirty-five state constitutions using this eighteenth-century language).

214. *See, e.g.*, State v. Arthur, 390 So. 2d 717, 718 (Fla. 1980) (citing cases and adopting the majority approach); State v. Hughbanks, 792 N.E.2d 1081, 1089 (Ohio 2003); *see also* Lindermayer, *supra* note 213, at 290-98 (discussing other cases adopting the majority approach).

215. *See* Martin v. State, 517 P.2d 1389, 1394 n.17 (Alaska 1974); State v. Pett, 92 N.W.2d 205, 206 (Minn. 1958); State v. Johnson, 294 A.2d 245, 249 (N.J. 1972).

216. *See* MICH. CONST. art. I, § 15; OKLA. CONST. art. II, § 8; S.C. CONST. art. I, § 15; WIS. CONST. art. I, § 8; *see also* State v. Hill, 444 S.E.2d 255, 256 (S.C. 1994) (interpreting the South Carolina Constitution as giving courts discretion to grant bail in capital cases); *Ex parte* Howell, 245 P. 66, 66 (Okla. Crim. App. 1926) (interpreting the Oklahoma Constitution as granting discretion to grant bail in capital cases).

217. *See, e.g.*, Commonwealth v. Baker, 177 N.E.2d 783, 785 (Mass. 1961).

218. *See, e.g.*, People v. Dist. Court, 529 P.2d 1335, 1335-36 (Colo. 1974) (en banc) (interpreting Colorado's constitution to forbid granting bail in capital cases); *see also* Lindermayer, *supra* note 213, at 298-301 (identifying Arizona, Colorado, Pennsylvania, and the Virgin Islands as categorically denying bail in capital cases).

states that categorically deny bail for noncapital felonies do so only for offenses punishable by life imprisonment.[219] A few states permit or require judges to deny bail in cases involving a broader range of serious felonies, including sexual assault and major drug offenses.[220] Even these states, however, restrict the right to bail for only a limited number of serious felonies, the commission of which could plausibly serve as evidence of a defendant's dangerousness or propensity to flee.[221] Proposition 100, by contrast, requires judges to deny bail for a broad range of felonies, including offenses for which a noncustodial sentence is possible.[222] Unlike the noncapital felonies for which other states permit or require judges to deny bail, these Arizona offenses have not historically been treated as strong indicators of a defendant's dangerousness or propensity to flee trial.

It is thus clear that Proposition 100 codifies "[d]iscriminations of an unusual character," and its constitutionality should therefore receive "careful consideration."[223] The law's putative regulatory goal of managing flight risk at criminal trials is no doubt a compelling governmental interest.[224] Since the founding era, however, this interest has been vindicated in noncapital cases by individually assessing a defendant's risk of flight and imposing bail conditions designed to ensure that defendant's appearance.[225] Proposition 100, by contrast, purportedly advances this goal by forbidding judges to grant bail to any undocumented immigrant arrested for particular felonies, including nonviolent ones. Given how dramatically these innovations break with historical tradition, it is easy to conclude that, insofar as it is not expressly punitive, Proposition 100 is

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219. *See* Lindermayer, *supra* note 213, at 286 & n.121.

220. *See, e.g.*, CAL. CONST. art. I, § 12 (restricting bail for felony sexual assault offenses); R.I. CONST. art. I, § 9 (restricting bail for certain controlled substance offenses).

221. *Cf.* United States v. Salerno, 481 U.S. 739, 750 (1987) (observing that the Bail Reform Act "operates only on individuals who have been arrested for a specific category of extremely serious offenses" and that "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest").

222. *See* Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1078 n.7 (9th Cir. 2013) (Fisher, J., dissenting).

223. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)).

224. *See Lopez-Valenzuela*, 719 F.3d at 1061.

225. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (establishing a right to bail in noncapital cases).

certainly "excessive in relation to"[226] its asserted regulatory purpose and therefore violates due process.

B. Weighing Legislators' Motivations

Having established that Proposition 100 imposes "[d]iscriminations of an unusual character,"[227] the second proposition this Article distills from *Windsor* is relatively easy to apply. In evaluating whether Proposition 100 violates due process because the legislature "expressly intended" it to be punitive,[228] the Ninth Circuit panel in *Lopez-Valenzuela* disagreed as to the relevance of statements by individual legislators expressing a desire to punish undocumented immigrants.[229] The majority concluded that, notwithstanding these statements, the overall legislative record suggested that Proposition 100's "primary purpose" was to manage flight risk.[230] The *Windsor* majority's evaluation of DOMA's legislative record, however, suggests that the Ninth Circuit's assessment of Proposition 100's legislative history was not sufficiently demanding.

Windsor's holding, I have argued, suggests that if a law selectively targets a subordinated group, significant weight should be assigned to evidence in the legislative record suggesting that the law was enacted for a purpose that violates due process.[231] By subjecting undocumented immigrants to a more restrictive set of bail laws than other criminal defendants, Proposition 100 singles out and places special burdens upon a subordinated group.[232] Moreover, Proposition 100's legislative record includes a number of statements by the bill's sponsors and supporters suggesting that the law should be enacted to punish those who entered the country illegally.[233] Indeed, some of the statements expressing hostility toward undocumented immigrants were made by the same legislators who elsewhere claimed that they were supporting the law to

226. *Salerno*, 481 U.S. at 747.
227. *Windsor*, 133 S. Ct. at 2692 (quoting *Louisville Gas*, 277 U.S. at 37-38).
228. *See Salerno*, 481 U.S. at 747.
229. *See supra* notes 184-91 and accompanying text.
230. Lopez-Valenzuela v. Cnty. of Maricopa, 719 F.3d 1054, 1060 (9th Cir. 2013).
231. *See supra* Part I.D.
232. *See supra* note 136 and accompanying text.
233. *See supra* notes 184-87 and accompanying text.

manage flight risk in criminal cases.[234] Under the Court's approach in *Windsor*, the legislators' statements revealing a constitutionally forbidden motivation should be given greater weight than those offering a constitutionally valid justification for the bill. Reading Proposition 100's legislative record in this manner, one would easily conclude that the Arizona legislature "expressly intended" for the law to be punitive.[235]

Ultimately, this assessment of the legislative record is consistent with both pre-*Windsor* doctrine and legislative reality. While the Supreme Court has sometimes endorsed using legislative history to identify improper constitutional motivations,[236] it is clear that legislators may manipulate the record to immunize a law against future constitutional challenges.[237] By suggesting that courts should weigh statements of discriminatory intent more heavily than statements offering a constitutionally legitimate goal, *Windsor* offers a commonsense way to resolve this tension.

CONCLUSION

The majority opinion in *Windsor*, it must be acknowledged, invites a far more critical analysis than I offer here. This Article is meant to illustrate, however, that it is possible to demystify *Windsor*'s holding so that it can be of use to judges, advocates, and others whose reasoning must conform to conventional doctrinal norms. This process requires that one accept the vagaries and internal contradictions that exist within *Windsor*, and develop an interpretation of it that is compatible with stare decisis and other

234. *Compare, e.g.*, *Lopez-Valenzuela*, 719 F.3d at 1060 (observing that one of the bill's sponsors, Representative Russell Pearce, "mentioned flight risk and public safety as the primary reasons behind the Proposition 100 laws"), *with id.* at 1074 (Fisher, J., dissenting) ("Rep. Pearce promoted the bill on the ground that 'all illegal aliens in this country ought to be detained, debriefed and deported.'").

235. United States v. Salerno, 481 U.S. 739, 747 (1987).

236. *See supra* notes 103-05 and accompanying text.

237. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31-37 (1997); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013) (reporting, based on a detailed survey of 137 congressional staffers who have legislative drafting responsibilities, that 69 percent of respondents said "their expectations about how courts would rule on the constitutionality of statutes played a significant role in the drafting process").

fundamental norms of American law. By doing so, it is possible to recognize *Windsor*'s value beyond the area of gay rights (as those rights are conceived by Justice Kennedy)[238] and to evaluate its potential for groups who have not yet made significant strides under the Court's "dignity" doctrine.

238. *Cf.* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240 (2006) (suggesting that the "same-sex marriage movement has accelerated and privileged the more assimilationist aspects of the gay rights struggle").