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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

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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

Nancy C. Marcus[†]

ABSTRACT

United States v. Windsor may, in the views of some, walk and talk like a federalist duck, but upon closer examination, the decision is not a federalist decision at all but is, rather, a swan song for federalist-based marriage discrimination.

Leading up to *Windsor*, federalist-based arguments for marriage equality were advocated by the late twentieth-century minimalist movement, which viewed the judiciary as an ineffective agent of social change and urged the narrowest of constitutional claims, pessimistic about the likelihood of successful broad individual rights claims to same-sex marriage rights. After *Windsor*'s release, some have interpreted it as being a federalist decision, due in part to the opinion's inclusion of a state powers discussion.

This Article describes both how backlash-fearing minimalists were wrong and how those who read *Windsor* as a federalist decision are wrong. The Article details an evolution in LGBT rights advocacy from backlash-fearing minimalism to a renewed faith in the courts serving an important role in the protection of constitutional rights. Finally, the Article offers alternative readings of *Windsor*'s state powers discussion in light of the passage's surrounding language, including the Court's pointed invocation of *Loving v. Virginia* as an applicable federalism-limiting precedent. Whether the state powers discussion in *Windsor* is read cynically as strategic rhetorical maneuvering or more generously, the decision does not in any sense

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leave marriage equality up to the states to decide but rather builds the latest layer of a growing foundation for the ultimate affirmation of same-sex marriage rights by the Supreme Court.

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INTRODUCTION

The adage, “if it walks like a duck and quacks like a duck” is a familiar one with various formulations and contested origins. Some attribute “the duck test” to “celebrated ‘Hoosier Poet’” James Whitcomb Riley, who purportedly wrote over a century ago, “[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.”¹ And yet, some attribute a less benign history to the duck test, tracing its roots to a McCarthy era anti-Communist labor union activist, quoted as saying in the height of the “Red Scare” targeting perceived Communists in the United States, “A door-opener for the Communist party is worse than a

1. See *Walczak v. Labor Works-Fort Wayne LLC*, 983 N.E.2d 1146, 1148 n.1 (Ind. 2013) (citing MICHAEL HEIM, *EXPLORING INDIANA HIGHWAYS: TRIP TRIVIA* 68 (2007)).

member of the Communist party. When someone walks like a duck, swims like a duck, and quacks like a duck, he's a duck."²

In retrospect, it is now well known that not everyone who was charged with quacking like a Communist during the McCarthy Era was in fact a Communist—far from it.³ The Red Scare highlighted the reality that things are often not what they seem. Indeed, as history has revealed after the fact, even those who persecuted perceived Communists in the McCarthy Era were, themselves, not what they seemed—patriotic Americans protecting liberty. Rather, they were misguided (to put it kindly) politicians who violated the constitutional rights and liberties of those they charged as anti-American Communists.⁴

Which is to say, not to ruffle the feathers of any patriotic Communist-hating duck hunters, but the “walks like a duck, quacks like a duck” adage is one that should not be used liberally but should be taken with a grain of context and awareness of its malleability.

This Article explores a different context for the application of the duck test: *United States v. Windsor*,⁵ the Supreme Court's historic marriage equality decision striking down Section 3 of the Defense of Marriage Act (DOMA), which codified a federal definition of marriage that excluded same-sex couples, even if their marriages were

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2. See, e.g., *id.* (citing THE YALE BOOK OF QUOTATIONS 131 (Fred R. Shapiro ed., 2006) (attributing quote to labor union activist James B. Carey)). But c.f. *MCI Telecomms. Corp. v. Pac. Bell*, No. 96-02-014, 1997 WL 868363 at *5 (Cal. Pub. Cont. Oct. 9, 1997) (“It might be thought that this case presents the perfect application for the well-known ‘duck test’ originally proposed by the labor leader Walter Reuther.”); Appellate Petition for Review at *5 n.10, *Denny’s Inc. v. Workers’ Compensation Appeals Bd.*, 2003 WL 23017886 (Cal. 2003) (No. S113539) (“The quote is sometimes attributed to Walter Reuther (1907-1970), American labor leader in the ’30s who is said to have made the remark in response to a journalist’s question of how to spot a communist.”).
 3. See, e.g., Brief of *Amici Curiae* Victims of the McCarthy Era, In Support of Humanitarian Law Project et al. at 7, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89) (“In their investigations of more than four million federal civilian employees, the government’s two hundred loyalty boards did not uncover a single instance of actual espionage or subversive malfeasance” (citing GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 351 (2004))).
 4. See generally *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional an Arizona statute that effectively criminalized membership in subversive organizations by public employees).
 5. 133 S. Ct. 2675 (2013).

recognized in their states of domicile.⁶ In *Windsor*, Edie Windsor, the surviving widow in a same-sex marriage that was recognized in the couple's home state, was slapped with a \$363,053 estate tax bill after her partner died, pursuant to DOMA's requirement that only opposite-sex marriages be recognized as valid under federal law.⁷ Had Edie's spouse been a man and their marriage recognized as valid under federal law, Edie would not have been taxed for the marital estate. After she unsuccessfully sought relief from the IRS, Edie brought a federal lawsuit seeking a refund and challenging the constitutionality of DOMA on equal protection grounds under the Fifth Amendment.⁸

In contrast with the *Windsor* action, another lawsuit challenging Section 3 of DOMA had also raised Tenth Amendment and Spending Clause claims.⁹ As described in this Article, asserting Tenth Amendment challenges to DOMA was an approach that appealed to some who viewed federalism challenges to the Act as strategically savvy in a minimalist appealing-to-conservatives way. Although Edie Windsor did not similarly assert a Tenth Amendment challenge to DOMA on federalism grounds, the Supreme Court's final decision in her favor did contain a passage addressing the general legislative authority of states to set marriage laws.¹⁰ This inclusion of a state powers passage in the majority opinion led some to view the decision as a federalist decision that renders the authority to define and regulate marriage exclusively a matter of state prerogative.¹¹

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6. 1 U.S.C. § 7 (2012) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."), *invalidated by Windsor*, 133 S. Ct. 2675.
 7. 133 S. Ct. at 2683.
 8. Amended Complaint ¶¶ 82–85, at 21–22, *United States v. Windsor*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ) (JCF)).
 9. Complaint ¶¶ 80–98, at 22–24, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).
 10. *Windsor*, 133 S. Ct. 2691–93.
 11. Except as otherwise noted (for example, in section I.B., *supra*, addressing the various meanings of "federalism" in more detail), I use the terms "federalist" and "federalism" throughout this article neither in their neutral sense, i.e., as a general reference to the tensions between federal and state power, nor as referencing the original approach to federalism as endorsed by the Federalist Party—with which the Supreme Court's early Chief Justice Marshall was aligned—that favored strong, centralized federal power and emphasized the supremacy of federal law in vertical conflicts of power. *See, e.g.*, *McCulloch v.*

This Article reveals the flaws of such readings of *Windsor* that erroneously conflate *Windsor*'s discussion of state legislative authority with the endorsement of a broader federalism doctrine that would allow states to deny marriage rights to entire classifications of people, unchecked by even federal judicial review. Such broad, unchecked federalism is anathema to the protection of constitutional rights, as it would leave some fundamental individual rights up to majority will. Moreover, such broad, unchecked federalism is not actually endorsed by the majority opinion in *Windsor*, its state powers passage notwithstanding, as revealed by a careful reading of the opinion.

Metaphorically, this Article explains how the duck test, if applied to *Windsor*, would not render it a federalist decision, despite being so labeled by dissenters in that case and by others. Rather, despite appearing to quack like a federalist duck, ultimately, *Windsor* is, in effect, something else entirely: a swan song setting the stage for the eventual demise of federalist-based marriage discrimination.

In support of this thesis, Part I of this Article describes the history of same-sex marriage litigation, with a particular focus on the influence of last century's "minimalist" movement in steering LGBT litigants away from asserting broad constitutional claims in court for a number of years.¹² The Article details how the minimalist movement alternatively advocated a federalism-focused approach toward attacking DOMA, as a means of narrowly garnering the five Supreme Court votes needed to win the case. Part II describes how some Court-watchers consequently viewed *Windsor* as a "federalist" decision when it was released. However, this section further explains why *Windsor* is not, in fact, a federalist decision but is, rather, an individual rights decision. Part III offers a somewhat cynical

Maryland, 17 U.S. (4 Wheat.) 316 (1819). Under that view, the Tenth Amendment, while recognizing unenumerated powers of individuals and states, does not create exclusive provinces of state legislation with which the federal government may not intervene. *See* *United States v. Morrison*, 529 U.S. 598, 645–52 (2000) (Souter, J., dissenting); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286–88 (1981). Rather, "federalist" and "federalism" in this article are used to reflect the opposite usage of the terms in more recent years, referring to the modern conservative reference to "federalism" as incorporating preference of strong sovereign state powers, including the view that there are zones of exclusively state legislative control under the Tenth Amendment. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O'Connor, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

12. Professor Cass R. Sunstein, the most visible proponent of modern minimalism, has not offered a clear or consistent definition of the term but generally identifies it as relating to the narrowness and shallowness of a judicial approach. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1961–62 (2005).

explanation of the state powers passage of the *Windsor* opinion, suggesting that Justice Anthony Kennedy's inclusion of federalism overtones in the majority opinion is strategic artifice that deliberately masks the decision's broader purpose of using federalism against itself—i.e., engaging federalism-sounding principles only to ultimately dismantle federalism-based marriage discrimination. *Windsor* is compared to other instances in history in which powerful rhetoric has been used to mask the fact that the speaker's end goal is the opposite of what a surface reading of the speaker's words might indicate. However, Parts IV and V then counteroffer a less cynical reading of *Windsor*, concluding that rather than indicating some type of artifice or intentional misdirection, *Windsor's* analysis, even with its tangential state powers discussion and narrowing language, is doctrinally solid and in line with the Court's past individual rights decisions.

Windsor is but the latest layer of a growing foundation of equal liberty jurisprudence, established with deliberate doctrinal integrity to ensure greater protections for individual rights over time as both society and the courts become more enlightened.¹³ To some extent, foundation-building jurisprudence may reflect a type of minimalism urged by some Court-watchers over the years in its paced and deliberate tone. However, to a greater extent, *Windsor*, like its predecessors, is a broad affirmation of evolving constitutional principles that serves as a doctrinally powerful precedent for future, potentially more sweeping, affirmations of equal LGBT rights and liberty interests under the Constitution.

13. As Thomas Jefferson wrote, and as inscribed on the ceiling of the Jefferson Memorial Rotunda,

[L]aws and institutions must go hand and hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 41 (Albert Ellery Bergh ed., 1905); see also *Schneiderman v. United States*, 320 U.S. 118, 137 n.15 (1943); Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 364 & n.46 (2006).

I. THE MINIMALIST MOVEMENT'S INFLUENCE ON
FEDERALISM-FOCUSED STRATEGY IN DOMA CHALLENGES

The arguments made in DOMA litigation and other LGBT rights cases should be understood in context of the caution LGBT rights advocates felt leading up to the Supreme Court's same-sex marriage cases. The sting of past political backlash kindled a fear not just of losing, but also of winning, into the hearts of those convinced that, for example, George W. Bush won re-election due to political backlash in response to judicial decisions favoring marriage equality.¹⁴ As a result, LGBT rights advocates largely stayed out of federal court in the years following the 2004 election.

As litigants finally began mounting federal challenges to DOMA, some advocates remained cautious, favoring arguments they thought to be the safest politically, over more doctrinally ambitious arguments. This Part describes how that caution was expressed through the flirtation with federalism in some advocates' and scholars' proposed approaches to overturning DOMA. Perhaps because of such expectations that DOMA would be decided on federalist grounds, even after *Windsor* was issued on individual rights grounds, it was nonetheless interpreted as a federalist decision by some Court-watchers and even some members of the Court itself who fell on the dissenting side of *Windsor*.

A. *Backlash Fears and Hollow Hopes:
The Movement Toward Minimalism*

Prior to the Proposition 8¹⁵ and DOMA¹⁶ decisions by the Supreme Court, there was widespread reluctance to bring a same-sex marriage case to federal court for fear of losing and setting bad precedent.¹⁷ The devastating negative impact of the anti-LGBT

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14. See, e.g., Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-elect Bush?*, S.F. CHRONICLE, Nov. 4, 2004, at A1, A16.
15. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (striking down on standing grounds, California's Proposition 8, which banned same-sex marriages in California in response to a court decision that allowed thousands of same-sex couples in California to wed).
16. *Windsor*, 133 S. Ct. 2675.
17. See, e.g., Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1199 (2013) (reviewing MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013)) (describing "the express design of LGBT-rights litigators, who elected to stay out of federal court for nearly twenty years"); Maura Dolan, *Battles Brew as Gay Marriage Ban Is Upheld*, L.A. TIMES, May 27, 2009, at A1, A12 ("Gay rights lawyers have urged supporters to stay out of federal court, fearful of a U.S. Supreme Court ruling that could set the same-sex marriage movement back decades.").

*Bowers v. Hardwick*¹⁸ decision was, after all, still fresh in the minds of many, even after it was overturned by *Lawrence v. Texas*.¹⁹

Among some LGBT-rights advocates, there was also a fear of *winning*, because of the negative repercussions that might ensue. The risk of harmful political backlash seemed most evident in the years when anti-LGBT constitutional amendments were succeeding at the ballot following two state supreme court decisions affirming marriage rights of LGBT individuals and same-sex couples, the Hawaii Supreme Court case *Baehr v. Lewin*²⁰ and, a decade later, the Massachusetts Supreme Court case *Goodridge v. Department of Public Health*,²¹ which was decided the same year as the Supreme Court's *Lawrence* decision. In addition to Congress enacting DOMA, between 1996 and 2005, the majority of states either enacted mini-DOMA statutes or amended their state constitutions to prohibit same-sex marriage.²²

Despite this temporary legislative backlash, in the span of the twenty years between 1993 and 2013, opinion polls reflected an overall increasing trajectory of support for same-sex marriage rights and LGBT equality. Nationwide support of same-sex marriage rose from around 20% in support of marriage in 1993²³ to 54–57% in support in the second half of 2013.²⁴ Comparative studies of polls over the years have conclusively demonstrated “that the public is growing

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18. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).
 19. 539 U.S. 558 (2003).
 20. 852 P.2d 44 (Haw. 1993).
 21. 798 N.E.2d 941 (Mass. 2003).
 22. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 879 (2006). Twenty-three states passed laws prohibiting same-sex marriage and recognizing same-sex marriages performed elsewhere while eighteen states added similar constitutional amendments. *Id.* at 869.
 23. Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, POLLING REPORT fig.1 (Aug. 17, 2009), <http://www.pollingreport.com/penp0908.htm>.
 24. Susan Page, *Same-Sex Marriage at Record Approval*, USA TODAY, July 2, 2013, at 1A (showing that 55% of Americans approve of same-sex marriage); Press Release, Quinnipiac Univ. Polling Instit., U.S. Catholics Back Pope On Changing Church Focus, Quinnipiac University National Poll Finds; Catholics Support Gay Marriage, Women Priests 2-1, 3 (Oct. 4, 2013) http://www.quinnipiac.edu/images/polling/us/us10042013_er9hjp.pdf/ (56% of all adults, 60% of Catholics, and 57% of registered voters); Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP, (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx> (“54% think gay marriages should be recognized as valid, with the same rights as marriages between men and women.”).

increasingly more amenable to same-sex marriage and that judicial decisions are unlikely to reverse that trend.”²⁵

By 2011, even the head of Focus on the Family had conceded that the organization, arguably the largest group of organized same-sex marriage opponents in the country, had lost the battle to keep marriage defined as solely between a man and a woman, stating the following in an interview:

We’re losing on that one, especially among the 20- and 30-somethings: 65 to 70 percent of them favor same-sex marriage. I don’t know if that’s going to change with a little more age—demographers would say probably not. We’ve probably lost that. I don’t want to be extremist here, but I think we need to start calculating where we are in the culture.²⁶

As more court-watchers and political analysts began to conclude, the early marriage opinions, if anything, should actually be credited with “start[ing] a process that culminated in same-sex couples securing widespread relationship protections.”²⁷ Professor Tom Goldstein describes the recent Supreme Court LGBT rights cases as having sent the “moral message . . . that these unions are entitled to equal respect. . . . [T]hat is probably the lasting legacy of the decisions and is probably going to play a significant role in public opinion.”²⁸

Not only has the acceptance of same-sex marriage risen substantially in public polling, but the number of states recognizing same-sex unions rose dramatically as well in the decade between the 2003 *Goodridge* decision and the 2013 *Windsor* decision. In that time, a dozen states and the District of Columbia legalized same-sex marriage.²⁹ By the end of 2013, only six months after *Windsor*, eighteen jurisdictions in the United States granted recognition to same-sex unions or had voted to do so.³⁰ This tally does not even

25. Egan & Persily, *supra* note 23; *see also* Patrick J. Egan, Nathaniel Persily & Kevin Wallsten, *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234–66 (Nathaniel Persily et al. eds., 2008).

26. *See* Marvin Olasky, Q&A, *Refocused*, WORLD, June 4, 2011, at 28, 28 (interviewing Jim Daly, CEO & President, Focus on the Family).

27. *E.g.*, Schacter, *supra* note 22, at 871.

28. Page, *supra* note 24, at 1A.

29. *United States v. Windsor*, 2675, 2689 (2013).

30. Those states, in addition to the District of Columbia (D.C. CODE § 46-401 (LexisNexis Supp. 2013)), included California (*In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)); Connecticut (*Kerrigan v. Comm’r of Pub. Health*, 957

include the numerous other localities and several states that additionally provided same-sex partnership recognition through civil unions or domestic partnerships by then.

In contrast, two decades before, when DOMA was enacted in the aftermath of *Baehr* and *Goodridge*, no state had yet granted same-sex marriage rights.³¹

Regardless, at least before the Court had issued four pro-LGBT rights opinions—*Romer v. Evans*,³² *Lawrence v. Texas*, *Hollingsworth v. Perry*³³ and *United States v. Windsor*—some LGBT-rights activists blamed their movement’s judicial victories for its legislative defeats and perceived public backlash. They lamented that the public had not been ready for judicial affirmations of constitutional rights for LGBT citizens, and that the backlash resulting from such victories was not worth the victories themselves. Their warnings urging LGBT litigants away from pursuing their day in court to protect their constitutional rights were fueled by an academic call for minimalism spearheaded by Gerald Rosenberg’s influential book, *THE HOLLOW HOPE*,³⁴ and

A.2d 407 (Conn. 2008)); Delaware (DEL. CODE ANN. tit.13, § 129 (Supp. 2013)); Hawaii (HAW. REV. STAT. § 572-1 (2012)); Illinois (Religious Freedom and Fairness Act, ch. 20, para. 201, 209, 212, 220, 2013 Ill. Legis. Serv. 4128-30 (West), (to be codified at ILL. COMP. STAT. §§ 750-5/201, /209, /212, /220 (Supp. 2014))); Iowa (Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)); Maine (ME. REV. STAT. tit. ANN. tit. 22, § 2710 (Supp. 2013)), Maryland (MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012) (effective Jan. 1, 2013)); Massachusetts (*Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) and *In re Ops. of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)); Minnesota (MINN. STAT. ANN. § 517.03 (Supp. 2014)); Nevada (NEV. REV. STAT. §§ 122A.010–122A.510 (LexisNexis 2010), *amended by* NEV. REV. STAT. §§ 122A.100, .500 (LexisNexis Supp. 2013)); New Hampshire (N.H. REV. STAT. ANN. § 457:1-a (Supp. 2013); New Jersey (*Garden State Equal. v. Dow*, L-1729-11, 2013 WL 6153269 (N.J. Super. Ct. Law Div. Sept. 27), *stay denied*, 79 A.3d 479 (N.J. Super. Ct. Law Div.), *cert. granted*, 75 A.3d 1157 (N.J.), *and stay denied*, 79 A.3d 1036 (N.J. 2013)); New Mexico (N.M. STAT. ANN. § 40-1-4 (LexisNexis 2004) (honoring marriages performed out of state)); New York (N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2014); Rhode Island (R.I. GEN. LAWS § 15-1-1 (2013); Vermont (VT. STAT. ANN. tit.15, § 8 (2010); and Washington (WASH. REV. CODE ANN. § 26.04.010 (West Supp. 2013)).

31. See *Windsor*, 133 S. Ct. at 2682.
32. 517 U.S. 620 (1996) (striking down Colorado’s Amendment 2, which had in effect prohibited all civil rights protections for gays and bisexuals).
33. 133 S. Ct. 2652 (2013).
34. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) [hereinafter *THE HOLLOW HOPE*].

echoed by legal scholars such as Cass Sunstein and Michael Klarman.³⁵

The original 1991 version of *THE HOLLOW HOPE* cautions against oppressed minorities seeking social reform through litigation, contending that the judiciary is, and should be, constrained by political considerations.³⁶ During the heyday of *THE HOLLOW HOPE*'s popularity among social justice lawyers at the turn of the century, Cass Sunstein frequently cited the book to urge a more minimalist view of the federal courts' appropriate role in affecting social change.³⁷

In the context of LGBT rights specifically, Sunstein cited *THE HOLLOW HOPE* to discourage LGBT litigants from bringing equal-protection claims to court, writing, "even if discrimination on the basis of sexual orientation is often a violation of the Equal Protection Clause, courts should be cautious and selective in vindicating that principle."³⁸ Sunstein warned, for example, that if the Supreme Court issued a marriage equality opinion too soon,

35. See *infra* notes 35, 38, 40, 42, 44, and 46.

36. See, e.g., *THE HOLLOW HOPE*, *supra* note 34, at 343 ("In assuming that courts can overcome political obstacles, and produce change without mobilization and participation, reformers both reified and removed courts from the political and economic system in which they operate.").

37. See, e.g., Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 308–09 (1993) (urging judges to exercise more modesty and recognize that due in part to their lack of "a good electoral pedigree," they should not attempt "to bring about significant social reform on their own" but instead recognize that "constitutional rights are judicially 'underenforced,' and properly so, because of the courts' distinctive limitations.") (emphasis added); see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1649 n.3 (2004) (additionally citing to MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) and Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003)); Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 361 & n.2 (1996) ("Supreme Court decisions may be counterproductive. If it is understood as a case about gender equality, *Roe v. Wade* is a possible example since the Court's decision may well have damaged the effort to produce gender equality."); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394 (1997) (arguing that in the context of abortion rights, the Court failed to be cognizant of its institutional limits and "ought not to have invoked ambitious abstractions about privacy or liberty to resolve so many issues so quickly"); Cass R. Sunstein, Essay, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1179, 1182 & n.11 (1996) (arguing affirmative action should be left to popular vote, not judicial decision, as a matter of pragmatism and principle).

38. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25 (1994).

[I]t might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more. Any Court, even one committed to the basic principle [of equal protection], should hesitate in the face of such prospects. It would be far better for the Court to start cautiously and to proceed incrementally.³⁹

These minimalist arguments urging civil rights advocates to eschew federal courts as agents for social justice, and, alternatively, advocating incremental over broad social change, continued generally even after the retirement of Justice Sandra Day O'Connor, who was widely perceived as a minimalist and who seems to have been the target of a substantial amount of minimalism scholarship.⁴⁰

In the arena of LGBT rights, the push toward minimalism continued even after the first two LGBT-rights Supreme Court victories, *Lawrence v. Texas* and *Romer v. Evans*.⁴¹ Klarman, for example, wrote in 2005 that “[b]y outpacing public opinion on issues of social reform,” such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.”⁴² That

39. *Id.* at 26.

40. See, e.g., Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1082 (2009) (describing O'Connor as a “minimalist by all measures”); Louis D. Bilonis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1353–54 (2005) (“Justice O'Connor is the exemplary practitioner of the style of judging that likely comes to mind most often when Court watchers and constitutional law *cognoscenti* allude to judicial centrism—what I will call here, with no claim to originality and a standing reference to the work of Cass Sunstein, ‘minimalist centrism.’”); Steve France, *Opinions with Style: Scholar Says Court Has Embraced O'Connor's “Minimalism,”* A.B.A. J., Sept. 1999, at 38, 38 (describing Cass Sunstein and Sandra Day O'Connor as an “odd couple” for their minimalist views); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1189–90 (2001) (footnotes omitted) (“Justice O'Connor in particular, like Justice Ginsburg, seems to embody minimalism's purported virtues. O'Connor never articulates broad rules, opting instead for context-based balancing tests. She is particularly deferential to precedent. She is, to some commentators, frustrating precisely because of her reluctance to endorse deep justifications.”); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (“In the nation's history, Justices Felix Frankfurter and Sandra Day O'Connor have been the most prominent practitioners of Burkean minimalism, in the sense that they have tended to favor small steps and close attention to both experience and tradition.”).

41. 517 U.S. 620 (1996).

42. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005).

said, by 2013, Klarman had reversed himself and substantially softened his opposition to same-sex marriage equality litigation. As Professor Schacter's review of Klarman's book on the history of same-sex marriage litigation describes:

Although Klarman covers much of the same ground in the book and alludes to the same factors in explaining the backlash, there is a noticeable change of tone and conclusion from the earlier article. In the book, Klarman is much less committed to a negative assessment of litigating for same-sex marriage at a time when public opinion was not supportive. Indeed, having explored both the costs and benefits of litigation, he concludes in the book that, "[o]n balance, litigation has probably advanced the cause of gay marriage more than it has retarded it." And, to a much greater degree than he did in his earlier work, Klarman recognizes that "[l]itigation put gay marriage on the table," and that, had early litigation not made marriage salient, it is "unlikely that more than 50 percent of Americans would support gay marriage in 2012." To his credit, Klarman notes expressly in the book that some of his views have changed. Klarman is not alone in having perspectives on the marriage controversy that have "evolved," and I think his candor about it is admirable. Indeed, the fact that the marriage debate has moved so quickly, and public support for marriage equality risen so rapidly, has created a challenge for scholars analyzing the debate in real time. At a minimum, the fast pace of change means that it is wise for anyone studying the issues to revisit and reassess, rather than clinging to earlier expressed opinions.⁴³

Cass Sunstein also backtracked somewhat from his original minimalism, ironically distancing himself from the minimalist movement he helped to create. In 2008, for example, he wrote that that minimalism is often "a terrible blunder,"⁴⁴ and he condescendingly mocked minimalists for possessing "characteristic timidity" or even "cowardice."⁴⁵ Instead of criticizing broad decisions, he offered praise for broad, sweeping adjudication of social justice issues, concluding that cases such as "*Brown v. Board of Education*, *New York Times Company v. Sullivan*[, and] *Brandenburg v. Ohio* . . . deserve celebration, not lament."⁴⁶

43. Schacter, *supra* note 17, at 1193–94 (quoting KLARMAN, *supra* note 17, at 208, 218).

44. Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 825 (2008).

45. *Id.* at 827.

46. *Id.* at 841 (footnotes omitted).

However, Sunstein's newfound respect for broad judicial civil rights decisions was not absolute, as evidenced in that very same article. Even after *Romer* and *Lawrence*, he continued to advocate minimalism as the preferred approach in some contexts, including same-sex marriage. Specifically, he wrote:

Frequently ordinary people disagree in some deep way on an issue—what to do in the Middle East, pornography, same-sex marriages, the war on terror—and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions and showing a measure of reciprocity and respect (even if they do not at all respect the particular conviction that is at stake). If reciprocity and mutual respect are desirable, it follows that public officials or judges, perhaps even more than ordinary people, should not challenge their fellow citizens' deepest and most defining commitments, at least if those commitments are reasonable and if there is no need for them to do so. Indeed, we can see a kind of political charity in the refusal to contest those commitments when life can proceed without any such contest.⁴⁷

Such a dismissive statement that life goes on (“life can proceed”) even if same-sex couples are denied judicial protections against marriage discrimination, and that it might actually be charitable to deny them their day in court, might give same-sex marriage proponents pause in following Sunstein's litigation strategy advice. At the very least, it reflects that he is less receptive toward LGBT claims than to other civil rights claims as appropriate subjects of constitutional litigation.

Staying even more doggedly true to his original position is THE HOLLOW HOPE's author, Rosenberg, who in a 2006 article wrote, “[t]he battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.”⁴⁸ Then, in 2008, Rosenberg added a supplement to THE HOLLOW HOPE devoted solely to extending his pessimistic attitude toward judicial review to the context of same-sex marriage, with one chapter titled “Confusing Rights with Reality.”⁴⁹ In the final section of the 2008 supplement, even more contemptuously titled, “When Will They Ever Learn?,” Rosenberg insisted that same-sex marriage advocates had “clearly” not succeeded but had gone to court too soon and had “confused the rhetoric of rights with the reality of reaction.”⁵⁰ He

47. *Id.* at 832–33.

48. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 813 (2006).

49. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 355–429 (2d. ed. 2008).

50. *Id.* at 415–19.

lambasted same-sex marriage litigants and attorneys, accusing them of “leaping beyond what the American public could bear,” thereby setting back their own cause.⁵¹ Rosenberg continued these attacks on marriage equality litigation in a 2009 later article as well,⁵² despite the increasing support for marriage equality strongly evident in polls by then,⁵³ writing that same-sex marriage litigation “set back [the] goal of marriage equality for at least a generation.”⁵⁴

In recent years, Sunstein’s comparatively restrained but persistent defense of minimalism in the context of same-sex marriage, Rosenberg’s pessimistic and stridently hollow same-sex marriage predictions, and other minimalist “Backlash Theorists” are being drowned out by the more optimistic and forward-thinking “Backlash Skeptics,” as dubbed by Michael D. Sant’Ambrogio & Sylvia A. Law.⁵⁵ In contrast with the “Backlash Theorists” such as Sunstein, Rosenberg, and the older incarnation of Klarman, the “Backlash Skeptics” (including the now-LGBT-litigation-friendly Klarman) argue that litigation remains an effective and important tool for social change, including in the context of same-sex marriage.⁵⁶ The same cases Backlash Theorists charge with causing backlash are, it is increasingly recognized, actually responsible in part for the growing popular acceptance of same-sex marriage, increased legislative protections for LGBT individuals and same-sex couples in other contexts, and a dramatic rise in the number of states with relationship protections for same-sex couples.⁵⁷

Since the Backlash Theorists’ pessimistic predictions of continued backlash and defeat for same-sex marriage advocates failed to come to fruition in, or after, *Windsor*, Sunstein has described *Windsor* in mixed terms. On the one hand, while conceding in a 2013 Internet post that “*Windsor* isn’t exactly a minimalist decision,” he critically describes *Windsor* as emphasizing “an unruly mixture of

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51. See *id.* (criticizing same-sex marriage proponents for not employing an incremental strategy).
 52. Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009).
 53. See Egan & Persily, *supra* note 23.
 54. Rosenberg, *supra* note 52, at 656.
 55. See Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 744–48 (2011).
 56. See *id.* at 746 (“Change will come in most of these places only, if at all, through federal court intervention.”).
 57. *Id.* at 747–48.

constitutional concerns,” which “leave[s] a great deal undecided.”⁵⁸ On the other hand, he then softens his tone toward *Windsor*, ultimately describing it as a decision reflecting appropriate judicial restraint in “resting its ruling on the foundation of human dignity.”⁵⁹

As for Rosenberg, he fell silent in the aftermath of *Windsor*. It remains to be seen whether in his future writings he will continue to try to dismiss the issue of same-sex marriage inequality as one that civil rights advocates should not have turned to the courts to resolve. If, even after *Windsor*, he continues to wish failure upon marriage equality litigators⁶⁰ and to charge same-sex marriage litigants with “set[ting] back [the] goal of marriage equality for at least a generation,”⁶¹ he is not likely to have much of a chorus of supporting followers any longer, at least among LGBT rights advocates.

As of this Article’s writing, there have been no law journal articles from LGBT rights/marriage equality advocates citing Rosenberg or Sunstein, or Klarman’s older writings, to argue, for example, that LGBT rights litigators should continue taking a more minimalist approach and refrain from turning to the courts to secure equal rights, or warning of post-*Windsor* backlash.

In place of the Backlash Theorists, the Backlash Skeptics are now becoming more prominent in the same-sex marriage litigation strategy dialogue, rising above the hollowness of THE HOLLOW HOPE and urging a new, more optimistic, look at the appropriate role of the Courts in protecting civil rights through judicial review. However, leading up to the *Windsor* litigation, some still clung to the cautionary words of THE HOLLOW HOPE and the corresponding minimalist backlash theory movement, as described in the following section.

*B. How the Minimalist Movement Led to a Push for
Federalist Anti-DOMA Arguments*

As marriage equality challenges approached the Supreme Court, the minimalist movement continued its chorus of what Professors Lawrence Tribe and Joshua Matz have described as a “comparative harmony of gradualism [that] holds sway, a tense balance between the undoubted benefits of marriage equality litigation and the real danger that a boldly liberal ruling could set our country ablaze at just the

58. Cass R. Sunstein, *Gay-Marriage Ruling Safeguards Human Dignity*, BLOOMBERG (June 26, 2013, 4:15 PM ET), <http://www.bloomberg.com/news/2013-06-26/gay-marriage-ruling-safeguards-human-dignity.html>.

59. *Id.*

60. Rosenberg, *supra* note 48, at 813 (“The battle for same sex-marriage would have been better served if [same-sex marriage advocates] had never brought litigation, or had lost their cases.”).

61. Rosenberg, *supra* note 52, at 656.

wrong moment.”⁶² Minimalists warned that a marriage inequality ruling could result in the type of backlash that was “unleashed with terrible force after *Goodridge v. Department of Public Health*.”⁶³

To avoid either losing completely or winning too big and sparking such a backlash, some LGBT rights advocates favored a careful minimalist strategy in attacking DOMA. They envisioned reaching the goal of securing at least five votes from the Supreme Court justices through a restrained decision on narrow federalism grounds that might appeal to a majority of the justices.⁶⁴

Minimalism advocates who embraced federalist arguments as a strategically savvy, narrow means of overturning DOMA had their support in a number of scholars who did not themselves identify as “minimalist,” but who nonetheless saw the potential for a successful federalist challenge to DOMA.⁶⁵ Federalism, after all, offered a tempting avenue of argument that might appeal to a majority of Justices, while allowing the Court the “out” of issuing a ruling more

62. See Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 202 (2013) (comparing today’s reaction with the backlash after *Goodrich v. Department of Public Health*).

63. *Id.*

64. See Adam E. Brauner & Andreas J. Meyer, *A Closer Look at the Marriage Equality Cases Before the United States Supreme Court*, ORANGE COUNTY LAW, May 2013, at 18 (“In the case of *Windsor*, LGBT activists across the country are optimistic, perhaps because multiple avenues to a positive outcome seem to exist, including ones that are consistent with conservative legal ideologies. For example, it has been suggested that certain members of the Court’s conservative wing, such as Chief Justice John Roberts or Justice Clarence Thomas, may vote to overturn the law on federalism grounds, like some conservative judges in lower courts have done in other cases.”).

65. See, e.g., William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371, 1379 (2012) (“Indeed, many of DOMA’s critics have articulated the attack in federalist terms.”) (citing, in part, David B. Cruz, Essay, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 815–23 (2011), and Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the “Defense of Marriage” Act*, 16 Quinnipiac L. Rev. 221, 231–39 (1996)). See also Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 Creighton L. Rev. 457 (1998) (“In its haste to pass DOMA and to put the President in a politically unpalatable position, Congress did not adequately take into account the potential constitutional ramifications of DOMA and its threat to our federalist system.”).

moderate and narrow in tone than a decision based, for example, on substantive due process.⁶⁶

Some litigants consequently chose to base their DOMA challenge on federalist grounds, with some success in *Massachusetts v. United States Department of Health & Human Services*.⁶⁷ The U.S. Court of Appeals for the First Circuit held that although DOMA did not violate the Tenth Amendment, it nonetheless implicated federalist “concerns,” which warranted a closer look at the governmental⁶⁸ justifications for the statute:

[The consequences upon states of the] denial of federal benefits to same-sex couples lawfully married . . . do not violate the Tenth Amendment . . . but Congress’ effort to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws does bear on how the justifications are assessed.

. . . .

Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.⁶⁹

The First Circuit’s treatment of DOMA’s unusual deviation from federalist principles not as providing the basis of an

66. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985))); see also CHARLES L. BLACK JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 3, 100–01 (1997) (“This paradoxical, even oxymoronic phrase—‘substantive due process’—has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution[] . . . [T]his non-concept rests on insufficient commitment, and has too little firm meaning (if it has any at all) to beget the kind of confidence, in judges or in others, that ought to underlie the regime of human rights.”).

67. 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884, 2887 (2013).

68. By “governmental” justifications, I mean those set forth by “BLAG,” the “Bipartisan Legal Advisory Group” that took over the defense of DOMA after the Department of Justice declined to defend it. See *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013); H.R. Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013) (“[BLAG] continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States*.”).

69. *Massachusetts*, 682 F.3d at 12–13.

unconstitutionality holding, but, rather, as triggering more careful scrutiny of government justifications was what one scholar, Professor Courtney Joslin, dubbed “the unusualness trigger theory,”⁷⁰ one of many possible approaches to federalism.

The First Circuit’s approach to federalism in *Massachusetts* was, critically, quite different from that taken by the lower court in that case. The lower court had deemed DOMA to be a categorical violation of the Tenth Amendment and state sovereignty because “the authority to regulate marital status is a sovereign attribute of statehood.”⁷¹ As Professor David Cruz argued in an article published after the district court’s decision but prior to the subsequent First Circuit decision, the “categorical federalism approach” reflected by the district court’s opinion is problematic, because “[c]urrent doctrine . . . does not recognize the Tenth Amendment as a font of categorical free-floating subject matter limitations on federal power.”⁷² However, Cruz offered that uncategorical arguments should still be made for DOMA’s unconstitutionality on federalist grounds, highlighting, for example, how DOMA uniquely operates “in the core” of domestic relations by redefining marriage “across the board in virtually any area in which the federal government acts,” and in the process singling out same-sex married couples for de-classification as married, despite their state’s laws respecting their marriages, thereby “violat[ing] constitutional federalism principles, even if not for the categorical reason seemingly relied on by the District Court in *Massachusetts v. United States Department of Health and Human Services*.”⁷³

In yet another approach to using federalism to pursue marriage equality, Tribe and Matz explain that a properly argued federalism-based challenge could be made to DOMA without undermining a future federal challenge to a state marriage ban because “[t]he Court’s doctrinal expression of federalism favors freedom *from* federal government intrusion rather than a right *to* federal government protection.”⁷⁴ In other words, federalism is a sword against the federal legislative branch exceeding its authority but is not a shield states may use to ward off federal judicial review. As Tribe and Matz explain:

70. Courtney G. Joslin, Windsor, *Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 163 (2013). <http://www.columbialawreview.org/wp-content/uploads/2013/10/Joslin-113-Colum.-L.-Rev.-Sidebar-156.pdf>.

71. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 251 (D. Mass. 2010).

72. Cruz, *supra* note 65, at 819.

73. *Id.* at 827.

74. Tribe & Matz, *supra* note 62, at 209–10.

For marriage equality, federalism-based principles of respect for traditional state autonomy and sub-national political process provide a sword against regressive federal laws (such as DOMA) without affording a shield to regressive state laws (such as same-sex marriage bans).

We are thus dealing with a rather particular federalism: one that does not respect states' choices about *whether* to expand liberty, but only state choices that actually *do* so; that limits federal *legislative* power when it intrudes upon comparatively liberty-enhancing state policy, but does not limit federal *judicial* power that intrudes upon comparatively regressive state policy. At least in this context, federalism is a one-way ratchet toward liberty (or at least a certain kind of liberty). A civil rights advocate is tempted to think, *Vive la Fédéralisme!*⁷⁵

With these various views on federalism's meaning and appropriate role in judicial challenges to DOMA percolating across the country in the years leading up to *Windsor*, the sword-shield approach is consistent with the *Massachusetts* court's explanation of the limited role of federalism as applied to DOMA. In that case, the First Circuit explained:

Supreme Court interpretations of the Tenth Amendment have varied over the years but those in force today have struck down statutes only where Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government. Whatever its spin-off effects, section 3 governs only federal programs and funding, and does not share these two vices of commandeering or direct command.⁷⁶

While there were competing views by same-sex marriage advocates and scholars on precisely what a federalist argument in a DOMA challenge should look like, federalism remained a pervasive theme in dialogues on the constitutionality of DOMA in the years leading up to *Windsor*. When DOMA finally arrived at the Supreme Court through the *Windsor* case, two sets of amici, unsurprisingly, presented federalist arguments to the Court in favor of striking down DOMA, although the two amici briefs took different approaches to arguing federalism. As Professor Joslin describes, the amici

75. *Id.* at 210.

76. *Massachusetts v. U.S. Dept. Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012) (citations omitted), *cert denied*, 133 S. Ct. 2884, 2887 (2013).

“Federalism Scholars” made a categorical argument that the power to define marital status lies solely with the states.⁷⁷

In contrast, “[a] qualitatively different federalism-based argument was pressed by other parties and amici,”⁷⁸ namely that Section 3 of DOMA should be subject to careful scrutiny under equal protection review because, in addition to other things, it “intrudes on the States’ traditional authority to regulate marriage and family relations.”⁷⁹

In *Perry*, the companion case to *Windsor*, a separate amicus brief urged the Court more generally toward incremental judicial restraint.⁸⁰ Tribe and Matz describe that brief, which warned against granting certiorari in the Proposition 8 case, as an “*amicus* brief built on a wave of scholarship that blends history and political science into grand narratives that preach the comparative merits of legal gradualism, especially when pegged to shifting public opinion and a Court keen to conserve its nebulous institutional capital.”⁸¹ Tribe and Matz grant that there is “much to commend” about the type of minimalism advocated by the amicus brief, once one considers

77. Joslin, *supra* note 70, at 161 (citing Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 3–4, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307)).

78. *Id.* at 162.

79. *Id.* (quoting Brief on the Merits for the States of New York et al. as Amici Curiae in Support of Respondent Edith Schlain Windsor at 3, *Windsor*, 133 S. Ct. 2675 (No. 12-307)).

80. See Brief of Amici Curiae William N. Eskridge Jr., Bruce A. Ackerman, Daniel A. Farber & Andrew Koppelman in Support of Respondents at 15–20, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); *Windsor*, 133 S. Ct. 2675 (No. 12-307). One of the brief’s authors, Andrew Koppelman, was a member of Case Western Reserve University School of Law’s same-sex marriage symposium for which this Article is submitted; I was honored to share a panel with him on the doctrinal meaning of *Windsor*. See generally Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 CASE. W. RES. L. REV. 1045 (2014).

81. Tribe & Matz, *supra* note 62, at 202–03. The article by Tribe and Matz, presenting a snapshot of the months following the filing of the amicus briefs in *Perry* and *Windsor* but prior to Court’s decisions in those cases, describes more broadly what they then perceived as “the shifting role of minimalism,” and its interplay with gay rights advocates’ “fickle romance with federalism” in the pursuit of liberty and equal protections in that historic moment in time. *Id.* at 200. Recounting the pervasiveness of the push toward minimalism in LGBT rights litigation in these “fragile times [when the Court is] delicately poised on Justice Anthony Kennedy’s evolving vision of liberty,” *id.* at 199, Tribe and Matz note the frequent tendency of federal courts in same-sex marriage cases “moved by a powerful spirit of minimalism to concentrate their firepower on smaller targets” and thereby prevent backlash. *Id.* at 201.

the uncertainty of a Supreme Court victory for marriage equality and the risk of backlash.⁸² While agreeing it would not be expedient to disregard the tactical considerations represented by minimalism, they nonetheless describe minimalism as “a gamble on an uncertain future—a bet that the Court will not tilt irretrievably conservative, that state-level constitutional bans on same-sex marriage can be overcome through political process, and that we are learning (but not overlearning) the right lessons from our complicated past.”⁸³ Thus, they conclude, “[a] measure of modesty in addressing these questions—whether we should be minimalist in litigation and in the goals of adjudication and, if so, how—will remain critical as LGBT rights advocates move forward.”⁸⁴

In the end, it is the cautious approach to federalism that seems the sagest, although it is admittedly easy to say that from the relative luxury of an after-the-fact retrospective when it is now evident that a majority of the *Windsor* Court would be receptive to individual rights-based attacks on DOMA, rather than a Tenth Amendment federalist claim.

Most importantly, some rights are, quite simply, too fundamental to be left to majority will. As explained by a federal court in Utah, upon applying *Windsor* to strike down that state’s same-sex constitutional marriage ban, “[t]he Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual’s fundamental rights ‘may not be submitted to vote; they depend on the outcome of no elections.’”⁸⁵ Thus, especially “[g]iven the importance of marriage as a fundamental right and its relation to an individual’s rights to liberty, privacy, and association, the Supreme Court has not hesitated to invalidate state laws pertaining to marriage whenever such a law intrudes on an individual’s protected realm of liberty.”⁸⁶ Leaving fundamental rights to the vote of a simple democratic majority can too easily result in the type of majority tyranny our Constitution was written to prevent;

82. *Id.* at 203.

83. *Id.*

84. *Id.*

85. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *9 (D. Utah Dec. 20, 2013) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). *Kitchen v. Herbert* is one of two federal decisions, along with a similar Oklahoma decision, *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014), which struck down such a state constitutional provision in the six months following *Windsor*.

86. *Kitchen*, 2013 WL 6697874, at *11.

it is anathema to our *constitutional* democracy for free-flowing prejudices to be left unchecked by federal constitutional safeguards.⁸⁷

The vestiges of the same type of prejudice that caused racial segregation, prompting federal judicial intervention in *Brown v. Board of Education*,⁸⁸ were also present in state interracial marriage bans, prompting federal judicial intervention in *Loving v. Virginia*.⁸⁹ However, had those issues been left to majority will, state-by-state, there would likely remain states that prohibit people from marrying the loves of their life if one's beloved is of a different race, just as, today (as of the writing of this Article), many states continue to prohibit people from marrying the loves of their life if one's beloved is of the same sex.

As the federal district court in the Utah case recognized, individual and state rights “are both weighty concerns.”⁹⁰ The *Kitchen* court further explained, however, that where they are in direct opposition to each other, Supreme Court cases such as *Loving* have in analogous circumstances resolved that tension by establishing “that the Fourteenth Amendment requires that individual rights take precedence over states’ rights where these two interests are in conflict” and “holding that a state’s power to regulate marriage is limited by the Fourteenth Amendment.”⁹¹ After all, in the end, federal constitutional rights are, under the Supremacy Clause of Article VI the U.S. Constitution, supreme over state laws that threaten to deny those rights.

*C. The Doctrinal Bases for the Plaintiffs’ Argument
and the Court’s Holding in Windsor*

While federalist arguments remained too tempting for some amici in *Windsor* to resist, the plaintiffs, in contrast, did not ultimately base their case on a state powers federalist argument. Rather, their

87. See Barbara J. Cox, “*The Tyranny of the Majority Is No Myth: Its Dangers for Same-Sex Couples*,” 34 *HAMLIN J. PUB. L. & POL’Y* 235, 244–50 (2013) (discussing the threat of majority tyranny generally, and to same-sex couples specifically, through an examination of ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835), *THE FEDERALIST* No. 10 (James Madison); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)).

88. 347 U.S. 483 (1954).

89. 388 U.S. 1 (1967). *Loving*, it is worth emphasizing, was not a federalist decision and was also enforced with none of the problems faced by schools trying to desegregate after *Brown*; nor should a parallel decision striking down same-sex marriage bans have any more enforcement problems than occurred after *Loving*.

90. *Kitchen*, 2013 WL 6697874, at *7.

91. *Id.*

argument emphasized individual constitutional rights: the denial of equal protection of fundamental liberties resulting from DOMA's destructive force on the rights of same-sex married couples.⁹²

Perhaps this was in part due to the fact that, by then, the civil rights litigation movement's enthusiastic (and misguided) love affair with THE HOLLOW HOPE and minimalism had died down just enough for the plaintiffs in *Windsor* to rely on strong, impassioned, and principled individual rights arguments. Or perhaps the plaintiffs were never that tempted to emphasize Tenth Amendment arguments in lieu of equal protection and liberty arguments in the first place. They may have been sufficiently confident (and rightly so) that the rights at issue were the same privacy and liberty rights that were recognized in the last two LGBT-rights cases, and in a long line of individual autonomy cases before then,⁹³ even though minimalists might decry such equal liberty building blocks as too abstract and amorphous to form a proper basis for a Supreme Court decision.

For whichever reason, rather than claim that DOMA violated the Tenth Amendment, the argument made by Edie Windsor was "that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment."⁹⁴ The Court's holding, in turn, reflected the plaintiffs' articulation of the issues, while also spelling out the liberty component of the equal protection violation. Specifically, the Court held on the merits that DOMA "violates basic due process and equal protection principles applicable to the federal government. . . . By seeking to displace [the State's protection for same-sex married couples] and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."⁹⁵

By basing its finding of unconstitutionality on Fifth Amendment due process and equal protection grounds rather than Tenth Amendment federalism grounds, the *Windsor* Court "dodged a bullet," and "[w]hile its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA, it also would have curtailed the ability of federal officials to protect same-sex couples and other families"⁹⁶ in future cases. On some level, the Court may have been tempted by federalism and flirted with it long enough in the majority opinion to confuse some into viewing the decision as a

92. *See generally* Brief on the Merits for Respondent Edith Schlain Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

93. *See generally* Marcus, *supra* note 13 (examining the history of privacy rights in Supreme Court jurisprudence).

94. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

95. *Id.* at 2693, 2696.

96. Joslin, *supra* note 70, at 158.

federalist decision. However, such an interpretation of *Windsor* would be a misreading, for the reasons set forth in the following Part. In the end, Justice Kennedy was not swayed in *Windsor* from the equal liberty foundation he had carefully laid in the preceding LGBT rights cases for the marriage equality case that finally arrived in the form of *Windsor*, and will likely reemerge in the near future.

II. WHY *WINDSOR* IS NOT A FEDERALIST DECISION

When the *Windsor* decision was released, perhaps having been conditioned to anticipate a federalist decision on DOMA, a number of scholars,⁹⁷ practitioners,⁹⁸ journalists,⁹⁹ and a couple of lower courts¹⁰⁰

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97. See, e.g., *id.* at 158 n.15 (“Much of the DOMA decision’s reasoning is based on federalism considerations.”) (citation omitted); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 214 (2013), <http://yalelawjournal.org/2013/9/15/eyer.html> (“Drawing widely on seemingly *sui generis* federalism and liberty-based reasoning, the Court offered virtually no guidance on how its reasoning might be applied to future cases, either in the equal protection context or elsewhere.”); see also Rick Hills, *Windsor and the States’ Power to Define Federal Constitutional Rights: Does Kennedy Revive Justice Harlan’s Theory of Rights?*, PRAWFSBLAWG (June 26, 2013, 11:51 AM) <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/windsor-and-the-states-power-to-define-federal-constitutionalrights.html> (“For federalism fans, the most interesting aspect of *Windsor* is its recognition that state law can define, at least in part, the scope of federal constitutional rights by (for instance) defining what constitutes an arbitrary classification under the Fifth Amendment’s Due Process clause.”); Damon Root, *Federalism and Liberty in the Supreme Court’s Gay Marriage Cases*, REASON.COM: HIT & RUN BLOG (June 26, 2013, 12:17 PM), <http://reason.com/blog/2013/06/26/federalism-and-liberty-in-the-supreme-co> (“In his majority opinion today invalidating Section 3 of the 1996 Defense of Marriage Act, Justice Anthony Kennedy employed two of the most common themes in his jurisprudence: federalism and liberty.”).
98. Scott Lauck et al., *Future of Marriage in Missouri No Clearer After Supreme Court Ruling*, MO. LAWYERS MEDIA, June 28, 2013, available at 2013 WLNR 16319428.
99. See, e.g., Jerry Elmer, *United States v. Windsor: Another Victory for Gay Rights*, R.I.B.J., Sept.–Oct. 2013, at 13, 16 (“[T]he closest the majority decision comes to stating a doctrinal basis for its ruling is federalism.”); James Oliphant, *Supreme Court Rulings on Gay Marriage: A Liberal Result Wrapped in Conservative Values*, NAT’L J., (June 26, 2013), <http://www.nationaljournal.com/domesticpolicy/supreme-court-rulings-on-gay-marriage-a-liberal-result-wrapped-in-conservative-values-20130626>; Editorial, *From the High Court, a Victory for Federalism*, KEY W. CITIZEN, July 1, 2013, at 4a.
100. See *Robicheaux v. Caldwell*, CIV.A. 13-5090, 2014 WL 4347099 (E.D. La. Sept. 3, 2014) (“*Windsor* leaves unchanged ‘the concerns for state diversity and sovereignty.’”); *Com. Dep’t of Health v. Hanes*, No. 379 M.D. 2013, 2013 WL 5469566 at *1 (Pa. Commw. Ct. Sept. 12, 2013)

identified *Windsor* as a federalist decision. The vast majority of federal courts—other than the lone above-cited Louisiana district court judge—applying *Windsor* to same-sex marriage equality claims since the decision, however, have rejected such a federalist interpretation.¹⁰¹

Interestingly, *Windsor*'s dissenting justices themselves were divided on whether Justice Kennedy's majority opinion from which they were dissenting was based on federalism. On the one hand, Chief Justice Roberts's dissent, for example, describes the majority opinion as "undeniabl[y] . . . based on federalism."¹⁰² Similarly, while not labeling the majority opinion a federalist opinion, Justice Alito's dissent "wholeheartedly" agrees "[t]o the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level."¹⁰³ On the other hand, Justice Scalia seemed to think that Chief Justice Roberts was fooled by the majority into thinking of its opinion as a federalist decision, writing, "the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion."¹⁰⁴ Elsewhere in his dissent, Scalia suggests that the majority opinion is part equal protection, part due process, and part "amorphous federalism."¹⁰⁵

However, as Justice Scalia himself recognizes in the first comment, *Windsor* is not at its core a federalist decision. As the vast majority of federal courts applying *Windsor* have recognized, and for

(ordering rogue clerk to stop issuing marriage license to same-sex couple and describing *Windsor* in the following terms: "Because the regulation of marriage is a matter for the states, the Supreme Court found that a federal definition of marriage that creates 'two contradictory marriage regimes within the same State' must fall. Congress 'interfered' with 'state sovereign choices' about who may be married by creating its own definition, relegating one set of marriages—same-sex marriages—to the 'second-tier,' making them 'unequal.'" (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

101. See *supra* section II.B., discussing *Bostic v. Schaefer*, Nos. 14–1167, 14–1169, 14–1173, 2014 WL 3702493 (4th Cir. July 28, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014); *Latta v. Otter*, 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 997 (W.D. Wis. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014).
102. *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting).
103. *Id.* at 2720 (Alito, J., dissenting).
104. *Id.* at 2705 (Scalia, J., dissenting).
105. *Id.* at 2707. For a thorough discussion of "amorphous federalism," see David B. Cruz, "*Amorphous Federalism*" and the Supreme Court's Marriage Cases, 59 LOYOLA L. REV. ____ (2014) (forthcoming).

the reasons set forth below as well, *Windsor* reasonably cannot be read as a federalist decision affirming an exclusive state power to regulate marriage unchecked by federal judicial review.

A. *About Those “Seven Full Pages . . .”*

Justice Scalia offers the following as a reason that some might interpret *Windsor*'s majority opinion as a federalism opinion: “the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion.”¹⁰⁶ However, this statement by Scalia is somewhat misleading.

Seven pages is not an accurate page count of the majority opinion's state powers discussion, which only takes up two pages out of the fourteen-paged final reported version of the *Windsor* majority opinion.¹⁰⁷ The seven-page tally cited by Scalia clearly came from the slip opinion, in which the discussion did total seven pages out of twenty-six.¹⁰⁸ However, as a seasoned Supreme Court Justice, Justice Scalia should certainly know that the final reported version of the decision would contain a different, much less lengthy, pagination than the slip copy circulated among the Justices, and that both Bluebook rules and his own Court's instructions on citation require citing to the reporter, not the slip opinion, particularly where they conflict in some manner.¹⁰⁹ By instead emphasizing the slip opinion's higher page number tally in order to emphasize how much ink the majority had devoted to an issue, despite the certain knowledge that the final version of the opinion would be much shorter in terms of pagination, Scalia's dissent could give the impression that half of the majority's opinion (which was fourteen pages in final reported form) was devoted to federalism, not a mere two out of fourteen pages. As such, Scalia arguably engages in a bit of trickery in his exaggeration of the section's length in order to make a rhetorical point, and his accusation of foolery by the majority might just be a case of the pot calling the kettle black.

B. *Windsor's Loving Reminder of the Primacy of Individual Rights*

Another reason that *Windsor*'s two-page state powers discussion does not render *Windsor* a federalist opinion lies in Justice Kennedy's pointed citation of *Loving v. Virginia*, which immediately prefaces the

106. *Windsor*, at 2705.

107. *See id.* at 2691–93 (majority opinion).

108. *United States v. Windsor*, No.12-307, slip op. (U.S. 2013).

109. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.B4.1.2, at 9 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010); *2013 Term Opinions of the Court*, SUP. CT. U.S., <http://www.supremecourt.gov/opinions/slipopinions.aspx> (last visited Feb. 22, 2014).

state powers discussion.¹¹⁰ Specifically, the *Windsor* majority opinion contains the following cautionary language immediately before launching into its state powers discussion:

[I]t is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. *State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees,* “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.”¹¹¹

Thus, the Court in *Windsor* did not describe the issue of marriage law as so exclusively within the province of state legislation that it falls outside the scope of federal judicial review even when it affects individual constitutional rights. To the contrary, the majority opinion’s reference to *Loving* frames and limits its ensuing state powers discussion in a manner that should remind the reader that while *state* legislative powers may trump federal *legislative* powers in some cases, constitutional rights may still be protected against state infringement by the federal *judiciary*. The Court’s powers of judicial review over unconstitutional state legislation are not limited by federalism. Rather, judicial review is a limitation upon federalism.

The critical significance of the *Windsor* Court’s citation to *Loving* and its emphasis that state marriage laws may not violate fundamental individual rights has not been lost on the federal courts that have applied *Windsor* to subsequent marriage equality cases.

For example, in the first federal marriage equality decision following *Windsor*, the Northern District of Oklahoma in *Bishop v. United States ex rel. Holder*¹¹² emphasized *Windsor*’s repeated use of “the disclaimer ‘subject to constitutional guarantees’” and described *Windsor*’s citation to *Loving* as “a disclaimer of enormous proportion.”¹¹³ Continuing with an explanation of the Constitution’s individual rights limits upon federalism, *Bishop* continued: “Arguably, the ‘state rights’ portion of the *Windsor* decision stands for the unremarkable proposition that a state has broad authority to regulate marriage, so long as it does not violate its citizens’ federal constitutional rights.”¹¹⁴ Other federal district courts addressing

110. *Windsor*, 133 S. Ct. at 2691 (majority opinion) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

111. *Id.* (emphasis added) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (citing *Loving*, 388 U.S. at 87).

112. No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014).

113. *Id.* at *18 (emphasis added) (quoting *Windsor*, 133 S. Ct. at 2692).

114. *Id.*

challenges to same-sex marriage bans have followed suit, similarly concluding that the *Windsor* decision was based on individual rights, not federalist principles.¹¹⁵

Federal appeals courts have likewise rejected efforts to paint *Windsor* as a federalist decision that leaves the determination of same-sex marriage rights up to the states. In *Kitchen v. Herbert*,¹¹⁶ the Tenth Circuit Court of Appeals rejected the appellants' federalism argument, explaining,

The *Windsor* Court concluded it was “unnecessary to decide whether” DOMA “is a violation of the Constitution because it disrupts the federal balance.” Rather than relying on federalism principles, the Court framed the question presented as whether the “injury and indignity” caused by DOMA “is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”¹¹⁷

The Fourth Circuit Court of Appeals similarly explained in *Bostic v. Schaefer*¹¹⁸ that although the *Windsor* decision was in part based “on the Supreme Court’s respect for states’ supremacy in the domestic relations sphere,” the Court in *Windsor* did not, however, “lament that section 3 had usurped states’ authority over marriage due to its desire to safeguard federalism Its concern sprung from

115. See *Wolf v. Walker*, 986 F. Supp. 2d at 997 (“[T]he Court declined expressly to rely on federalism as a basis for its conclusion that DOMA is unconstitutional.”); *Bostic v. Rainey*, 970 F. Supp. 2d at 476 (“This Court remains mindful that the federal intervention is best exercised rarely, and that the powers regarding domestic relations properly rest with the good offices of state and local government. This deference is appropriate, and even essential. However, federal courts have intervened, properly, when state regulations have infringed upon the right to marry. The *Windsor* Court prefaced its analysis about deference to the state laws defining and regulating marriage by citing *Loving’s* holding that recognized that ‘of course,’ such laws ‘must respect the constitutional rights of persons.’”) (citations omitted); *Latta v. Otter*, 2014 WL 1909999 at *11 (“[F]ederalism’ is no answer where, as here, individuals claim their state government has trampled their constitutional rights. Indeed, *Windsor* also recognizes the transcendent quality of individual constitutional rights, even when those rights conflict with a state’s traditional sovereign authority. ‘State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, e.g., *Loving*’ *Windsor*, 133 S. Ct. at 2691” (emphasis added)).

116. 755 F.3d 1193 (10th Cir. 2014).

117. *Kitchen v. Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014).

118. 760 F.3d 352 (4th Cir. 2014).

section 3's creation of two classes of married couples within states that had legalized same-sex marriage. . . ."¹¹⁹

Therefore, it has been widely recognized that the *Windsor* decision is ultimately an affirmation of individual rights, not state rights. As with *Loving*, even if an area of legislation, such as marriage law, is traditionally left to the states rather than dictated by Congress, state law does not trump federal law for purposes of exempting state legislation from federal judicial review. The United States Constitution is still the supreme law of the land, with the Federal Constitution setting forth limits on both federal and state power.¹²⁰ As such, individual federal constitutional rights still reign supreme in some cases, including in the case of either federal or state attempts to carve out a class of persons for the deprivation of fundamental rights, including marriage.¹²¹ As previously explained, federalism can be a sword used by the State against federal legislative intrusion, but it is not a shield the state may use to exempt itself from federal constitutional mandates.¹²²

The Court's citation to *Loving* in *Windsor* signals that the state powers discussion that follows the *Loving* citation should in no manner be viewed as granting states unbridled authority to define marriage in a way that unconstitutionally discriminates against members of disfavored groups. In a future decision, the Court should specify the extent to which laws limiting marriage rights by the sex of one's intended spouse are analogous to the laws struck down in *Loving* that limited marriage rights by the race of one's intended spouse. *Loving* will ultimately be a difficult case for same-sex marriage opponents to distinguish, as will other cases in which the Court has affirmed the fundamental right to marry in other contexts, even for prisoners, who give up many rights upon conviction and incarceration.¹²³ Regardless of the ultimate outcome of a future

119. *Bostic v. Schaefer*, 760 F.3d 352, 378 (4th Cir. 2014).

120. U.S. CONST. art. VI. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

121. See generally *Loving*, 388 U.S. 1 (holding that "[m]arriage is one of the 'basis civil rights of man'" and that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

122. See *supra* Part II.B.

123. See generally Marcus, *supra* note 13, at 418–34 (discussing the precedential value of *Loving* for future same-sex marriage cases, as well as that of *Zablocki v. Redhail*, 434 U.S. 374 (1978), which affirmed a fundamental right to marry regardless of an individual's record of delinquent child support payments and *Turner v. Safley*, 482 U.S. 78 (1987), which affirmed a fundamental right to marry regardless of prisoner status).

challenge to state same-sex marriage bans, *Windsor's* citation to *Loving*, emphasizing the primacy of fundamental individual marriage rights over discriminatory state and federal laws, sets the stage for such a future marriage equality determination, rather than precluding it.

C. *Federalism Discussed Solely in Context of Evaluating DOMA's Stated Justifications*

None of this is to say that the two-page state powers discussion commencing with the *Loving* citation in *Windsor* is insubstantial. Constituting nearly a quarter of the majority opinion's analysis section, although not half of the whole opinion as Scalia's misleading page count could imply,¹²⁴ it clearly has some significance. However, as previously discussed, the Court's substantial discussion of federalism principles does not mean that state legislation on marriage is immune from federal judicial review; the *Loving* citation is a pointed reminder of this fundamental principle of constitutional law. So what *does* the state powers passage mean?

The Court's purpose in inserting a state power analysis into an individual rights decision is revealed when one examines the surrounding context of the Court's federalist discussion, namely, the Court's scrutiny of the *government's* purpose in enacting DOMA.¹²⁵ By holding DOMA up to the light of longstanding federalism principles giving federal deference to state marriage laws, the Court unveiled a profound incongruity between traditional federalist respect and DOMA's utter lack of respect for state marriage laws. The Court concluded that this incongruity was evidence of a constitutionally suspect purpose. Specifically, the Court found that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."¹²⁶ After citing both *Romer* and a second "rational basis plus" case in which legislation motivated by animus failed to pass constitutional muster even under the rational basis test, the Court then concluded that that deviation, in turn, served as "strong evidence of a law having the purpose and effect of disapproval of that class."¹²⁷

This analysis by the Court mirrors the First Circuit's *Massachusetts* analysis that employed what Professor Joslin described

124. *See supra* Part II.B.

125. *United States v. Windsor*, 133 S. Ct. 2675, 2691–95 (2013).

126. *Id.* at 2693.

127. *Id.* (citing *Romer v. Evans* 517 U.S. 620, 633 (1996); *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973)).

as the “unusualness trigger theory.”¹²⁸ It also parallels the Second Circuit’s conclusion in *Windsor* that “[b]ecause DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification.”¹²⁹

However, whereas the Court of Appeals in *Windsor* had, in effect, applied the unusualness trigger theory in direct response to the Bipartisan Legal Advisory Group’s (BLAG’s)¹³⁰ argument that DOMA was justified by the need for a federal rule achieving uniformity in marriage laws,¹³¹ the Supreme Court in *Windsor* did not give BLAG’s “uniformity” justification enough credence to even articulate it explicitly. Rather, the Court conducted an independent inquiry into what the purpose of DOMA was and made three interrelated findings about DOMA’s stated purpose, its demonstrated purpose, and its principal purpose.

First, as to the “stated purpose” of DOMA, the Court quoted the Congressional Record’s House Report statement “that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality,’” and concluded that “[t]he 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 Act.”¹³² Second, as to the “demonstrated purpose,” the Court explained that both the arguments by BLAG and the title and dynamics of the bill revealed that “[t]he Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution’s Fifth Amendment.”¹³³ Note here the lack of similar reference to the Tenth Amendment. Third, as to the “principal purpose,” after describing a principal effect of imposing inequality on a subset of marriages otherwise sanctioned under state law, the Court concluded that DOMA’s “principal

128. *See supra* Part I.B.

129. *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012), *aff’d* 133 S. Ct. 2675 (2013).

130. *See supra* note 68.

131. *Windsor*, 699 F.3d at 185–86.

132. *Windsor*, 133 S. Ct. at 2693 (citing H.R. REP. NO. 104-664, at 16 (1996)).

133. *Id.* at 2693–94.

purpose is to impose inequality, not for other reasons like governmental efficiency.”¹³⁴

While the Supreme Court declined to pay even lip service to the uniformity justification, the higher Court’s opinion nonetheless mirrored that of the Second Circuit in a more critical respect: its use of a vertical separation of powers analysis in support of a separate horizontal separation of powers conclusion. The Court, in essence, used principles of traditional federal legislative deference to state legislative areas including marriage laws (vertical separation of powers), to illuminate how BLAG’s justifications for DOMA were constitutionally suspect. That vertical analysis, in turn, established grounds for increased scrutiny in federal judicial review over a discriminatory Act of Congress (horizontal separation of powers). By engaging multiple levels of constitutional law jurisprudence, the Court concluded that unconstitutional animus may be inferred from the federal government’s glaringly unprecedented intervention in an area of law generally left to state determination under federalist principles.¹³⁵

It is critical to understand that this conclusion that deviation from federalist norms evidences animus, triggering a higher degree of scrutiny, is not the same as a conclusion that DOMA is unconstitutional because it violates federalist principles. This distinction is evident in the Court’s explanation that “*it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution* because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case *quite apart from principles of federalism*.”¹³⁶

Here, the Court unambiguously explains that its discussion of DOMA’s unusual federal intrusion on state power was relevant not for the purpose of determining whether DOMA unconstitutionally violated federalism principles but was relevant for another reason altogether. It then proceeded to spell out that other reason in terms of the decision’s primary individual rights analysis:

[T]he State’s decision to give [same-sex couples] 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. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “[D]iscriminations of

134. *Id.* at 2694.

135. *Windsor*, 133 S. Ct. at 2691–92.

136. *Id.* at 2692 (emphasis added).

an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”¹³⁷

In other words, the Court’s analysis of state powers in the context of marriage laws was relevant for purposes of identifying a deviation from usual federalist deference, which, in turn evidences “discrimination[] of an *unusual* character” warranting close scrutiny.¹³⁸ However, the deviation from federalist principles does not amount to a Tenth Amendment violation in and of itself establishing unconstitutionality.¹³⁹ Rather, the Fifth Amendment’s due process and equal protection guarantees are what formed the basis of *Windsor*’s ultimate individual rights holding, as described below.¹⁴⁰

*D. Textualist Reading of Unambiguous Holding Reveals
an Individual Rights Fifth Amendment Holding,
Not a Federalist Tenth Amendment Holding*

The text of *Windsor*’s holding itself unambiguously cites the Fifth, not the Tenth, Amendment, yet another clear indicator that the decision is at its core an individual rights decision, not a federalism decision.

The majority opinion presents its ultimate holding both at the beginning of its analysis and at the end. The Court’s first articulation of the holding is that DOMA “violates basic due process and equal protection principles applicable to the federal government.”¹⁴¹ The holding is then repeated at the end of the opinion as follows: “By seeking to displace [the State’s protection for same-sex married couples] and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”¹⁴²

Thus, the text of the Court’s holding unambiguously references the Fifth Amendment, not the Tenth, and clearly indicates that the

137. *Id.* (alteration in original) (quoting *Romer, v. Evans*, 517 U.S. 620, 633 (1996)).

138. *Id.* (emphasis added); *cf.* *Joslin, supra* note 70, at 163 (discussing “unusualness trigger theory”).

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

140. As Professor Cruz points out, the only question presented in the Government’s certiorari petitions was the question of whether Section 3 of DOMA violates equal protection, not whether it violates the Constitution’s federalism provisions, and the “Supreme Court is only supposed to decide that question or subsidiary questions ‘fairly included therein.’” *See Cruz, supra* note 105, at 30.

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

142. *Id.* at 2696.

Court's decision is one based on a finding of due process and equal protection, i.e., individual rights, violations. State powers and federalism are not even mentioned in the Court's articulations of its holding.

E. Court Details Examples of Federal Legislation in Area of Marriage

One final indicia of *Windsor's* not being a federalist opinion is the Court's explicit affirmation of Congress' authority to enact statutes bearing on marriage rights and privileges.¹⁴³ As examples, *Windsor* cites federal preemption of state laws through a federal program giving a former spouse priority in retaining life insurance proceeds under formal beneficiary designation rules;¹⁴⁴ immigration laws pertaining to the treatment of noncitizen marriages regardless of relevant state law;¹⁴⁵ and the federal statutes setting forth the income-based Social Security benefit criteria, reflecting Congress' decision "that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships."¹⁴⁶ These examples from the Court reinforce the limitations of federalism, under which, the Court explains, even legislative actions by the federal government may in some cases substantially affect and even regulate legal areas generally left to state legislatures.

For all of the above reasons, Justice Scalia may claim that *Windsor* deceptively quacks like a federalist duck, and Chief Justice Roberts may claim the decision *is* a federalist duck, but the decision is in fact not a federalist duck at all but is something else entirely.

III. WHY, DESPITE QUACKING LIKE A DUCK,
WINDSOR IS ACTUALLY A SWAN SONG FOR
FEDERALIST-BASED MARRIAGE DISCRIMINATION

In the end, while *Windsor* may emit slight federalist duck quacks, I propose that *Windsor* is actually a swan song for federalism-based marriage discrimination. I have elsewhere written of the inevitability of a Supreme Court decision recognizing that the deep-rooted fundamental right to marry the person of one's choice applies equally to members of same-sex couples across the country.¹⁴⁷ Its inevitability

143. *Id.* at 2690.

144. *Id.* (citing *Hillman v. Maretta*, 133 S. Ct. 1943 (2013); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Wissner v. Wissner*, 338 U.S. 655 (1950)).

145. *Id.* (citing 8 U.S.C. § 1186a(b)(1) (2012)).

146. *Id.* (citing 42 U.S.C. § 1382c(d)(2) (2006)).

147. *See generally* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality*

results from the precedential doctrinal grounds set by past Supreme Court cases, from *Romer* and *Lawrence* to other personal autonomy cases, ultimately enabling the Court to “strik[e] down same-sex marriage bans as universally as *Loving [v. Virginia]* struck down interracial marriage bans, with the Fourteenth Amendment’s Equal Protection and Substantive Due Process Clauses united to provide equal liberty guarantees for same-sex couples and their families.”¹⁴⁸

In *Windsor*, building upon the precedent of *Romer*—which struck down a broad state constitutional amendment singling out LGBT individuals for the denial of civil rights protections—the Court concluded that DOMA analogously “writes inequality into the entire United States Code.”¹⁴⁹ The *Windsor* Court emphatically reiterated *Romer*’s admonition that “[t]he 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.”¹⁵⁰

Following the precedent of *Lawrence*, the *Windsor* Court explained that DOMA unconstitutionally undermined the state of New York’s attempt to accord equal liberty protections to same-sex unions, “for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.”¹⁵¹

Finally, in citing *Loving*, as previously discussed, the *Windsor* Court issued a powerful reminder of the limits of federalism when states abuse their power to discriminate against individuals, particularly in the context of fundamental marriage rights¹⁵²—not that the precedential grounds for *Windsor* and future marriage equality cases started with *Loving*; to the contrary, the foundation for autonomy and equal liberty in the recognition of intimate partnerships has roots as far back as nineteenth-century case law.¹⁵³

After Windsor, 23 TUL. J. L. & SEXUALITY 17 (2014); Nancy C. Marcus, *Beyond Romer*, *supra* note 13, at 416–20.

148. Marcus, *Argle Bargle*, *supra* note 147.

149. *Windsor*, 133 S. Ct. at 2694.

150. *Id.* at 2693 (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); *Romer v. Evans*, 517 U.S. 620, 634 (1996).

151. *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

152. *See supra* Part II.B.

153. *See* Marcus, *supra* note 13, at 371–78 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)); *see also* *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Union Pac. Ry. Co. v.*

Furthermore, the constitutional history of judicial review is replete with examples of the United States Constitution serving as the ultimate buffer against the abuse of state power in the exercise of discriminatory treatment and classifications of individuals, whether in the name of federalism or otherwise. Nor is *Windsor's* reverse incorporation of Fourteenth Amendment equal protection guarantees into the Fifth Amendment's Due Process Clause unprecedented. Although the Fifth Amendment's text may not contain an explicit equal protection clause, the "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."¹⁵⁴ This is because, the Court has recognized, "the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws."¹⁵⁵ *Windsor* merely builds upon these precedents to affirm that principle in a context and manner establishing protections of LGBT individuals and same-sex couples specifically from discriminatory abuses of federal and state power alike.

As to the transformation of ducks into a swan song for federalism-based marriage discrimination, *Windsor's* federalist-seeming analysis actually sets the stage for the demise of federalist-justified state denials of equal marriage rights to same-sex couples. The Court in *Windsor* held that "DOMA seeks to injure the very class New York [a state recognizing same-sex marriages] seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government."¹⁵⁶ That this holding should apply equally to state governments engaging in the same sort of discrimination is made evident by the Court's abundant references throughout the Fifth Amendment opinion to Fourteenth Amendment cases such as *Loving, Romer, and Lawrence*. Its incorporation of these Fourteenth Amendment cases into its analysis illustrates that the same doctrines apply under either Amendment.

Windsor serves as the latest and most explicit reminder, consistent with this longstanding principle, that although state powers may come before federal powers in some contexts, the Ninth Amendment (rights reserved to the people) still comes before the Tenth (powers reserved to the states). In this respect, *Windsor* ultimately stands for the limitation on both federal and state legislative power to engage in class-based, unequal deprivation of

Botsford, 141 U.S. 250 (1891); *Boyd v. United States*, 116 U.S. 616 (1886)).

154. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

155. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231–32 (1995).

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

substantive due process rights, including the right of same-sex married couples to receive equal respect for their marriages.

If *Windsor*'s recitation of federalist principles were, as Justice Scalia cynically charged, an attempt to fool the reader,¹⁵⁷ this would be a case of strategic artifice by the Court, resulting in an opinion in which things are quite the opposite of what they seem. *Windsor* could be viewed as a case in which, in the name of limiting federal power, the Court reaffirmed the broadest power of all—that of judicial review.

We have seen such strategic rhetorical maneuvering before. Recall the original Supreme Court case affirming the power of federal judicial review over the constitutionality of legislation: the parallel between *Windsor* and *Marbury v. Madison*¹⁵⁸ is quite striking, when one steps back to examine *Windsor* in this light. In *Marbury*, Justice Marshall, the Supreme Court's fourth Chief Justice, engaged in a substantial discussion of the extent and limitations of federal judicial power, for the purpose of explaining why the Court lacked original jurisdiction to issue writs of mandamus under Article III.¹⁵⁹ However, on a deeper and more important level, this explanation of the limits of the Court's power turned into an affirmation of the greatest of federal judicial powers—that of judicial review, with Marshall declaring the Judiciary Act of 1789 unconstitutional.¹⁶⁰ Until *Marbury v. Madison*, which was thus written in terms of limiting judicial power even while effectively serving to broaden that power, there had not been a similar explicit declaration by the Court that “[i]t is emphatically the province and duty of the [J]udicial [D]epartment to say what the law is,”¹⁶¹ and that the power of judicial review accordingly provides the authority of the Supreme Court to strike a statute in conflict with the Supreme Law of the Land, i.e., the Constitution.

Is Justice Marshall to be condemned for what, in the eyes of a cynic, might be viewed as a power grab through rhetorical artifice in *Marbury v. Madison*? By engaging in a historically revolutionary power grab in the name of limiting the Court's power, was he guilty of the very type of duplicitousness with which he charged critics of judicial review, writing in *Marbury* that such critics “would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits”?¹⁶²

157. *Id.* at 2705 (Scalia, J., dissenting).

158. 5 U.S. (1 Cranch) 137 (1803).

159. *Id.* at 168–80.

160. *Id.* at 180.

161. *Id.* at 177.

162. *Id.* at 178.

Or was he merely striking a balance between articulating the Supreme Court's constitutional restraints, while also recognizing the power of judicial review that was already inherent in the early structure of our constitutional democracy and its judicial structures?

Is Justice Kennedy, over two centuries later, fairly subject to parallel criticism? Has he tried to pull a fast one, first in *Lawrence*, as Justice Scalia charged in his dissent in that opinion,¹⁶³ and again in *Windsor*, attempting to mask his more ambitious intent in both cases of enabling a future sweeping same-sex marriage decision that will secure him a heroic spot in history?¹⁶⁴

Both questions may be answered the same way. Perhaps, in each case, the ends justify the means. In the case of *Marbury*, it was necessary to pay lip service to judicial humility to soften the force of the most powerful assumption of judicial power in the Court's history—the power of judicial review that is now generally accepted as necessary and important for the protection of federal constitutional rights and delineation of constitutional checks and balances of governmental powers. Similarly, Justice Kennedy's LGBT rights opinions may be viewed as having created a carefully constructed stage for the final act of marriage equality jurisprudence, each adding an additional foundation for more bold opinions down the road, secure in the precedents set by *Romer*, *Lawrence*, and *Windsor*. And while clever, and at times indirect, these doctrinal foundations are not a matter of play but are the serious and studied work of a Supreme

163. *Lawrence v. Texas*, 539 U.S. 558, 604 (Scalia, J., dissenting) (“At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it.” (quoting *Lawrence*, 539 U.S. at 578 (majority opinion))).

164. Running with this cynical view for a moment, a tangential literary comparison begs to be made to Kennedy's and Marshall's possible parallel strategies of rhetorical artifice. Such a political power grab disguised as the opposite, committed through clever, rhetorical wordsmithing, also is displayed in at least one other political context: the Shakespearean telling of the aftermath of Julius Caesar's assassination, in the form of Marc Antony's famous “Friends, Romans, Countrymen, I come to bury Caesar, not to praise him” speech. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2. In that speech, again in the name of humility and honoring the limits of power, Antony effects the seizure of power from Brutus even while paying him lip service as “an honorable man,” in order to avenge the slain Julius Caesar, from whom he distanced himself rhetorically even as, between the lines, he avenged his murder and reclaimed power from his slayers. *Id.* Just like the aforementioned opinions by Justices Marshall and Kennedy, the speech by Shakespeare's Marc Antony could be viewed as engaging in a strategically savvy claim to power through manipulative rhetoric that accomplishes the opposite of what, on the surface, it seems to say at first glance.

Court Justice writing what he truly believes, in furtherance of what he just as sincerely believes to be his duty to the Constitution and the country.

IV. BEYOND MINIMALISM: FOUNDATION-BUILDING
JURISPRUDENCE AS A GIANT LEAP, NOT SMALL STEP,
TOWARD SIGNIFICANT EVOLUTIONS IN RIGHTS PROTECTIONS

In some respects, *Windsor* presents the most solid foundation to date of any Supreme Court case addressing LGBT issues, as it sets forth substantial limitations upon government abuses of power, for the ultimate and primary purposes of protecting fundamental individual liberty interests. Further, by acknowledging both liberty and equality components of same-sex marriage protections, under the Fifth as well as the Fourteen Amendment, *Windsor*, as an equal liberty decision, bridges doctrines and unifies principles and precedents into an increasingly clearer equal liberty doctrine for the twenty-first century.

Even among LGBT rights and marriage equality allies, there are those stragglers from the minimalist camp who may shudder at such lofty principle-based doctrinal evolutions as a basis for a line of cases involving politically heated issues. The unapologetic development of a more coherent twenty-first century equal liberty doctrine through a foundation-building jurisprudence is more akin to a giant leap than a small step toward significant constitutional rights protections.

But why, if not engaging in artifice, do Justice Kennedy's LGBT-rights opinions fail to own up to the tremendous precedential import each of them has in paving the path toward future cases protecting equal liberties of LGBT individuals? Why was the Court so careful to disclaim in the *Lawrence* opinion that that case "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"¹⁶⁵ and in *Windsor* that "[t]his opinion and its holding are confined to those lawful marriages [performed in states recognizing same-sex marriage],"¹⁶⁶ both times prompting Justice Scalia to roll his eyes in response with accusations of foul play and trickery?¹⁶⁷ As Scalia predicted, *Lawrence* did indeed become a building block for a future opinion affirming same-sex marriage rights.¹⁶⁸ Underscoring the connection between the two cases is the fact that *Windsor* was decided not just on the last

165. *Lawrence*, 539 U.S. at 578 (majority opinion).

166. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

167. *Id.* at 2705 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

168. *Lawrence*, 539 U.S. at 604.

day of the Court's term in 2013, but ten years to the very date that *Lawrence* had been decided.

There are several possible explanations for Justice Kennedy's serving up cautionary narrowing language and failing to explicitly flesh out the extent of the rights affirmed in his opinions that are otherwise breathtaking in their strong articulation of constitutional principles and protections of LGBT individuals.¹⁶⁹ First, there is a perceived jurisprudential preference among jurists to decide cases on narrow grounds.¹⁷⁰ Perhaps influenced by this, Justice Kennedy, even while issuing doctrinally powerful decisions in LGBT rights cases, nonetheless has been tempered by this culture of encouraging a narrow framing of decisions, if only to garner the most votes among one's colleagues on the bench. Second, Justice Kennedy may be acting out of a sense of political fairness, expedience, or even ambivalence, well aware that he is the swing vote on the bench, the balance of which may shift against marriage equality if, for example, the Republicans win the White House in 2016 and a departing Justice Ginsburg is replaced by a more conservative justice.¹⁷¹ Perhaps the pressure of being the swing vote is too much, and he is stalling, waiting to see how the future composition of the Court might change and determine the future of same-sex marriage adjudication, leaving

169. On the latter point, the *Bishop* court in the 2014 Oklahoma constitutional amendment case stated, "There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a rhetorical shift when it sees one." *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014).

170. "[T]he appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief. This consideration applies even though such grounds are not raised in the jurisdictional submissions." *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 451 n.1 (1974) (Powell, J., concurring) (citing *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Barr v. Matteo*, 355 U.S. 171, 172 (1957)). See also Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 114 (2006) (describing "the modern Court's preference for narrow reasoning"); Michael F. Perry, Recent Development, *Avoiding Mead: The Problem with Unanimity in Long Island Care at Home*, 31 HARV. J. L. & PUB. POL'Y 1183, 1183-84 (2008) (describing "Chief Justice Roberts's announced preference for narrow and unanimous opinions").

171. As a matter of politics and procedure, it will now be more difficult for any party to block judicial nominees, now that the Democrats have exercised the "nuclear option" of eliminating judicial nomination filibusters altogether. See David Welna, *With Nominees Stalled, Democrats Reprise Filibuster Threat*, NPR: IT'S ALL POLITICS (Nov. 20, 2013, 6:06 PM), <http://www.npr.org/blogs/itsallpolitics/2013/11/20/246394094/with-nominees-stalled-democrats-reprise-filibuster-threat>.

the decision, ultimately, up to the voters to decide rather than bearing the burden himself.

Justice Kennedy's motivation in throwing both federalism-like and narrowing language into *Windsor*, which is otherwise a powerful opinion affirming broad equal liberty principles, may be related to the minimalist movement's lingering, if diminished, impact on the Court. With several amicus briefs filed on the side of the LGBT litigants in the Supreme Court marriage cases urging a more narrow or conservative approach, the pressure was on the Court to refrain from issuing too broad an opinion. Had *Windsor* been even more sweeping and lofty in tone than it already was, perhaps Kennedy felt it would have risked either causing overt backlash or simply not being taken as seriously. Instead, by writing an opinion that was more moderate in tone, honoring both conservative principles of minimalist narrow adjudication and federalism (at least on the surface) and doctrinally liberal principles of equal liberty, Kennedy struck a careful but not overly cautious balance honoring the different voices and concerns raised in the context of a controversial social issue.

Justice Kennedy may have sent mixed signals in tempering both *Lawrence* and *Windsor* with language affecting a cautious tone without significantly limiting the precedential force of those cases. Nonetheless, even if such careful writing is to be described as artifice, it is acceptable artifice, cautiously building for the greater good, brick-by-brick and layer-by-layer, the most solid, carefully constructed doctrinal basis for future marriage equality and other equal liberty decisions possible, anticipating and answering objections from various critics even as the architecture for a new era of equality is put into place.

Just as *Windsor* is not truly a federalist decision, neither is it truly a narrow or minimalist decision when viewed in its entirety, limiting language and federalism lip service aside. Justice Kennedy went farther than he had to in authoring *Windsor's* affirmance of the Second Circuit's decision in several respects. Although federalism was not the approach argued by Edie Windsor, Kennedy did not have to go beyond the federalism argument offered by amici that marriage is traditionally an issue left to the States, rendering DOMA an unconstitutional trouncing of state sovereignty. But he did, forsaking a narrow federalist approach for a broader individual rights approach. He did not have to reach the issue of harm to children, which was not directly at issue in *Windsor*, but he did, flipping the script on equal marriage opponents who have historically tried to justify same-sex marriage bans in the name of protecting children. Anticipatorily rebutting such arguments that might occur in a future marriage case, Kennedy poignantly points out in the *Windsor* majority opinion that marriage recognition denials result in "humiliat[ing] tens of thousands

of children now being raised by same-sex couples”¹⁷² and that DOMA “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”¹⁷³ And in listing DOMA’s harms, Kennedy included those harms suffered by children of same-sex couples denied marriage rights, such as the harm resulting from the statute’s message to “all persons with whom same-sex couples interact, *including their own children*, that their marriage is less worthy than the marriages of others.”¹⁷⁴

Finally, while *Windsor*’s immediate holding was limited to those same-sex marriages performed in states allowing same-sex marriage, this does not preclude its later extension to cases involving the right of same-sex couples in all states to marry. As Justice Scalia helpfully offers:

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. As I have said, the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “bare . . . desire to harm” couples in same-sex marriages. *Supra*, at 2691. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today’s opinion *ante*, at 2694:

~~“DOMA’s This state law’s principal effect is to identify a subset of state sanctioned marriages—constitutionally protected sexual relationships, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA this state law contrives to deprive some couples married under the laws of their State enjoying constitutionally protected sexual relationships, but not other couples, of both rights and responsibilities.”~~¹⁷⁵

As an additional example of things not being quite what they seem, there is some true irony in Justice Scalia, who appears to be the

172. *Windsor*, 133 S. Ct. at 2694.

173. *Id.*

174. *Id.* at 2696 (emphasis added).

175. *Id.* at 2709–10 (Scalia, J., dissenting) (alteration in original) (quoting *id.* at 2691, 2693 (majority opinion)).

Justice most vehemently opposed to same-sex marriage, being the one to spell out most clearly how *Windsor* provides the clear precedent for a future decision striking down state laws banning same-sex marriage. There is also reciprocal irony in Justice Kennedy, the Justice most likely to author that future opinion recognizing individual rights of LGBT citizens to marry the person of their choice, having yet to own that all of the Court's recent LGBT rights opinions—authored by him—build the solid, undeniable foundation for that future decision. Strange ducks though the Justices may at times appear,¹⁷⁶ they are ultimately human, with motivations that can only be surmised by Court-watchers; we will never know for certain what prompts them to adjudicate in the sometimes less-than-straightforward way that they do.

One can only conjecture what Justice Scalia's motive is in handing marriage equality proponents the wording of a future marriage equality decision on a silver platter.¹⁷⁷ In the end, he is right about *Windsor*: it is not a federalist decision but is, rather, a powerful individual rights-based precedent for a future marriage equality affirmation. When Justice Scalia's illustrative dissents spelling out the path toward future marriage equality decisions are read in conjunction with the Court's previous declaration in *Lawrence* that "[e]quality of treatment and the due process *right to demand respect*

176. Justice Scalia has even, in an admittedly entirely different context, literally quacked like a duck. In 2004, while defending his decision not to recuse himself from a case involving former Vice President Dick Cheney, with whom Scalia is a friend and duck hunting partner, Scalia stated to a college audience with his trademark defiant wit, "[The case] did not involve a lawsuit against Dick Cheney as a private individual, . . . This was a government issue. It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. *Quack, quack.*" See Dan Collins, *Justice Scalia Defends Cheney Trip*, AP (March 18, 2004, 10:35 AM), <http://www.cbsnews.com/news/justice-scalia-defends-cheney-trip/> (emphasis added).

177. Allow one last cynical conjecture about veiled meanings of judicial statements: Scalia's emphasis of "this" in his statement that "the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion" may betray his view of the Court as little more than a political entity, governed by the political bent of its majority members. If this is a fair reading, it demonstrates his intent to use his dissents as lobbying tools, to the extent they signal to the voters the need to change the Court from "this" Court to a new Court. With this cynical lens held to Scalia's dissents in LGBT rights cases, it may explain his pattern of spelling out how the opinions he is dissenting from will likely lead to a future same-sex marriage equality opinion. He does so not to help those Justices accomplish the result he appears to abhor but to point out to others the danger of such a result happening. His audience is not the Court, or even lower courts, but, rather, a certain ilk of American voters.

for conduct protected by the substantive guarantee of liberty are linked in important respects,¹⁷⁸ one can easily envision a future opinion citing *Lawrence* and *Windsor* to affirm equal marriage rights. Such an opinion built on past equal liberty cases might, for example, conclude that the “right to demand respect” and equal treatment under law includes a right of all same-sex couples, not just those already legally married, to demand respect in the form of equal marriage rights.

Whatever exact form the final swan song for marriage inequality takes, it will surely be one that rejects any raised federalist claim, whether minimalist-inspired or otherwise, based on the alleged power of states to deny same-sex marriage rights. In that inevitable decision affirming same-sex marriage equality for once and for all, the Court will rise above the hollow minimalism of the past to offer a new optimistic model for the critical and necessary role of judicial review in protecting freedom from governmental discrimination in the equal protection of our most intimate life partnerships and families.

178. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (emphasis added).