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— Symposium —

THE SUPREME COURT'S TREATMENT
OF SAME-SEX MARRIAGE IN *UNITED
STATES V. WINDSOR* AND
HOLLINGSWORTH V. PERRY: ANALYSIS
AND IMPLICATIONS

INTRODUCTION

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For many years, gay rights advocates focused primarily on overturning sodomy laws. The Supreme Court initially took a skeptical view of those efforts. In 1976, the Court summarily affirmed a ruling that upheld Virginia's sodomy law.¹ And a decade later, in *Bowers v. Hardwick*,² the Court not only rejected a constitutional challenge to Georgia's sodomy law but ridiculed the claim.³ That precedent lasted less than two decades before being overruled by *Lawrence v. Texas*.⁴

Meanwhile, the effort to secure legal protection for gay rights expanded to other issues. For example, in *Romer v. Evans*,⁵ the

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1. *Doe v. Commonwealth's Att'y*, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975) (3-judge court). Although this challenge failed, it is worth noting that there was a dissenting opinion in the district court, *see* 403 F. Supp. at 1203 (Merhige, J., dissenting), and three justices would have set the case for plenary consideration in the Supreme Court, *see* 403 U.S. at 901 (Brennan, Marshall & Stevens, JJ., "would note probable jurisdiction and set the case for oral argument").
2. 478 U.S. 186 (1986).
3. *See id.* at 194 ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."); *id.* at 196 (Burger, C.J., concurring) ("Condemnation of [sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards.")

The statute at issue in *Bowers v. Hardwick* later was invalidated for violating the right to privacy protected under the state constitution. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

4. 539 U.S. 558 (2003).
5. 517 U.S. 620 (1996).

Supreme Court struck down a state constitutional amendment that repealed all existing laws and policies prohibiting discrimination on the basis of sexual orientation because the amendment was based on illegitimate animus against an unpopular group.⁶

More significantly, same-sex couples began to seek the right to marry. They won a preliminary victory in Hawaii, where the state supreme court held that a ban on same-sex marriage was subject to strict scrutiny.⁷ Although the Hawaii case was short-circuited by the adoption of a constitutional amendment allowing the state to limit marriage to opposite-sex couples,⁸ the prospect that other states and the federal government might have to recognize same-sex marriages performed in Hawaii prompted Congress to enact the Defense of Marriage Act (DOMA) in 1996.⁹ Some courts, relying on state constitutional provisions, did strike down bans on same-sex marriages.¹⁰ One of those decisions came from California,¹¹ where the voters responded by passing Proposition 8 to amend the state constitution to limit marriage to opposite-sex couples.¹²

Litigation challenging the constitutionality of Proposition 8 and of DOMA reached the Supreme Court last term. In *Hollingsworth v. Perry*,¹³ the Court held that the proponents of the California amendment lacked standing to appeal a lower court ruling that struck down the Golden State's ban on same-sex marriage after state officials declined to do so.¹⁴ In *United States v. Windsor*,¹⁵ the Court held that section 3 of DOMA,¹⁶ which defines marriage for federal purposes as open only to opposite-sex couples, was unconstitutional. Both of these

6. *Id.* at 632–35.

7. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

8. HAW. CONST. art. I, § 23 (ratified 1998).

9. Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)). More than 30 states also adopted measures to limit marriage to opposite-sex couples. E.g., ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; NEV. CONST. art. I, § 21; OHIO CONST. art. XV, § 11; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; WIS. CONST. art. 13, § 13.

10. *E.g.*, *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

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

12. CAL. CONST. art. I, § 7.5 (approved 2008).

13. 133 S. Ct. 2652 (2013).

14. *Id.* at 2668.

15. 133 S. Ct. 2675 (2013).

16. 1 U.S.C. § 7 (2012).

decisions were 5–4 rulings, although the votes did not fall along the same lines: the majority in *Windsor*, the DOMA case, consisted of the four more liberal justices joined by Justice Kennedy, who wrote the opinion, while the four more conservative justices dissented;¹⁷ the majority in *Hollingsworth v. Perry* consisted of Chief Justice Roberts and Justice Scalia, from the conservative wing, and Justices Ginsburg, Breyer, and Kagan from the more liberal side, while the conservative Justices Alito and Thomas as well as the liberal Justice Sotomayor joined Justice Kennedy’s dissent.

The divisions within the Supreme Court and the intensity of the public debate about same-sex marriage led the editors of the Case Western Reserve Law Review to organize a symposium in October 2013 to discuss the Court’s decisions and their implications. This issue contains papers presented at that symposium. Participants included a wide range of legal scholars, social scientists, and other commentators. Several broad themes pervaded the program: doctrinal matters such as the implications of these rulings for federalism and equal protection, the role of the judiciary in addressing contentious public questions, the nature of the family, and the place of empirical and other social-scientific perspectives in legal decision making.

The papers might profitably be read in groups of two or three, although many of the themes identified above appear at many points in this issue. The first set of papers illuminates some institutional factors raised by the marriage cases. Robert Nagel focuses on Justice Kennedy’s approach to federalism in *Windsor*.¹⁸ Professor Nagel suggests that the lead opinion’s discussion of federalism does not really respect the role of the states despite rhetorical flourishes to the contrary.

Next, Nancy Scherer brings the perspective of political science to the analysis of the *Windsor* decision.¹⁹ She applies two models of judicial decision making, neither of which seeks to parse constitutional text, judicial precedent, or other traditional sources of legal interpretation. Instead, she applies the attitudinal model, which seeks to predict the votes of Supreme Court justices by focusing on each member’s judicial ideology. Then she refines her analysis by means of the strategic model, which refines the attitudinal model by recognizing that justices at least occasionally vote with an eye toward their colleagues’ preferences—this might represent a more formal way of analyzing the so-called “long game,” or at least an intermediate-term perspective. Professor Scherer applies her approach not only to

17. *Windsor*, 133 S. Ct. at 2681; *Hollingsworth*, 133 S. Ct. at 2658.

18. Robert F. Nagel, *Same-Sex Marriage, Federalism, and Judicial Supremacy*, 64 CASE W. RES. L. REV. 1119 (2014).

19. Nancy Scherer, *Viewing the Supreme Court’s Marriage Cases Through the Lens of Political Science*, 64 CASE W. RES. L. REV. 1131 (2014).

Windsor and *Perry*, the marriage cases, but also to *Craig v. Boren*,²⁰ the case that established intermediate scrutiny as the standard of review in cases involving gender-based classifications.

In the last paper in the first group, Susan J. Becker addresses the role of the judiciary and explains why court rulings that uphold a right to same-sex marriage reflect an appropriate use of judicial independence rather than a usurpation of power that properly belongs to the political branches or to the people as a whole.²¹

The next three papers address the nature of the family and its implications for judicial decision making. Maggie Gallagher and William C. Duncan criticize the *Windsor* opinion's equal protection analysis, which emphasizes the absence of a legitimate governmental interest underlying DOMA.²² Instead, these authors urge that differing views about families are sincerely held and do not reflect illegitimate animus.

Next, Frances Goldscheider, a prominent demographer, applies the tools of her field to analyzing same-sex relationships.²³ In particular, she examines long-term trends in household composition and warns against inferring overly broad generalizations about the nature of families from romanticized images of the past and misleading portraits of stable, two-parent households in which husbands and fathers went off to work to support the family while wives and mothers stayed home to raise the children and take care of domestic chores.

Helen M. Alvaré closes the second set of papers by examining the role of children in the development of family law.²⁴ In particular, Professor Alvaré contends that constitutionalizing a right to same-sex marriage changes the law's focus from imposing and enforcing duties on adults toward children toward granting rights to adults that might only indirectly benefit children.

The third set of papers directly addresses equal protection in the marriage context. Andrew Koppelman contends that *Windsor*, despite

20. 429 U.S. 190 (1976).

21. Susan J. Becker, *The Evolution Toward Judicial Independence in the Continuing Quest for LGBT Equality*, 64 CASE W. RES. L. REV. 863 (2014).

22. Maggie Gallagher & William C. Duncan, *The Kennedy Doctrine: Moral Disagreement and the "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 949 (2014).

23. Frances Goldscheider, *Rescuing the Family from the Homophobes and Antifeminists: Analyzing the Recently Developed and Already Eroding "Traditional" Notions of Family and Gender*, 64 CASE W. RES. L. REV. 1029 (2014).

24. Helen M. Alvaré, *Same-Sex Marriage and the "Reconceiving" of Children*, 64 CASE W. RES. L. REV. 829 (2014).

the absence of discussion of the standard of review, can be understood as part of the Supreme Court's larger body of equality jurisprudence.²⁵ He explains that the *Windsor* Court did not treat DOMA as a statute that classified on the basis of sexual orientation but rather as one that drew a line based on sex: the statute classified on the basis of the sex of the parties to the marriage. Professor Koppelman goes on to defend the Court's silence on the standard of review by situating *Windsor* in the context of other cases that did not rely on an explicit level of scrutiny but instead invalidated laws or policies that rested on no more than a bare desire to harm. Then he argues for an expansive definition of "bare desire to harm" that includes extreme indifference toward the interests of a group that is singled out for extraordinarily harsh treatment.

By contrast, Sherif Girgis criticizes *Windsor* for having arbitrarily defined marriage under the Constitution when the document was silent on the subject.²⁶ Girgis finds that Justice Alito's dissenting opinion was the most persuasive of all the approaches taken in the case. He contends that the federalism challenge to DOMA was misguided, rejects the argument that the federal statute improperly classified on the basis of either sexual orientation or sex, and that the majority's approach was no more defensible than that taken in *Lochner v. New York*.²⁷

The third paper in this group serves as a bridge between the discussions of equality and federalism. Nancy C. Marcus explains why the brief discussion of state power in *Windsor* should not be understood as supporting federalism-based objections to bans on same-sex marriage.²⁸ While conceding that Edith Windsor had not asserted a federalism claim, Professor Marcus analyzes why Justice Kennedy's federalism discussion ultimately makes the ruling one about equal liberty rather than state autonomy.

The last two papers from the symposium involve state authority. First, Ernest A. Young maintains that *Windsor* can and should be understood as a federalism ruling but that the decision so understood does not necessarily give the states carte blanche to define marriage: any state definition of marriage still must satisfy the requirements of the Equal Protection Clause, an issue that was irrelevant to the

25. Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 1045 (2014).

26. Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971 (2014).

27. 198 U.S. 45 (1905).

28. Nancy C. Marcus, *When Quacking Like a Duck Is Really a Swan Song in Disguise: How Windsor's State Powers Analysis Sets the Stage for the Demise of Federalism-Based Marriage Discrimination,* 64 CASE W. RES. L. REV. 1073 (2014).

resolution of the dispute over DOMA's validity.²⁹ Professor Young goes on to make a broader point, that the Constitution does not give the federal government express or implied authority to define marriage.

Second, Robin Fretwell Wilson examines the tension between recognizing both a right to same-sex marriage and space for religiously motivated opponents of such a right.³⁰ She notes that the political process sought to accommodate both sets of interests in those jurisdictions where same-sex marriage was adopted by legislation or ballot initiative but that recognizing same-sex marriage through the judicial process might make accommodation more complicated. But while recognizing that approval of same-sex marriage by legislation or initiative might be less likely in those states that have not already taken this path, she urges that the political process nevertheless holds greater promise of reconciling the competing interests than does litigation.

The final paper in this issue was not actually presented at the symposium but reflects much of the program's content. Ronald Kahn, a prominent political scientist who specializes in the Supreme Court and constitutional theory, attended all of the conference presentations and wrote a synthetic essay that might be understood as the comprehensive work of a discussant.³¹ However, Professor Kahn seeks to go beyond summarizing and synthesizing the various papers and also tries to explain how and why a purportedly conservative Supreme Court rendered decisions in both *Windsor* and *Perry* that advanced gay rights without finally resolving whether the Constitution affords a right to same-sex marriage. That question remains on the table, but these rulings will play a prominent role in litigation and political debate in the future.

29. Ernest A. Young, *Is There a Federal Definitions Power?*, 64 CASE W. RES. L. REV. 1269 (2014).

30. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014).

31. Ronald Kahn, *Understanding United States v. Windsor and the Symposium Contributions Using Unidirectional and Bidirectional Models of Supreme Court Decision Making*, 64 CASE W. RES. L. REV. 1293 (2014).