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Understanding United States v. Windsor and the Symposium Contributions Using Unidirectional and Bidirectional Models of Supreme Court Decision Making

Ronald Kahn

UNDERSTANDING *UNITED STATES V. WINDSOR* AND THE SYMPOSIUM CONTRIBUTIONS USING UNIDIRECTIONAL AND BIDIRECTIONAL MODELS OF SUPREME COURT DECISION MAKING

Ronald Kahn†

ABSTRACT

This Article explores the landmark case of *United States v. Windsor*, which ruled that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional on Due Process and Equal Protection grounds. The Article examines the ways in which the *Windsor* decision builds upon rights and polity principles from previous gay rights cases, such as *Romer v. Evans* and *Lawrence v. Texas*, and contributes to a line of doctrine that exemplifies "bidirectional" Supreme Court decision making.

The Article's starting point is the observation that from 1969 to 2006, thirteen of the fifteen appointees to the Supreme Court have been by Republican presidents. The Article asks why rights created in the Warren and Burger Court eras have not only been preserved, but in many instances have been strengthened. In other words, why does a conservative Court in our present conservative political age make significant decisions based on strong rights principles and a concern for minority interests?

The answer lies in the nature of Supreme Court decision making, which is viewed as unique and different from the way that political institutions—more directly accountable to popular opinion and election results—craft law and policy. The Supreme Court engages in the bidirectional, mutual construction of text, precedent, and doctrine *and* the lived lives of persons outside the Court. At the heart of bidirectional decision making is a social construction process. Social

†. Erwin N. Griswold Professor of Politics and Law, Oberlin College. Dr. Kahn received his B.A. from Rutgers University and his M.A. and Ph.D. from the University of Chicago. Dr. Kahn specializes in constitutional law, legal theory, and American political development. Dr. Kahn received Distinguished Teaching Awards from Oberlin College in 2001 and from the Law and Courts Division of the American Political Science Association in 2006. The Author thanks Gerard D'Emilio, research assistant, B.M. in Voice, Oberlin Conservatory of Music, and B.A. with Highest Honors in Politics, Oberlin College, 2012, who made important contributions to this paper.

constructions become as much a part of cases, precedents, and the case before the Supreme Court as are rights principles. In any given case, the Court brings the internal world of its jurisprudence into conversation with the realities of the world beyond its walls, thereby constructing new avenues of doctrine and precedent that draw on both constitutional text and case law that precede them and the social constructions in precedents.

The model of bidirectional Court decision making—"Model 2"—is juxtaposed against a Model 1, unidirectional explanation of Supreme Court decision making. Scholars employing Model 1 explanations of Court decision making assert that justices on the Court makes decisions based on either internal elements—such as constitutional text or legal precedent—or factors external to the Court—such as politics, legal advocacy, personal ideological affiliation or policy wants of justices, or the views of presidents who made Court appointments. Model 1 scholars accept what Brian Tamanaha calls the "formalist-realist divide," a separation that is absent from Model 2 scholarship. Most constitutional theorists, including Mark Tushnet, Cass Sunstein, Randy Barnett, and old and new originalists, such as Antonin Scalia and Jack M. Balkin, respectively, also accept the divide and fail to recognize the bidirectionality of Court decision making in their theories of what the Court should do when it makes constitutional choices, and also are found wanting for doing so.

The Article concludes with an examination of the contributions to this Symposium in light of the above analysis. It investigates the Articles presented, dividing them into three groups—Doctrinal, Institutional, and Policy—based on the primacy focus of each symposium contribution. Each contribution is discussed with respect to *Windsor* as a clear and forceful example of bidirectional Court decision making and the efficacy of Model 2 explanations of Court decision making as predictors of future Court action.

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INTRODUCTION

One would have expected the Supreme Court in the late twentieth and early twenty-first centuries—and now—to be conservative. Since 1969, when President Richard Nixon named Warren Burger as Chief Justice, through President George W. Bush's appointments of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006, Republican presidents have made thirteen of fifteen appointments to the Supreme Court, thus constituting a clear majority of appointees in any given year.[1]

The Supreme Court, however, "has not overturned any of the major individual rights cases from the progressive Warren Court era (1954–1969). Moreover, during the years under Chief Justice Warren Burger (1969–1986), the Supreme Court expanded individual rights in

1. President Nixon appointed Chief Justice Burger (1969), Justice Blackmun (1970), Justice Powell (1972), and Justice Rehnquist (1972). President Gerald Ford appointed Justice Stevens (1975). President Jimmy Carter had no appointees to the Supreme Court. President Ronald Reagan appointed Justice O'Connor (1981), reappointed Justice Rehnquist as Chief Justice in 1986, appointed Justice Scalia (1986), and Justice Kennedy (1988). President George Herbert Walker Bush appointed Justice Souter (1990) and Justice Thomas (1991). President Bill Clinton appointed Justice Ginsburg (1993) and Justice Breyer (1994). Not until 2005, eleven years later, would any President make additional appointments to the Supreme Court. In 2005, Republican President George W. Bush appointed John Roberts as Chief Justice. One year later, Bush appointed Justice Alito. For a list of all Supreme Court nominations from 1789 to the present, including those listed above, see *Members of the Supreme Court of the United States,* SUPREME CT. U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited April 14, 2014) [hereinafter *Members of Supreme Court*]. More recently, President Barack Obama appointed Justice Sotomayor (2005) and Justice Kagan (2010). *Id.*

significant ways,"[2] such as deciding that a woman has a constitutional right to elect abortion in *Roe v. Wade*,[3] that gender classifications under the law would be subject to heightened judicial scrutiny in *Craig v. Boren*,[4] and that race can be one factor among many in the admission of students to colleges and universities in *Regents of the University of California v. Bakke*.[5]

During the Rehnquist Court, the Supreme Court reaffirmed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[6] and overturned *Bowers v. Hardwick*[7] and extended the

2. Ronald Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?:* Lawrence v. Texas *(2003)*, *in Legal and Political Time*, *in* 44 STUD. IN L. POL'Y & SOC'Y 173, 174 (Austin Sarat ed., 2008).

3. 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, . . . in the Ninth Amendment's reservation of rights to the people, *is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.*" (emphasis added)).

4. 429 U.S. 190, 197–98 (1976). Justice Rehnquist would have used a "rational basis" approach, *id.* at 217–18 (Rehnquist, J., dissenting), and criticized the rationale for treating sex as a suspect classification, "the plurality [in *Frontiero v. Richardson*] rested its invocation of strict scrutiny largely upon the fact that 'statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.'" *Id.* at 218 (quoting Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (plurality opinion)).

5. 438 U.S. 265, 317 (1978) (Powell, J., concurring) ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.").

6. 505 U.S. 833, 846 (1992). To ascertain whether or not *Casey* simply upheld *Roe* technically, or was in fact rights expansive, one must do more than an analysis in policy terms of whether the Pennsylvania abortion law has made it more difficult or easier in the short run to obtain an abortion; one would have to explore whether the right itself is more or less fundamental by reviewing the evolution of Supreme Court decisions addressing this issue. In this regard, I would argue that the *Casey* decision upheld the fundamental right to choose an abortion, and in important ways made the right more fundamental. The jettisoning of the trimester framework in *Casey* was a significant step in expanding the right to choose abortion because it did away with medical science as the framework within which the right to choose abortion rested. *See id.* at 872–73 (O'Connor, J., concurring) (rejecting the trimester approach established in *Roe*). Arguably, *Casey* removed the collision course that would undermine the right to choose, as medical science now allows fetuses to be kept alive closer to conception, albeit with scientific aids, and women likewise have safer abortions closer to term. Also, in *Gonzales v. Carhart*, 550 U.S. 124, 156–57 (2007), the most recent Supreme Court case addressing "partial birth abortions," the Supreme

implied fundamental rights of privacy and personhood to homosexuals, specifically in terms of the right to sexual intimacy, in *Lawrence v. Texas*[8] (thereby overturning *Bowers v. Hardwick*). As well, the Court reaffirmed the *Bakke* principle that race may play a role in university admissions in *Grutter v. Bollinger*,[9] and even heightened the level of scrutiny of gender classifications in *United States v. Virginia* (*VMI*).[10] Most importantly, in *Romer v. Evans*,[11] a 6–3 decision, the Rehnquist Court invalidated a Colorado constitutional amendment that required all laws relating to homosexuals to be valid only through the process of amending Colorado's constitution.[12] The Court said this initiative by the people

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Court reinforced the fundamentality of the right to choose, but also recognized that certain abortion methods carry greater risks. Justice Kennedy openly recognized the practice of lethal injections for fetuses. *Id.* at 136. Moreover, as both *Roe* and *Casey* seem to suggest, there remains the possibility that a state could pass a law today that would permit women to choose an abortion up to term so long as the law takes into consideration those standards of humanity espoused in *Gonzales*. *See id.* at 157–60 (discussing Congress's desire to promote "respect for human life").

7. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

8. 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . demeans the lives of homosexual persons.").

9. 539 U.S. 306, 336–37 (2003) ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount."); *see Bakke*, 438 U.S. at 518 n.52 ("The denial . . . of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

10. 518 U.S. 515, 531–34 (1996); *see id.* at 573 (Scalia, J., dissenting) (criticizing the majority opinion's application of intermediate scrutiny to the facts of the case, noting that "[o]nly the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women . . . willing and able to undertake VMI's program").

11. 517 U.S. 620 (1996).

12. *Id.* at 627, 635–36.

was invalid because it was based on pure animus against homosexuals and, thus, was a violation of the Equal Protection Clause.[13]

Even with the addition to the Court of Chief Justice Roberts in 2005 and Justice Alito in 2006,[14] the Supreme Court refused to overrule landmark cases. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[15] the Court refused to find that race could not be a factor in attempts by school boards to diversify public schools.[16] Similarly, in *Fisher v. University of Texas at Austin*,[17] the Court under Chief Justice Roberts reaffirmed the principles of *Bakke* and *Grutter* by allowing the continuation of race to be one "plus factor" among many in the University of Texas's undergraduate admissions process.[18]

This is not to say that the Roberts Court has not had an impact on doctrinal change. For example, the Roberts Court has generally been pro-business, dramatically reducing access to federal courts by those seeking to use class action suits to limit what many feel are discriminatory corporation policies, as well as reducing the impact of required arbitration agreements for those interacting with businesses.[19]

The Court also has defined new individual rights. In 2008, it established an individual right to keep and bear arms in the *District of Columbia v. Heller*[20] decision. Similarly, in *National Federation of Independent Business v. Sebelius*,[21] there is a stunning definition of a new individual right or liberty interest under the Commerce Clause that protects a person from being forced into interstate commerce by

13. *Id.* at 632, 635.

14. *See Members of Supreme Court*, *supra* note 1.

15. 551 U.S. 701 (2007).

16. *Id.* at 735.

17. 133 S. Ct. 2411 (2013).

18. *Id.* at 2415–16. Justice Kennedy did note that race could not be considered "[i]f 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense.'" *Id.* at 2420 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion)).

19. *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("[T]he Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts . . . . The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business.").

20. 554 U.S. 570 (2008).

21. 132 S. Ct. 2566 (2012).

the national government, thereby possibly limiting the power of Congress to define what affects commerce for purposes of regulation.[22]

Most significantly, as we will discuss in Part II of this Article, in *United States v. Windsor*[23] the Court not only refuses to backtrack on the expansion of homosexuals' rights under the Due Process Clause in *Lawrence*[24] and under the Equal Protection Clause in *Romer*;[25] but it also chooses to *expand* homosexuals' rights under the Constitution[26] by declaring the nation's Defense of Marriage Act[27] (DOMA) unconstitutional, because it violates basic due process and equal protection principles by "impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[28]

Moreover, the analysis presented below explains why the Supreme Court has let stand federal circuit court decisions that found unconstitutional state bans on same-sex marriage. It did so even though *Windsor* found only that it was unconstitutional for the national government to fail to recognize same-sex marriage rights that were established by states.

Thus, the Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law during a period of political dominance by social conservatives, evangelical Christians, and other groups who largely view the protection of their

22. *Id.* at 2590. For a discussion of the doctrinal implications of the nascent right to liberty under the Commerce Clause in the *NFIB* case, see Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in* National Federation of Independent Business v. Sebelius, 73 MD. L. REV. 133 (2013). *See infra* notes 76–77 and accompanying text.

23. 133 S. Ct. 2675 (2013).

24. *Id.* at 2694; Lawrence v. Texas, 539 U.S. 558, 575 (2003).

25. Windsor, 133 S. Ct. at 2692; Romer v. Evans, 517 U.S. 620, 633 (1996).

26. *Cf. Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) ("The majority emphasizes that DOMA was a 'system wide enactment with no identified connection to any particular area of federal law,' but a State's definition of marriage 'is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' And the federal decision undermined (in the majority's view) the 'dignity [already] conferred by the States in the exercise of their sovereign power,' whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern." (internal citations omitted)).

27. 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

28. *Windsor*, 133 S. Ct. at 2693 (majority opinion).

definition of family values as a central mission of government.[29] As I noted in a previous publication, "social conservatives hoped that Republican appointees to the Supreme Court would roll back abortion rights, gay rights, affirmative action policies, and the constitutional separation of church and state."[30] I argued, however, that the Supreme Court has surprisingly (or unsurprisingly) sustained doctrine in opposition to the core values comprising the base of the Republican Party or expanded rights in these doctrinal areas.[31]

We need to explain why the Court expanded gay rights in the *Windsor* decision, rather than simply describe what the Court said. In order to explain why a conservative-moderate Supreme Court has expanded implied fundamental rights for homosexuals, first in *Lawrence* and now *Windsor*, one must explore the nature of Supreme Court decision making and focus in particular on how Supreme Court decision making relates to the social, economic, and political factors outside the Court: to see whether the Court, in its decision making, relates principles in cases to its view of the lived lives of individuals. Such an analysis will also help explain why most social scientists and many legal experts in constitutional law have failed to explain (or predict) the expansion of privacy rights and other individual liberties.[32]

29. *See, e.g.*, Lynn D. Wardle, Essay, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility.").

30. Kahn, *supra* note 2, at 174.

31. *See id.* at 185 ("[Principled bi-directional decision making] causes the Supreme Court to be simultaneously empirical and normative and inward and outward looking in its decision making. It results in the mutual construction of the internal and external through a process I will call the 'interpretive turn.').

32. *See, e.g.*, Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27 ("My principal suggestion here is that the Court's remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions. So understood, *Lawrence*, like *Griswold*, reflects a distinctly American variation of the old English idea of desuetude." (footnotes omitted)).

In this Article, I seek to explain the *Windsor* case and understand the importance of the contributions of fellow participants to this Symposium. To do so, I first present two primary models through which scholars seek to explain Court decisions and comment on them. "Scholars who rely on Model 1 . . . seek to explain Court decision making in *unidirectional* terms, either internally from text or precedent, *or* externally"—that is, directly "from the social, economic, and political realities of the world outside,"[33] or directly from other factors, such as justices' attitudes toward public policy before they reach the Court. Model 2 says that Court decision making and doctrinal change is "a *bidirectional* relationship between [1] legal principles and precedents *and* [2] the social, economic, and political climate outside the Court."[34]

To clarify, Model 1 explains Supreme Court decision making, *either* (1) from the historical, political, or social facts and events outside the Court, *or* (2) from text, statute, or precedent. Model 2 explains Supreme Court decision making in bidirectional terms, as a mutual construction process *between* text, precedent, and principles *coupled with* the social, political, and historical realities of the lived lives of persons.[35]

After Part I discusses Model 1 and Model 2 in more detail, Part II of the Article analyzes *Windsor* by viewing the Supreme Court as engaging in a bidirectional decision making process. In doing so, I first look at what polity and rights principles are raised in the case, and how they are applied through what I call a social construction process, which I argue has been a part of the Court since its

33. Kahn, *supra* note 22, at 140 (emphasis added).

34. *Id.* at 140–41 (emphasis added); *see also* Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining* Lawrence v. Texas, 67 MD. L. REV. 25, 35 (2007) ("[B]i-directionality between the internal Court and the world outside occurs at several levels, at the level of the lived lives of citizens as the Court makes decisions about rights of privacy and personhood as we see in the SCP [social construction process], and at the level of politics itself."). This Article will center on the use of both Models to explain doctrinal change on the Supreme Court. Nevertheless, these models may also be applied to decision making and doctrinal change in lesser federal and state courts.

35. Kahn, *supra* note 22, at 141. These two models are distinguishable in other respects as well. For example, political scientists applying Model 1 use quantitative methods and those applying Model 2 use interpretive methods to study the Supreme Court and doctrinal change. Further, both models adopt conflicting assumptions about the importance of Court institutional norms and process on the preference formation of Justices.

establishment.[36] I ask whether both liberal and conservative justices employ arguments that are based on a bidirectionality between principles and the lived lives of individuals. I also ask whether the polity and rights principles articulated in *Windsor,* and their application, make sense in light of the principles and social constructions in prior cases involving the rights of privacy and personhood.

In Part III, I explore the contributions of fellow Symposium participants to see whether they analyze *Windsor* by employing unidirectional or bidirectional methods of analysis. I also explore the implications of their choices on their ability to explain why the Court expanded gay rights in these same-sex marriage cases. In doing so, we see the continued impact of the "formalist-realist divide" on our discussion of the development of American constitutional law and the role of the Supreme Court in that process.

I. UNIDIRECTIONAL AND BIDIRECTIONAL MODELS OF COURT DECISION MAKING

A. Background: The Formalist-Realist Divide

To understand the reason for the Models—why Model 1 dominates the analysis of Supreme Court decision making, especially among most social scientists, and why Model 2 is superior in explaining Court action and doctrinal change—we need to explore the nature of this divide, whether the divide between formalism and realism was ever valid historically as justices made decisions, and whether it remained valid when *Windsor* was decided.[37] I also note that many other scholars of the Court and of common law reject the formalist-realist divide, and thus by rejecting it, also reject the possibility of Model 1 unidirectional explanations of Court action and doctrinal change.[38]

36. RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY: 1953–1993 (1994).

37. Brian Tamanaha, at least, suggests that the divide is a "stranglehold. It consists of a web of interlocking misinterpretations and confusions bundled in a mutually reinforcing package that is now virtually taken for granted. The consequences of this collection of errors are ongoing and pernicious." BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 3 (2010).

38. *See generally, e.g.*, DOUGLAS E. EDLIN, JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW 47–48 (4th ed. 2011) (discussing how common law tradition gives judges the dual mandate of applying law and developing law); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 165–67 (2003) (arguing that common law is key to unlocking fundamental principles of the U.S. Constitution

The divide consists of the view that the 1870s through the l920s should be viewed as the heyday of legal formalism,[39] a doctrine that asserts, "the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions."[40] While operating within the legal formalism framework, "[f]ormalist judges . . . assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics."[41] The formalist vision as described by legal realists, however, included the following premises: "(1) the law is rationally determinate, and (2) judging is [deductive in a] mechanical [way]. . . . (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome [and] no recourse to non-legal reasons [is] demanded or required";[42] (4) the process is "*formal* in that right answers [can] be derived from [an] autonomous, logical working out of the system"; and (5) legal thought is "*conceptually ordered* in that ground-level rules [can] all be derived from a few fundamental principles."[43]

The other side of the divide narrative places an emphasis on legal realist conceptions of judging and the study of courts, which are viewed as counter to conceptions of judicial formalism.[44] During the 1920s and 1930s, legal realists were charged with discrediting legal formalism; this is due in part to the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo.[45] As Professor Brian Tamanaha writes:

> [T]he legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law

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and is a guide for judges deciding contemporary constitutional matters); s*ee also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (providing a common law constitutional theory for a modern-day bidirectional interpretation of Court decision making).

39. TAMANAHA, *supra* note 37, at 1.

40. MATHIEU DEFLEM, SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION 98 (2008).

41. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187 (1988).

42. Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999) (book review); *see* TAMANAHA, *supra* note 37, at 160.

43. Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999); *see* TAMANAHA, *supra* note 37, at 160.

44. TAMANAHA, *supra* note 37, at 1.

45. *Id.*

> is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results. The realists argued that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome.[46]

For the realists, legal formalism, principles, and precedents—that is, the law and legal method—do not explain what justices and judges do.[47] For the realist narrative, one must look outside the law and legal process, into the ideologies of justices and the social, economic, and political world outside the Court, to explain what courts do. The law and legal process is indeterminate, not bounded in a disciplined way, and clearly cannot be explained by the Court applying principles and precedents.

B. Model 1: Unidirectional Models for Explaining What Court Does, or Should Do

Whether scholars reject or accept the divide results in two quite different models for explaining Court decision making. Scholars who accept the divide engage in "unidirectional" models (Model 1) for explaining Court action. Scholars who reject the divide engage in "bidirectional" models (Model 2) of Court decision making.[48]

Political scientists who employ attitudinal,[49] regime,[50] interest group,[51] and other approaches[52] to Supreme Court decision making

46. *Id.*

47. *Id.* at 84.

48. *See infra* Part I.C.

49. This approach emphasizes that judges "vote" instrumentally in constitutional (and other) cases in a way that is consistent with their preexisting political "attitudes." *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

50. Led by Robert A. Dahl, it emphasized that the Supreme Court follows elections returns and the policies of the regime in power. *See* Robert A. Dahl, *Decision-Making in a Democracy: the Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 284–86 (1957). The Supreme Court is viewed as a policy-making institution that is not very different from those with elected officials in the executive and legislative branches of government. *Id.* at 294–95.

51. Studies of the dynamics of agenda setting and interest-group litigation—that is, legal mobilization occurring prior to Supreme Court actions—emphasize the instrumentalism of lawyers, social change groups, and other actors as precursors to a consideration of the instrumentalism of judges. *See* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 24-32 (1992) (outlining the goals and strategies of interest group litigators); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE

employ unidirectional explanations of Court action. All the factors by which they seek to explain Court decisions are external to the Court decision process. This has had enormous implications for how we study the Supreme Court and explain doctrinal change, and thus how we explain the development of individual rights.

The legalist strand of Model 1 unidirectional explanations of Court decision making assumes that judging can be explained as the application of principles and precedents in a formalistic way, without looking into the outside world of the lived lives of persons. Under this version of Model 1, it is assumed that doctrinal change comes from a completely internal process, and the objective for legalist scholars is to influence this process, or train lawyers to do so, through their scholarship. Thus, constitutional scholars who argue for their version of originalism, what the text means, and even for their vision of what the Constitution should mean—whatever that is—are unidirectional in their goals, whether or not such unidirectionality is possible or not.[53]

Thus, constitutional theories that argue that the Constitution should be interpreted based on a particular theory of rights or polity principles will also be considered unidirectional, even when that theory makes the argument that the Supreme Court is only one of many important venues for making constitutional choices, and perhaps not the best one at that—as Mark Tushnet does in his argument for "taking the Constitution away from the courts."[54] The reason for this is that, like originalists or Dahlian political scientists,

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UNITED STATES SUPREME COURT 245–68 (1991) (describing the criteria for certiorari which can include cases that "are of huge political and societal importance" or that involve a justice's area of interest).

52. We also see Model 1 unidirectional premises in scholars who view the Court following or responding to historical events, such as the Depression, the Cold War, or activities of social movements prior to Court action. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 99–107 (William Chafe et al. eds., 2000) (explaining how American desire to win the Cold War spurred Supreme Court intervention in the school desegregation cases).

53. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM (2011) (an example of Originalism and its unidirectionality); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23–25 (Amy Gutmann ed., 1997) (distinguishing textualism from strict constructionism, "a degraded form of textualism").

54. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS ix (1999). More specifically, Tushnet argues for "populist constitutional law," which favors "the public generally [participating] in shaping constitutional law more directly and openly." *Id.* at 181–94.

theories that are justificatory, no matter on what basis, are formalist, while the Court is simultaneously formalist and realist in its decision making. A theory that advocates a particular set of polity or rights principles on which the Court should decide cases cannot explain what the Court does—and therefore cannot be a model for how the Court should act.

Unidirectional approaches used by legalists would include the originalist approach, as well as when constitutional theorists argue for one approach to what the Constitution means, such as Ronald Dworkin's moral theory,[55] Barnett's libertarian theory,[56] and even John Hart Ely's theory that the Court should intercede into the political system to help individuals and groups secure equal rights when the political system cannot do so because of prejudice.[57] Thus, unidirectional approaches include how political scientists have attempted to explain Court decisions as well as when constitutional scholars have argued on what basis the Constitution should be interpreted.

The unidirectionality that is central to many Model 1, social science explanations of Court decision making is also found in arguments that Court decision making results from justices mechanically applying precedents, text, and constitutional principles as they decide a case. Under this legalist strand of Model 1, unidirectional Supreme Court decision making, it is presumed that all well-trained justices would make the same decision, given the appropriate precedents. This is the notion that justices are simply mechanical in what they do in a closed system of legal decision making.

As we have explored above, the formalist vision of law as rationally determinate, judging as deductive in a mechanical way, and legal reasoning as autonomous from society is not a valid description of decision making by the Supreme Court. Right answers cannot be derived from an autonomous, logical working of the system. Legal

55. Ronald Dworkin's moral reading of the Constitution "proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice." RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

56. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259–69 (2004) (arguing for interpreting the Constitution with a "presumption that in pursuing happiness persons may do whatever is not justly prohibited" instead of a "presumption that the government may do whatever is not expressly prohibited").

57. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980).

thought is not conceptually ordered to the point that ground-level rules could be derived from a few fundamental principles.

The history of Supreme Court decision making demonstrates that unidirectional formalist models simply do not fit with what the Court does in practice. Judges in the so-called formalist age knew the law was indeterminate at times; knew that it involved notions of policy considerations; and knew that principles had to be reconciled with customs, norms, opinions in the community, and a popular sense of rights and social interests in a changing world. In other words, all lawyers and justices knew they made common law.

The most famous and influential theory of constitutional interpretation that is characteristic of this internal-looking unidirectional strand of Model 1 is originalism. However, while advocates of originalism view their theory of how to interpret the Constitution as formalist, and therefore not political, there are many reasons to believe that there are realist elements external to the Court in originalism. And it has been that way throughout the history of the Court.[58]

Therefore, unidirectional Model 1 approaches for explaining Court action or for advocating normative bases for its actions accept the divide between formalism and realism, and in so doing are not based on an understanding of what the Court has done throughout its history—employing both formalist and realist elements. This will become clearer as we explore below the key elements of Model 2 bidirectional approaches for explaining Court decision making, and make an argument for such approaches.

Thus, legalist unidirectional models of the Court, whether based only on formalism or skeptical realist explanations of Court action from outside the Court, foster improper visions of what the Supreme Court is doing. Tamanaha writes:

> The story about formalism promotes the unrealistic image of self-applying legal rules; skeptical realism promotes the equally unrealistic opposite image of human judges pursuing their personal preferences beneath a veneer of legal rules . . . If

58. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 224–40 (1997), for the view that the period prior to 1937 was the age of formalism, textualism and originalism and the period after 1937 was the age of the "Living Constitution." This narrative is additional evidence of the impact of the idea of a divide on scholarship and unidirectional methods of Court analysis. The divide was rejected by the Court; *id.* at 238, however, it was accepted by many legalists, political scientists and historians. In doing so, we have a misguided view of both pre- and post-Lochner era judging.

> legal rules were perfectly preexistent and judges were calculating machines, these situations [of difference in opinion among justices, negotiation, and changes of opinion] *would be* indications of flaws. But mechanical jurisprudence is impossible. It is a mistake to think of these unavoidable aspects as flaws rather than as inherent conditions of law and judging.[59]

The unidirectional realist narrative of what the Court does and why it does it also is not borne out by an analysis of the history of Supreme Court decision making, in part because formalist elements such as principles and precedents, not simply realistic ones, are at the core of Court decision making. In addition, realist assumptions that justices make decisions on the basis of personal ideologies, policy wants, or the beliefs of the presidents who appointed them also are not borne out by the history of the Supreme Court. Realist assumptions that one only has to look outside the Court for social, economic, or political factors to explain Court action also are not valid when one studies the history of the Supreme Court. Nor is the realist assumption that legal arguments and the process through which the Court makes decisions are simply justifications for decisions made on realist factors.

C. Model 2: Court Decision Making as a Bidirectional, Mutual Construction Process

Under Model 2, doctrinal change, including the development of individual rights, is caused by a constitutive Supreme Court decision making process that is bidirectional: the internal decision-making process in which principles and precedents are applied in a case interact with the social, economic, and political world outside the Court, but not in the unidirectional way that is assumed in Model 1. Moreover, explanations of Court action must also be explained in bidirectional terms. Unlike Model 1, Model 2 scholars do not see the outside world as one "X factor" causing Court decisions; nor do they see internal values and norms as deciding cases in a closed system. The objective of the scholar is to understand the factors internal to the Court decision-making process and to see how the Court brings the social, economic, and political world into its decision making.

Scholars who reject the divide employ Model 2 understandings of Supreme Court decision making. They emphasize that, in order to understand Court decision making, one must explore the mutual construction of formalist and realist elements in Court decision making. They stress that there is a bidirectional relationship between the formalism of Court decision making (principles, precedents, and doctrine) and the realism of the political, economic, and social world

59. TAMANAHA, *supra* note 37, at 195.

outside the Court. Therefore, neither legal or formalist elements nor realist elements alone can explain Court decisions.

Thus, bidirectionality occurs at two levels—at the level of the relationship between formalist and realist elements in internal Court decision making, and in terms of the importance of the realism surrounding the social, economic, and political world outside the Court.

Model 2, unlike Model 1, is based on the assumption that the Court is in a bidirectional relationship with society as it makes constitutional choices, as well as the assumption that Court decision making is based, simultaneously, on the application of principles and the effect of institutional norms and processes on the Court and professional norms on lawyers and justices. Model 2 rejects the behavioralist methodological assumptions of Model 1—that is, that Court action can be explained by assuming that factors either internal to the Court or external to the Court inform what the Court does.

Support for Model 2—viewing the Court as bidirectional in its decision making—is based on the premise that it will provide a superior basis by which to understand the relationship between Supreme Court decision making and the development of individual rights in specific cases, such as *Windsor*, as well as over time within and among doctrinal areas.

Model 2 will help us explain why a conservative/moderate Court in a conservative era extends progressive individual rights and establishes new ones. Finally, the analysis of the development of individual rights under the assumptions of Model 2 bidirectionality will help us better understand the limits and possibilities of contemporary normative constitutional theories as guides to past and future Court actions.

II. *UNITED STATES V. WINDSOR*: A PRODUCT OF BIDIRECTIONAL SUPREME COURT DECISION MAKING

Polity principles are important to all of the justices writing opinions in *Windsor*. All justices accept the polity principle of deference to states to decide who may marry.[60] Justice Kennedy

60. Justice Kennedy provided evidence of the traditional deference that the federal government and the courts have given to states to define who can marry by emphasizing the following: (1) the definition of marriage is the foundation of the states' broader authority to regulate the subject of domestic relations—with respect to offspring, property interest, and enforcement of marital responsibilities; (2) at the time of adoption of the Constitution, states had full power over marriage and divorce; (3) the Constitution did not delegate authority over marriage and divorce to the federal government; and (4) federal courts defer to states on

explores polity principles to decide whether there is a case or controversy, and finds there is because of prudential principles in rules of standing.[61] The importance of polity principles is not limited to deciding questions of standing; they are also central for the consideration of whether DOMA is unconstitutional because it violates rights and principles central to whether same-sex couples have been denied equal protection and due process of law.[62] Kennedy uses the principle of deference to states as a basis for arguing that the refusal of the national government to recognize state-defined rights to same-sex marriage is an important factor in demonstrating why DOMA denies equal protection and due process rights to same-sex families.[63]

The dissenters would have liked the Court to either not grant certiorari or to take the case and then say there was no case or controversy for various reasons.[64] Or the dissenters would have liked the Court to say that the polity principle of deference to state decisions on who may marry was not violated in *Windsor* by the national government's refusal to recognize the right to marry for same-sex couples.[65]

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regulation of marriage and divorce even in diversity of citizenship cases. *See* United States v. Windsor, 133 S. Ct. 2675, 2691–92 (2013).

61. *See id.* at 2687–88 (holding that there was a sufficiently adversarial process because a group from Congress (BLAG) was permitted to argue for DOMA's constitutionality).

62. *See id.* at 2689 ("Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.").

63. *See id.* at 2692 ("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 an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))).

64. *See id.* at 2698 (Scalia, J., dissenting) ("But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we 'undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *id.* at 2688 (majority opinion)).

65. *See id.* at 2696 (Roberts, C.J., dissenting) ("The majority sees a more sinister motive, pointing out that the Federal Government has

Justices Scalia, Roberts, and Alito explore polity principles both within standing rules and within their views of how to interpret the Constitution. Because there is no right to same-sex marriage in the Constitution, and because same-sex marriage is only now recently within the history and tradition of our nation, democratic institutions, not courts, should decide whether same-sex couples should have the right to marry.[66] The dissenters' reading of the Constitution and the history and tradition of marriage laws result in a finding that the federal government did not act unconstitutionally when it passed DOMA. For the dissenters, looking ahead to later cases, these same factors and their analysis of equal protection and due process principles in *Romer* and *Lawrence* suggest that states should not be required to offer same-sex couples the right to marry.[67]

What is so interesting in *Windsor* is Justice Scalia's analysis of the application of rights principles in Justice Kennedy's decision—specifically Scalia's assertion that Kennedy's analysis may lead to a constitutional right to same-sex marriage and his skepticism of Justice Kennedy's disclaimer that *Windsor* will not do so.[68] It demonstrates that Justice Scalia understands the implications of the rights principles set out in Justice Kennedy's opinion—and how the rights to liberty and equal protection first enunciated in *Lawrence* and *Romer*,

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generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—'thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.'" (alteration in original) (quoting *id.* at 2689 (majority opinion))).

66. *See id.* at 2697–98 (Scalia, J., dissenting) ("This case . . . is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation.").

67. *See id.* at 2697 (Roberts, C.J., dissenting) ("[W]hile '[t]he State's power in defining the marital relation is of central relevance' to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." (quoting *id.* at 2692 (majority opinion))).

68. *See id.* at 2709 (Scalia, J., dissenting) ("The penultimate sentence of the majority's opinion is a naked declaration that '[t]his opinion and its holding are confined' to those couples 'joined in same-sex marriages made lawful by the State.' I have heard such 'bald, unreasoned disclaimer[s]' before." (quoting *id.* at 2696, 2695; Lawrence v. Texas, 539 U.S. 558, 604 (2003))).

respectively, have been applied in *Windsor*.[69] He also understands that the social construction of sexual intimacy as central to enduring personal relations informs whether same-sex couples should have a right to marry.[70] It is also significant that Chief Justice Roberts and Justice Alito dislike what Justice Scalia does—I suspect for strategic reasons—as it undermines their argument that DOMA is constitutional on the basis of their application of polity principles.[71]

Justices Kennedy and Scalia agree that there is a polity principle throughout our nation's history: we have deferred to states to define who can marry. They differ on whether only polity principles are involved in this case, because of differences over whether gay men and lesbians have any liberty rights. This debate is bounded by prior debates about polity and rights principles in *Romer* and *Lawrence,* and can only be understood in those terms.[72] Moreover, the social construction of what rights of liberty are violated by DOMA builds on rights defined in prior cases, and the social construction of those rights, through a process of analogy.

It is quite clear that Justice Kennedy rejects the divide between formalism and realism.[73] Throughout the majority decision, questions as to whether DOMA violates equal protection and due process principles are explored through looking at the reality of the lived lives

69. *See id.* (Scalia, J., dissenting) ("It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it.").

70. *See id.* 2708–09 ("In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act . . . with *the purpose* to 'disparage,' 'injure,' 'degrade,' 'demean,' and 'humiliate' our fellow human beings, our fellow citizens, who are homesexual.").

71. *See id.* at 2696–97 (Roberts, C.J., dissenting) ("Justice SCALIA believes this is a 'bald, unreasoned disclaime[r].' In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt." (quoting *id.* at 2709 (Scalia, J., dissenting))); *id.* at 2714 (Alito, J., dissenting) ("The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.").

72. *See id.* at 2693–96 (majority opinion) (considering the equal protection principles established in *Romer*, then showing the relationship between those equal protection principles and the due process liberty principles in *Lawrence*).

73. *See generally* TAMANAHA, *supra* note 37, at 1–3 (discussing the divide between formalist and realist).

of same-sex couples.[74] Justice Kennedy is always looking outside the walls of the Constitution to see whether the rights of same-sex couples and their families are violated. In doing so, he also looks outside the walls of formalist principles to view the place marriage has in the lives of opposite-sex couples. But the degree to which justices look at the reality of the world outside the Court depends on how they interpret rights and polity principles, as we saw the dissenters refusing to accept the social constructions of Justice Kennedy because they rejected his view of rights principles in *Romer* and *Lawrence*.[75]

But the dissenters in *Windsor* did not always oppose the construction process to see whether rights have been violated. We see below a mutual construction process between formalism and realism when Justice Scalia, joined by Justice Alito, Chief Justice Roberts, Justice Thomas, and Justice Kennedy, argue for a right to liberty under the Commerce Clause as a basis to find the Affordable Care Act unconstitutional. At the core of Justice Scalia's opinion in *Sebelius* is the proposition that the national government cannot force persons into interstate commerce.[76] This right to liberty is based on an economic construction: refusing to buy health insurance is not action, but inaction,[77] in contrast to the analysis of Justice Ginsburg, in which choosing not to buy health insurance is action, and one that can be regulated by Congress under the Commerce Clause.[78]

74. *See Windsor*, 133 S. Ct. at 2694 ("The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question 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.") (citation omitted).

75. *See id.* at 2707 (Scalia, J., dissenting) ("As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. I will not swell the U. S. Reports with restatements of that point." (citing Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting))).

76. Nat'l. Fed'n. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2647–50 (2012) (Scalia, J., dissenting).

77. *See id.* at 2649 ("But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything.").

78. *Id.* at 2617 (Ginsburg, J., dissenting in part, concurring in part).

Comparing *Sebelius* and *Windsor* suggests that both originalists and non-originalists apply polity and rights principles through a process of social and/or economic construction, which brings the realism of the world outside the Court into the Court's decision-making process. And they do so by comparing polity and rights principles, and social/economic constructions and prior cases, as they define new polity and rights principles and social/economic constructions in the case before the Court. There is a mutual construction of the formalist polity and rights principles and the realism of the world outside the Court. Yet this is not new, since Court decision making has been one of "balanced realism" throughout the history of our nation.[79]

III. UNIDIRECTIONAL AND BIDIRECTIONAL METHODS OF ANALYSIS IN SYMPOSIUM CONTRIBUTIONS

Because of the range and complexity of these important contributions to legal scholarship and the understanding of The Marriage Cases, I have written a set of questions that I will apply to each of the articles to see whether they are built on Model 1 or Model 2 conceptions of Supreme Court decision making. I understand that some articles discuss the policy implications of the marriage cases. For example, the wonderful contribution of Nancy C. Marcus speaks to the doctrinal impact of *Windsor* and the institutional questions that impact the strategies used by the LGBT advocacy groups in bringing gay rights cases to court.[80] However, to make this manageable, I am organizing the articles into groups that are discussions primarily of the Doctrinal (Maggie Gallagher and William C. Duncan,[81] Sherif Girgis,[82] Andrew Koppelman,[83] Nancy C. Marcus,[84] and Ernest A.

79. As Professor Tamanaha explains, "'balanced realism' has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. . . . The rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing aspect." TAMANAHA, *supra* note 37, at 6.

80. Nancy C. Marcus, *When Quacking Like a Duck is Really a Swan Song in Disguise: How* Windsor's *State Powers Analysis Sets the Stage for the Demise of Federalism-Based Marriage Discrimination*, 64 CASE W. RES. L. REV. 1073, 1079–97 (2014).

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

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

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

Young[85]), the Institutional (Susan J. Becker,[86] Robert F. Nagel,[87] Nancy Scherer,[88] and Robin Fretwell Wilson[89]), and the Policy (Helen M. Alvaré[90] and Frances Goldscheider[91]) implications of the marriage cases.

In doing so, I realize that I cannot get into the complex thought processes and motives in the writing of each of these articles, although a good number of contributors speak to their motives and objectives for writing their articles. So when I use the term that a contributor assumes something, it is based on the scholarly assumptions that I identify in his or her articles.

A. Doctrinal Analyses

1. Nancy C. Marcus

"*When Quacking Like a Duck Is Really a Swan Song in Disguise: How* Windsor*'s State Powers Analysis Sets the Stage for the Demise of Federalism-Based Marriage Discrimination*"

Although based on Model 1 assumptions about decision making, Marcus rejects the formalist-realist divide. She rejects a simple inside-out or outside-in explanation for Court decisions, and while she does not explore the direction of change at the level of the mutual construction of formalism and realism, Marcus does examine the role of legal advocacy group politics on Court decisions. She offers an important analysis of conflicts within the LGBT advocacy community as to what strategy to follow, whether one based on polity or rights principles or on minimalist or maximalist rights arguments.[92]

84. Marcus, *supra* note 80.

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

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

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

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

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

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

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

92. Marcus, *supra* note 80, at 1079–97.

However, in the end, the LGBT community chose litigation strategies that were not as aggressive in terms of rights demanded as what the Court delivered in *Windsor*.[93] In institutional terms, Marcus must admit that the Court is quite autonomous from the influence of legal advocacy groups, because the choice of what polity and rights principles to emphasize is up to the Court, and one could not predict what the Court would do in *Windsor*.

In doing so, Marcus is admitting that preference formation on the Court occurs and is not predictable. She also is admitting that polity and rights principles inform Court decision making,[94] but it is not easy to predict how polity and rights principles will be chosen and how they relate to each other. It is quite clear that, given the choices that the Court has, Marcus is not taking an originalist view of how the Constitution should be interpreted, in part because she admits Court choices are based on a look at preceding cases.

It is quite clear that Marcus likes the policy implications of the rights defined in *Windsor*, and the Court's rejection of basing the decision on the polity principle of deference to states in deciding who can marry.[95] However, this is not Model 2 analysis because there is no discussion of the mutual construction of the polity and rights principles or of the formalist and realist elements in Court decision making. Nor is there a discussion of the implications of choosing a specific reading of equal protection or due process rights principles, in light of the realism of the world outside the Court.

We see this in the fact that Marcus' Duck Test is not about the relationship of formalist and realist elements in Court decision making, the comparison of social constructions in precedents with those in the case before the Court, or other elements of Model 2 decision making. It is that the Duck is no longer quacking only federalist polity principles, and that rights principles, as Marcus argues, will lead to a right to same-sex marriage.[96]

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93. *Id.* at 1096–97.

94. *See id.* at 1110 ("*Windsor* ultimately stands for the limitation on both federal and state legislative power to engage in class-based unequal deprivation of substantive due process rights, including the right of same-sex married couples to receive equal respect for their marriages.").

95. *See id.* at 1096 ("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.'" (quoting Courtney G. Joslin, Windsor*, Federalism, and Family Equality*, 113 Colum. L. Rev. Sidebar 156, 158 (2013), http://www.columbialawreview.org/wp-content/uploads/2013/10/Joslin-113-Colum.-L.-Rev.-Sidebar-156.pdf)).

96. *Id.* at 1112–17.

While no article can discuss all that has to be discussed with regard to the marriage cases, Marcus does demonstrate why *Windsor* is based ultimately on rights principles. Clearly, Marcus does more than simply support or oppose the *Windsor* decision. Rather, the argument is made why *Windsor* will most likely lead to a constitutional right to marriage, in part because the Court did not base its decision on polity principles alone, nor on narrow rights principles as requested by LGBT legal advocacy groups.[97]

In doing so, Marcus is demonstrating that the law is bounded, but not determinant. It is the result of a robust process of legal advocacy and a Court that can make choices to inform changing individual rights.

At times, Marcus seems to accept the Model 1 premise that Court decision making can be explained as a result of unidirectional factors outside the Court when she notes that the change from federalism to rights-based arguments may be seen as the Court following public opinion as demonstrated by polling.[98]

Marcus also argues that the "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."[99] One could argue that here Marcus is rejecting the validity of Model 2 Court decision making, because she does not see that the Court's decision making and its final opinions are the result of a process of preference formation, in which the mutual construction processes, the consideration of precedents, and the definition of the relationship between polity and rights principles are real, and not simply strategic moves by the Court.

Part of the article is a discussion of the Court's application of formalist polity and rights principles[100]; the other part is an important discussion of the realism of the external advocacy process in which lawyers must decide whether to make arguments against DOMA based on polity and rights principles and whether to be minimalist or maximalist in the application of these principles.[101] The importance of scholarly analysis on litigation strategies is demonstrated by LGBT advocacy groups' acceptance of Cass Sunstein's argument for

97. *Id.*

98. Marcus, *supra* note 80, at 1080–82.

99. *Id.* at 1078.

100. *Id.* at 1105.

101. *Id.* at 1082–83.

minimalism[102] and Gerald Rosenberg's argument from THE HOLLOW HOPE as to why the groups should fear a political backlash if they choose to be maximalist in seeking individual rights for gay men and lesbians.[103]

2. Sherif Girgis

"Windsor*: Lochnerizing on Marriage?*"

In support of Justice Alito's dissent, Girgis argues that the Court decided between two reasonably disputed views about marriage. One is consent-based, that marriage is to "promote any romantic pair-bond," and the other is based on conjugality, that marriage is to promote "a comprehensive . . . union . . . intrinsically ordered to producing new life" and thus is "intrinsically opposite-sex."[104]

Because the Constitution is entirely silent on what marriage is and what branch of government should decide who can marry, and the Equal Protection Clause is not applicable to a right to marry, the Constitution cannot inform what the social stakes of marriage are to individuals or to the nation. The decision as to whether there is a right to marry should be left up to politics. Therefore, *Windsor*'s finding that DOMA is unconstitutional and that it violates the Constitution for the federal government or the states to ban same-sex marriage was inappropriate for the Court to do.[105] In fact, to do so is just as illegitimate as the Court establishing a right to liberty that keeps the government from interfering with the freedom to bargain between employer and employee by limiting the working hours of bakers,[106] as in *Lochner v. New York*.[107]

Therefore, *Windsor* is "Lochnerized." The Court substituted its own policy judgments of a consent-based view of marriage for the constitutionally-legitimate and electorally-favored alternatives, a conjugal view of marriage.[108] Thus, Girgis goes beyond Justice Alito's dissent.

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102. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25–26 (1994) (arguing for incremental change).

103. *See* Marcus, *supra* note 80, at 1082–84; *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 355–429 (2d ed. 2008).

104. Girgis, *supra* note 82, at 974 (quoting United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (internal quotation marks omitted).

105. *Id.* at 991–95.

106. *Id.* at 995–97.

107. 198 U.S. 45 (1905).

108. Girgis, *supra* note 82, at 973–74.

For Girgis, any ruling against DOMA or any state or national law that chooses (on equal protection grounds) between two reasonably disputed, "extra-constitutional value and policy judgments," as to which definition of marriage is best for individuals and the nation, is Lochnerizing, and not based on a proper reading of the Constitution.[109]

Girgis argues for the power of government to favor traditional marriage in two ways. The "Value Judgment Defense" of marriage gives marriage a distinct moral value as it "unites the whole of the partners: not just in heart and mind, but also bodily."[110] The "General Welfare Defense" of traditional marriage as conjugal-based is that traditional marriage is socially valuable for society because it benefits children—a purpose better served, frankly, by recognizing opposite-sex and same-sex bonds.[111]

In the Girgis article, we see a rejection of the Model 2 decision-making process of the *Windsor* Court. Girgis' elaborate, but flawed, analysis in opposition to the *Windsor* decision, and any Court decision favoring a right to same-sex marriage, has all the problems of an originalist interpretation of the Constitution because of its rejection of Model 2 Court decision making.[112]

Ironically, Girgis is willing to give his views on the realism of what happens in opposite-sex and same-sex marriages to adults and children, but for the Supreme Court to do so violates an originalist interpretation of the Constitution. We see this in his construction of the ideal type of consent and conjugal-based conceptions of what marriage is and his support of a conjugal-based view of marriage. We see this in Girgis' criticism of Koppelman's equal protection argument in support of *Windsor*.[113] Girgis argues that reproduction has a clear

109. *Id.* at 997.

110. *Id.* at 991.

111. *Id.* at 992.

112. *See id.* at 1013–27 (arguing that using realism to strike down DOMA on equal protection grounds because it would be the equivalent of Lochnerizing).

113. In what he labels the "Depraved Heart" attempt to strike DOMA down on equal protection grounds, *id.* at 1022, Girgis would not permit Koppelman to use realist arguments:

> All that DOMA did effectively was to "tell [same-sex] couples . . . that their otherwise valid marriages are unworthy of federal recognition." Its "purpose [wa]s to convey a message of disdain for gay couples." And because none of the purported benefits was even nearly proportionate to its costs, DOMA accomplished this purpose "with extreme indifference to the human costs."

social value for individuals and the nation, one that is related to marriage, unlike race and gender classification, which are pure inventions of social custom.[114]

This is not the place to write a detailed criticism of Girgis' view of the reality of opposite-sex and same-sex marriages for adults and children. This Symposium offers many informed articles with quite different views of that reality. It is ironic that Girgis argues that government should only recognize, legally, his reality of what marriage should be at this time in our nation's history. Today, fewer heterosexual individuals are marrying but are having children, resulting in more children in homes without married parents. Allowing same-sex marriage does not disparage opposite-sex marriage—it secures personal relations and encourages having children, both of which are good for society.

For the reasons stated above, the Court has good reason to reject the arguments of Girgis and the originalists about the right to marriage. They are willing to impose their view of reality and marriage on the Court, but do so by hiding behind the façade of an originalist interpretation of the Constitution.[115]

The argument that any decision by the Court on the right to marry is Lochnerizing is mistaken. The problem with *Lochner* was that the right to liberty of contract was not really liberty; when one socially constructs what the reality is between the employer and employee when they bargain over wages and hours, one realizes that they are not on equal footing, and the cost of this "liberty" is paid not only by the employees and their families, but by the entire nation as well.[116] A right of due process liberty to marriage for same-sex couples is no different than the liberty that opposite-sex couples get when they are allowed to marry. The failure to see these differences— and see that the Court can make such distinctions and overturn landmark decisions when a right to liberty never has or no longer does relate to the lived lives of persons—suggests the formulaic nature of the charge that the Court in *Windsor* is Lochnerizing. To reject the fact that principles and realism mutually construct each other, and the fact that the Court looks outside the walls of the Constitution, as it

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Id. at 1024 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694 (2013); Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 N.W. L. REV. COLLOQUY 131, 151 (2013), http://www.law.northwestern.edu/lawreview/colloquy/2013/12/LRColl2013n12Koppelman.pdf).

114. *See id.* at 988–91.

115. *See supra* Part I.B.

116. *E.g.*, Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 880 (1987).

always has done, is the most important indication of Girgis' rejection of Model 2 Court decision making.

Finally, why does Girgis emphasize the place of equal protection and not due process liberty principles in his critique of the *Windsor* decision and the right to same-sex marriage?[117] The right to same-sex marriage is stronger if one considers long-time precedents and Justice Kennedy's opinions in *Lawrence* and *Windsor*.[118] It also is stronger if one considers the relationship of marriage to enduring personal relations between gay couples. The charge that the Court is Lochnerizing in *Windsor* is an argument against the power of the Court as an institution to decide what constitutes liberty under the Due Process Clauses. It does not speak directly to the question of why Kennedy is misguided in his analysis of why DOMA violates the liberty of same-sex couples.

3. Maggie Gallagher and William C. Duncan

"*The Kennedy Doctrine: Moral Disagreement and the 'Bare Desire to Harm'*"

The Gallagher and Duncan contribution is an argument against what it calls the "Kennedy Doctrine," as found in Justice Kennedy's decisions in *Bond v. United States*,[119] *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*.[120] It appears more as a political attack on those that support gay marriage rather than a deep analysis of the doctrinal bases of these decisions or of the Court as an institution.

In this article, we are told that conservatives are more respecting of counter arguments on gay rights than liberals, because Justice Kennedy and liberals assume any opposition to gay rights and marriage constitutes a bare desire to harm, even by those with sincere religious beliefs, and that "bare desire to harm" arguments intensify political conflict.[121] We see the Kennedy doctrine as part of the "collapse of sexual norms and order,"[122] brought on by the "new liberal moral order,"[123] led by the Supreme Court, that is part of this new liberal elite.

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117. *Cf.* Girgis, *supra* note 82, at 993 n.105.

118. *See supra* Part II.

119. 131 S. Ct. 2355 (2011).

120. Gallagher & Duncan, *supra* note 81, at 949.

121. *Id.* at 960–66.

122. *Id.* at 964.

123. *Id.* at 968.

At the doctrinal level, Justice Kennedy is criticized for not recognizing that heightened Court scrutiny under the Equal Protection Clause applies to only race and gender classifications in law,[124] for not respecting the history and tradition of our nation in support of traditional marriage,[125] for not respecting moral values that support traditional marriage,[126] and for the failure to see the difference between what constitutes a liberty and equality interest under our Constitution.[127] In so doing, the Kennedy doctrine constitutes a "constitutional ideology."[128]

It is difficult to determine whether the authors support Model 1 or Model 2 Court decision making, because there is no analysis of the relationship of polity to rights principles in Justice Kennedy's decisions, no discussion of the relationship between rights advocated by Justice Kennedy and the lived lives of persons, and no discussion of why the "Kennedy doctrine" violates equality and liberty principles in prior cases and under the Constitution more directly.

By not exploring some of the above issues in Justice Kennedy's decisions, the authors seem to accept the formalist-realist divide. And the Kennedy doctrine is all about the realism of Kennedy and the Justices that signed on to the opinions as putting into law their own political ideologies.

4. Andrew Koppelman

"*Beyond Levels of Scrutiny:* Windsor *and the Bare Desire to Harm*"

In this superb article, one of our nation's foremost scholars of what the Equal Protection Clause means wants to fit his analysis of *Windsor* into what he has long been examining: whether having sexual-orientation classifications in laws is a denial of equal protection

124. *Id.* at 949.

125. *Id.* at 952–53.

126. *See id.* at 951 (positing that, for Kennedy, "the desire to protect a traditional moral understanding of marriage became in itself animus.").

127. *See id.* at 959–60. An "equality interest" is a right "to be protected from knowledge of civil and moral disagreement with the choices one has made in everyday life, in the interests of advancing equality," while a "liberty interest" is "the right to live as they choose, to express affection, to be who they are in public unmolested by harassment, to visit each other in hospital rooms, etc." Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260, 270–71 (2010).

128. *See* Gallagher & Duncan, *supra* note 81, at 951 ("The difference between a desire to harm and a desire to affirm . . . becomes invisible in this constitutional ideology.").

of the law.[129] Rather than analyzing what the Court did and offering reasons why it did it through an analysis of Model 2 Court decision making, Koppelman interprets *Windsor* so that it can be viewed as sustaining his constitutional theory of what equal protection before the law means. Thus, it is a Model 1, not a Model 2, analysis of Court decision making. It is a unidirectional explanation of a Court decision based on analysis principles. It reads as if Koppelman accepts the formalist-realist divide, even though he does not. It is similar in this regard to Cass Sunstein's unsuccessful effort to fit *Romer* and *Lawrence* into his argument for minimalism in Court decision making.[130]

Koppelman begins by explaining why DOMA did not classify on the basis of sexual orientation, but instead classified on the basis of sex. Next, he examines the "bare desire to harm" cases, such as *Romer,* in which the Court invalidates a statute without expressly elevating the level of scrutiny. In this class of equal protection cases "the statute targets a narrowly defined group and then imposes on it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest."[131] Koppelman argues that DOMA was such a statute and concludes his article by examining the curious place of federalism in the *Windsor* Court's reasoning.

In applying equal protection principles in this article, I have some quibbles, such as why Koppelman downplays the innovative quality of and increase in scrutiny of gender classifications in the *VMI* case.[132] However, a more basic problem with Koppelman's article is that *Windsor* involves both equal protection and due process liberty principles, individually and as related to each other, in relationship to polity principles, and in terms of the lived lives of persons. *Windsor,* in light of *Lawrence,* has a more complex set of principles and social constructions that can be understood by asking whether sexual

129. Koppelman, *supra* note 83, at 1047–53.

130. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 150–57 (1999) (explaining *Romer*'s silence in regards to *Bowers v. Hardwick* was a result of the Court's subminimalist approach); *supra* note 32; *see also* Kahn, *supra* note 2, at 191–98 (explaining that Sunstein's Theory of Minimalism does not explain *Lawrence* and *Romer* because it does not (i) "reject the status quo as neutral"; (ii) discuss "the social construction of rights or polity principles"; and (iii) determine when minimalism or maximalism may be a better strategy in any particular situation).

131. Koppelman, *supra* note 83, at 1046–47.

132. *Id.* at 1048–49 (citing to United States v. Virginia, 518 U.S. 515 (1996), merely to provide the Court's description of what intermediate scrutiny is to be used with gender-based classifications).

orientation is like race and gender, especially when the sexual orientation classification is about the rights of same-sex couples to marry.[133]

An example of this problem is Koppelman's support for the BLAG argument that:

> A marriage between a man and a woman would fall within DOMA's definition even if one or both spouses were homosexual. Similarly, the marriage of two men would fall outside the definition even if both were heterosexual. There is no question, however, that DOMA has a disproportionate impact on individuals with a homosexual orientation.[134]

BLAG is trying to limit the impact of the case for future gay rights, and Koppelman falls for it completely.[135] We can see the limitations of the BLAG argument in Justice Kennedy's *Lawrence* opinion and Justice O'Connor's concurring opinion where they talk of their concern for the lack of equal respect for gay men and lesbians, and their agreement that the right to liberty and equal protection are not that different.[136] One must see Justice Kennedy's argument in *Windsor* as resting on that formulation, and not simply on an analysis of the difference between race, gender, and sexual-orientation classifications under the tiered equal protection analysis.

By siphoning off the liberty, imputation of inferiority, and history of discrimination arguments, Koppelman has set up a doctrinal structure he thinks will win—simply as an equal protection case under his view of what equal protection means**.** He does this rather than explore the equal protection principles and the social constructions that support them that are in *Lawrence* and *Windsor.*

Koppelman writes:

> The Court could have disposed of *Windsor* on sex discrimination grounds. Why didn't it do that? This would have been doctrinally tidy and would not have required the Court to craft any new law. On the other hand, it would have reached the question that the Court avoided in *Perry*, effectively declaring the presumptive invalidity of every law in the country

133. *Id.* at 1051–52.

134. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 25 n.7, United States v. Windsor, 133 S. Ct. 2675 (Jan. 22, 2013) (No. 12-307); Koppelman, *supra* note 83, at 1051.

135. Koppelman, *supra* note 83, at 1048.

136. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003); *id.* at 581 (O'Connor, J., concurring).

> denying same-sex couples the right to marry. The Court was not eager to reach that issue.[137]

Koppelman is asking why the Court did not follow his theory of why DOMA denies equal protection under the law.

The answer is that, under Model 2 decision making, the Supreme Court applies principles that do not draw on tidy theories and analyses of what those principles are or what scholars want them to be. Koppelman analyzes Court decision making in the same manner as many legalists, which is to analyze these cases as if they can be understood as primarily or only formalist principles, even though they cannot be understood in those terms. Moreover, unfortunately, such formalist analyses lead Koppelman to conclude that DOMA represents simply a sound application of a *Romer*-type equal protection principle 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,"[138] when in fact this was not so. In fact, the case rested on due process liberty principles and a more complex view of what a denial of equal protection means and the relationship between those principles in light of the lived lives of same-sex couples.[139] In doing so it was not minimalist, nor was it less maximalist than Koppelman's interpretation of the application of Equal Protection that would have "effectively declar[ed] the presumptive invalidity of every law in the country denying same-sex couples the right to marry."[140] I say this because basing the right to same-sex marriage on both equal protection and due process liberty principles and the social constructions in support of those principles will be much more transformative of gay rights.

5. Ernest A. Young

"Is There a Federal Definitions Power?"

In a fascinating and complex article, Young asks whether DOMA violates what he calls the federal definitions power.[141] In this Model 1 analysis of a doctrine that none of the justices in *Windsor* chose to explore, we see some similar problems that I explored in the Koppelman article. It simply does not get into what the *Windsor*

137. Koppelman, *supra* note 83, at 1058.

138. *Id.* at 1072 (quoting United States v. Windsor, 133 S. Ct. 2675, 2693 (2013)) (internal quotation marks omitted).

139. *See supra* note 63.

140. Koppelman, supra note 83, at 1.

141. Young, *supra* note 85.

Court did as a result of its engaging in Model 2, bidirectional decision making. Yet there are some differences from the Koppelman contribution. Although a foremost expert on the structural limits of congressional and state powers and how to interpret those powers when they are viewed as clashing, Young does not try to shoehorn the analysis into a prescribed path. Because "DOMA simply ruled out for federal purposes one particular aspect of some states' laws," those involving same-sex marriage, "it offered no federal definition of th[e] term [marriage], and instead simply incorporated state law on every other aspect of what it means to be a 'lawful' marriage."[142] Moreover, he writes, "|t]he sky will not fall if Congress is denied, in areas outside its enumerated powers, the power to alter this traditional relationship between state and federal law."[143]

Young's important contribution to the Symposium is based on a Model 1 understanding of Court decision making because there is no, or perhaps I should say only a very limited, discussion of the relationship of these rights principles,[144] which undergird polity principles such as separation of powers, and the powers of the national government and the states. Also, because *Windsor* is not based on federalism principles alone, and when push comes to shove, rights principles trump the polity principle of deference to states to decide who can marry, the applicability of Young's contribution to what the marriage cases mean is limited.

B. Institutional Analyses

1. Robert F. Nagel

"*Same-Sex Marriage, Federalism, and Judicial Supremacy*"

Robert J. Nagel is a renowned scholar of the Supreme Court, American constitutional law, and the jurisprudence of Justice Kennedy. This article is based on a Model 2 view of Court decision making. It centers on the relationship of polity and rights principles in a wide range of Kennedy decisions, as a way to understand the place of polity and rights principles in the *Windsor* decision.

As to polity principles, Nagel emphasizes that Justice Kennedy supports a weak form of federalism.[145] When there are conflicts among

142. *Id.* at 1291.

143. *Id.*

144. Young does mention another article where he argues that American opinions regarding same-sex marriage changed so quickly because of federalism. *Id.* at 1276–77; *see also* Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. (forthcoming 2014).

145. Nagel, *supra* note 87, at 1121.

the states, especially on issues involving constitutional rights, Justice Kennedy favors national government and Supreme Court power, that is, judicial supremacy.[146] Nagel writes:

> In fact, taken as a whole, Justice Kennedy's record demonstrates a deep fear of political disintegration; therefore, his support for federalism is limited to circumstances where the assertion of state power does not seriously challenge—or in some way actually enhance—the authority of the central government. The notion that he would allow a deeply divisive issue like same-sex marriage to be decided in a variety of ways in states across the country is inconsistent with his deeply held view about the need for unchallenged, central authority.[147]

Kennedy also has a commitment to judicial supremacy. Nagel writes, "Perversely, the looser the conception of law, the more crucial seems that institutional apex of central authority, the Supreme Court."[148]

Conflicts between state and federal authority are most significant when states defy constitutional judgments of the Supreme Court. This is because Court decisions are the highest expression of the centralized authority and the supreme law of the land.[149] One can see also another core polity principle of Justice Kennedy, which is his distrust of politics, especially on questions of individual rights.[150] For Justice Kennedy, it is important on such issues that the Court is insulated from "parochial political pressures"—as in *Romer* and *Lawrence*, where state statutes were invalidated as being inconsistent with the Constitution,[151] or in *Brown v. Plata*,[152] where Justice Kennedy wrote an opinion that upheld a decree that California release 46,000 prisoners system-wide because prison conditions threatened "the essence of human dignity" and explained the state's noncompliance in part on "a lack of political will."[153] Here, as in many of Justice Kennedy's decisions, the relationship of rights and polity principles is key, and usually rights principles trump polity principles.

In *Romer*, the Court held that states are not allowed to write laws which are based on "the bare desire to harm," especially when a

146. *Id.* at 1123–29.

147. *Id.* at 1121.

148. *Id.*

149. *Id.* at 1123–24.

150. *See id.* at 1124–27.

151. *Id.* at 1124.

152. 131 S. Ct. 1910 (2011).

153. *Id.* at 1928, 1936; Nagel, *supra* note 87, at 1126–27.

politically weak minority is involved.[154] In *Casey*, the decisions about whether to abort a fetus must belong to women because it is "central to personal dignity and autonomy," "concept of existence," and what the "mystery of human life" means to them.[155] And the Court cannot surrender to political pressure; moreover, the Court must remain steadfast to women because the reasons for the right of abortion choice in *Roe* have not changed, and are even more a part of the rule of law because women continue to rely on this right in their lives.[156]

Even though Nagel does not explore the social construction process of Justice Kennedy as he decides whether something should be a right, it is quite clear that Nagel views Justice Kennedy as asking what the rights principle should be—in light of the lived lives of persons.

Also the polity principle as to whether the Court should trust politics or the Court, and courts in general, to make decisions is built upon a concern that political leaders are not trustworthy when rights are at issue, particularly the rights of minorities and the politically weak. The legitimacy of the Supreme Court and the rule of law are at stake were the Court not to act accordingly.[157]

We see Justice Kennedy deciding what "our national legal norms and traditions" are, such as not allowing an "irrational act of hatred" in *Romer*,[158] or the threat to "human dignity" in *Brown v. Plata*,[159] or the denial of basic human rights to gay men and lesbians in *Lawrence*.[160]

An indication of the subtlety of the Nagel argument, and perhaps a problem with it, is that one can ask why DOMA was overturned. Nagel does speak of the "bare desire to harm" principle in *Romer* and

154. Romer v. Evans, 517 U.S. 620, 634 (1996); Nagel, *supra* note 87, at 1125.

155. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992); Nagel, *supra* note 87, at 1128. Justice Kennedy was a co-author of this opinion. *Id.*

156. *See* Nagel, *supra* note 87, at 1128 ("The . . . Justices declare that they cannot create the impression that they will 'surrender' to political pressure. To those who have accepted the ruling in *Roe*, 'the Court . . . undertakes to remain steadfast.' To overrule that decision, to give in to political 'fire,' would amount to a 'breach of faith.'"(footnotes omitted) (quoting *Casey*, 505 U.S. at 867–68)).

157. *Id.* at 1124.

158. *Id.* at 1125.

159. *Id.* at 1127. (quoting Brown v. Plata, 131 S. Ct. 1910, 1928 (2011)).

160. *Id.* at 1124.

used in *Windsor*.[161] Nagel suggests that state same-sex marriage laws did not challenge the centralized authority of the national government, a polity principle that is important to Justice Kennedy.[162] But why is DOMA unconstitutional? It must be that DOMA violates individual rights important to Kennedy, as defined in his majority opinion in *Lawrence*.

Justice Kennedy does not say it, but it must be that, because DOMA did not respect the principles in *Romer* and the rights principles in *Lawrence*, and was not a key statement of national policy on marriage, DOMA was not constitutional.

Therefore, without directly discussing whether *Windsor* will lead to a right to same-sex marriage, this article provides much evidence that it will. But to say this, one must make some conclusions about the jurisprudence of Justice Kennedy that Nagel is not willing to make. When push comes to shove for Justice Kennedy, important rights principles will trump polity principles. In fact, his polity principles about trusting courts or politics also suggest that rights principles are more important to Kennedy than polity principles alone. That is why Justice Kennedy supports a weak form of federalism.

2. Robin Fretwell Wilson

"*Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*"

This contribution is a comprehensive and detailed analysis of the politics within states (called Enacting Jurisdictions or EJ) that now allow same-sex marriage, along with the prospects of same-sex marriage being approved in additional states in the future. Professor Fretwell Wilson is a member of a group of scholars that does not take a position on same-sex marriage, but argues for robust protections for religious objectors who adhere to a heterosexual view of marriage.[163]

This article documents the history of the spread of same-sex marriage by judicial decision, state statute, and ballot initiative, as well as the political, public opinion, and demographic factors that are present in states that do and do not recognize a right to same-sex marriage. It also documents how extensive bargaining for a religious liberty exception was key to states approving same-sex marriage, with the religious exception provisions "nudging" same-sex marriage laws

161. *Id.* at 1125, 1129; *see also* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

162. Nagel, *supra* note 87, at 1129.

163. Fretwell Wilson, *supra* note 89, at 1161 n.†.

over the top.[164] Moreover, where jurisdictions enacted same-sex marriage, there was quick passage of laws to provide religious exemptions.[165] Fretwell Wilson finds that the political terrain in favor of same-sex marriage is nearly exhausted;[166] however, court decisions and rapidly changing public opinion in support of same-sex marriage in most states will result in same-sex marriage in the not-too-distant future.[167]

Therefore, Fretwell Wilson offers advice for both proponents and opponents of same-sex marriage. Even in tougher political terrain, she advises that those who care about marriage equality can continue to sew up legislative victories; the price tag in the short run is to agree now to robust religious protections for dissenters rather than wait for overwhelming political support for same-sex marriage, because they go hand in hand with approval of same-sex marriage.[168]

For opponents of same-sex marriage, Fretwell Wilson advises that the best strategy is to cement meaningful religious exceptions now, trading robust religious exemptions for the right to same-sex marriage.[169] This will mute the impact on those who oppose same-sex marriage. Thus, Fretwell Wilson is arguing for a pragmatist approach to same-sex marriage by those who oppose it on ideological or religious grounds.

What are the implications of this great weight of information and analysis of the politics surrounding same-sex marriage—and for whether a unidirectional Model 1 or bidirectional Model 2 analysis can best explain the role of the Supreme Court as a venue for social change? This article does not analyze cases from the inside out and show how the Court brings the outside social world into its decision making. Rather, it makes Model 1 assumptions as to what causes the establishment of the right to same-sex marriage—that is, what causes this social change.

However, there is evidence in this article that Court decision making in support of same-sex marriage can influence the politics in support of same-sex marriage, because federal court decisions such as *Lawrence* and *Windsor*, as applied by federal and state court justices, have resulted, now or in the near future, in the establishment of the

164. *See id.* at 1186–1212.

165. *Id.* at 1182–93. However, when same-sex marriage arises from judicial decisions, states are less likely to have protections for religious objectors. *Id.* at 1176–93.

166. *See id.* at 1218–28.

167. *See id.* at 1235–41.

168. *Id.* at 1228.

169. *Id.* at 1242.

right of same-sex marriage in additional states.[170] While public opinion and demographic data makes some states more prone to support same-sex marriage, court decisions can move the process along, and Fretwell Wilson suggests they will in the future.[171] Therefore, the argument that bidirectional, Model 2, Court decision making can have an independent effect on the establishment of the right to same-sex marriage is confirmed by Fretwell Wilson's study, and this will increase in the future.

Fretwell Wilson presents a wealth of information that public opinion,[172] party control of state legislatures and governorships,[173] percent of religious persons,[174] and level of education correlate with whether a state will support same-sex marriage.[175] Model 1 political scientists who seek explanations from outside the court for social change must be wary of viewing these data as simple support for their views because this is not a study of the relationship between external factors and internal court effects on social change.

However, one should not conclude that unidirectional explanations alone could explain the movement toward a right to same-sex marriage. For, as Fretwell Wilson demonstrates throughout the article and with regard to her advice about policy, Court decisions, including *Windsor,* influence the politics in states.[176]

The detailed timelines as to where same-sex marriage states are now and how they got there, and the presentation of public opinion data at the state level, will be of use to legal scholars, political scientists, and historians interested in same-sex marriage and the role of courts and more directly politically accountable institutions on social change. But it is only the beginning. Also, Fretwell Wilson provides no discussion of the complex relationship between Court action and politics, and vice versa. As Michael McCann demonstrates, there is a feedback effect between court decisions and political action

170. *Id.* at 1168 fig.1, 1179–80.

171. *Id.* at 1195–210.

172. *E.g.*, *id.* at 1199 (reporting that the streak of passing same-sex marriage bans ended abruptly in 2012 "after the tide of national public opinion had shifted in favor of same-sex marriage").

173. *Id.* at 1211–12.

174. *Id.* at 1212–13.

175. *Id.* at 1213–14.

176. *See supra* note 170.

because court decisions restructure the preferences of political actors.[177]

Also, in this article there is no discussion of legal conflicts between religious exceptions for those who oppose same-sex marriage and state anti-discrimination laws. I mention this, not because Fretwell Wilson should discuss these in this article, but because such conflicts could influence legislatures and courts in the movement toward a right to same-sex marriage.

Finally, one also can see from this article—specifically when Fretwell Wilson documents Court action since *Windsor* and while she extends advice to proponents and opponents of same-sex marriage—that *Windsor* already has had an important impact on the movement toward a right to same-sex marriage. Thus, it will have a long staying power, for reasons I explored above.

3. Susan J. Becker

"*The Role of Judicial Independence in the Continuing Quest for LGBT Equality*"

Susan Becker makes an important contribution to the Symposium. She demonstrates that court decisions extending equal rights to LGBT litigants are not the result of improper judicial activism. Rather, they result from "an appropriately restrained application of law to facts, thus moving the judiciary closer to the elusive ideal of judicial independence."[178]

Judicial independence requires that judges "resolve cases with fidelity to the rule of law established in case precedents, statutes, and procedural rules. Decisions rendered in adherence to this principle are immunized from improper influences such as personal interests, religious beliefs, concern for popular opinion, and the desire to please special interest groups."[179]

Since Becker says she cannot measure judicial independence, she defines eight judicial decision-making models that meet her definition of judges engaging in judicial independence, including Formalism, Balanced Realism, and Constrained Pragmatism.[180] Those that do not meet her ideal type of judicial independence, in order of decreasing judicial independence, include decision making that is based on

177. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 135–37 (1994) (discussing a political process model of legal mobilization).

178. Becker, *supra* note 86, at 866.

179. *Id.* at 866–67 (footnote omitted) (internal quotation marks omitted).

180. *Id.* at 896–97 tbl.1; *see infra* note 192 and accompanying text.

Realism, Pragmatism, Attitudinal, Strategic, and judges acting as Oracles.[181]

After a short history of the failure of judges to be judicially independent in their decision making in LGBT cases,[182] Becker offers a detailed account of pro-equality marriage cases in Hawaii, Massachusetts, California, and Iowa.[183] In these cases, Becker finds that judges "applied well-established legal principles to an extensive record of highly credible evidence to reject antiquated rationales for excluding same-sex couples from secular marriage."[184]

Becker's fine analysis of the lower federal court cases on DOMA prior to *Windsor* shows judges met her standards of judicial independence.[185] Moreover, Republican presidents appointed a majority of the justices who decided these pro-marriage equality cases.[186] These cases centered on the application of equal protection principles and discussions of the level of scrutiny that courts should use.[187] As with the state cases, federal judges used an extensive analysis of data and studies to decide these cases.[188]

Therefore, we see these courts employing Model 2 Court decision making in applying precedent, equal protection principles, and data on the lived lives of same-sex couples. The data and studies help courts to socially construct what the right to marriage means in terms of equality principles, when compared to opposite-sex couples.

Becker is stunned, as are Koppelman and Marcus—and most observers, Becker tells us—that the Supreme Court did not decide the case on equal protection grounds with a decision that would decide the constitutionality of DOMA in *Windsor* on a heightened level of

181. *Id.*

182. *See id.* at 897–905. The first case seeking same-sex marriage, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), faced similar challenges, with the U.S. Supreme Court not finding a constitutional violation when Minnesota denied the plaintiffs' request for a marriage license. *Id.* at 907.

183. *Id.* at 909–21.

184. *Id.* at 919.

185. *See id.* at 921–31.

186. *Id.* at 922–24 tbl.2.

187. The First Circuit employed a variant of rational basis because the legislation affected unpopular groups. Massachusetts v. U.S. Dep't Health & Human Servs., 682 F.3d 1 (1st Cir. 2012), cert. denied, 133 S. Ct. 2884, 2887 (2013); Becker, *supra* note 86, at 926. The Second Circuit identified several factors for determining the level of scrutiny and found that intermediate scrutiny was the most appropriate. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012); Becker, *supra* note 86, at 933–34.

188. Becker, *supra* note 86, at 929–30, 935–36.

scrutiny for sexual orientation classifications—the central issue in lower federal court cases.[189]

Many legal scholars and litigators were astonished by *Windsor* being decided on due process liberty grounds, because they think in formalist doctrinal terms. However, bidirectional Model 2 Supreme Court decision making allows the Court to choose the doctrinal principles it wishes to consider, usually from precedent, and by looking at the lived lives of same-sex and opposite-sex couples, in *Windsor*. When it does so, the Court can decide whether DOMA's lack of recognition for same-sex married couples denies them the equal protection of the law. However, Model 2 decision making does not preclude the Court from deciding that DOMA also denied same-sex couples a liberty not unlike the denial of liberty in *Lawrence*—but even more significant. This is because the Court compares the principles in prior cases and the social constructions in the case before the Court with principles and the social construction of marriage in *Windsor*.

Litigators and legal scholars trained in doctrine and advocacy think vertically. They do not think the same way as Supreme Court justices who can be much more creative, as they were in *Windsor*: linking the polity principle of deference to state authority over who can marry, to the equal protection principle of laws based on animus and bare desire to harm, and to the denial of liberty under the Due Process Clause of the Fifth Amendment. This creativity is most evident in cases that break new paths in the law, such in *Windsor*.

Finally, Becker concludes the article by arguing that the Court was not judicially independent in *Windsor*. Rather she argues that because the *Windsor* court did not base its decision on the equal protection structure of levels of scrutiny to sexual orientation classifications, as debated in the lower federal courts, it does not engage in a decision-making process that meets her standards for a judicially independent Court.[190] She then opines that the Court must have been engaging in either pragmatic decision making, considering that the failure to apply 1,000 federal statutes could affect hundreds of thousands of people, or constrained pragmatism to avoid having heightened equal protection principles be applied to state bans on same-sex marriage.[191]

The problem with this analysis is that judicial independence is not secured by "Formalism," a type of Court decision making that brings a court closest to judicial independence. Nor is it a product of "Balanced Realism," a form of decision making informed primarily by

189. *Id.* at 943.

190. *Id.* at 944.

191. *Id.* at 944–45.

unique facts and the law in a case. Nor is judicial independence secured by "Constrained Pragmatism," which Becker defines as "decid[ing] cases on narrow grounds especially when law is uncertain or evolving, considering the impact on institutions and society."[192] These categories simply do not fit with Supreme Court decision making, where there is a mutual construction of formalist principles and social constructions of the lived lives of persons in light of precedent. Nor does the Supreme Court gain its judicial independence, which may be a reference to legitimacy as well, by centering on the unique facts in a case or on narrow grounds when the law is uncertain. The Supreme Court gets its legitimacy and independence by not being so constrained, especially when it is carving out new paths in the law.

4. Nancy Scherer

"*Viewing the Supreme Court's Marriage Cases Through the Lens of Political Science*"

The attitudinal approach to explaining Supreme Court decision making is based on the premise that justices decide cases based on the liberal or conservative policies they desire.[193] Liberal justices vote for liberal policies; conservative justices vote for conservative policies. The Court decision-making process, choices of what polity and rights principles are at issue in a case, and the social construction of a case—for example, what marriage is, in light of rights principles, the role of precedent, etc.—are simply window dressings; they have no effect on case outcomes.

As a unidirectional model, attitudinalism suffers from the pitfalls I explored above.[194] Reliance on attitudinalism shows what happens when scholars accept the formalist-realist divide and use an empirical behavioral rather than empirical interpretive method to analyze Court decision making.[195] It is the most pointed example of an attempt by scholars to explain Supreme Court decision making as unidirectional Model 1, and to reject the Model 2 bidirectional approach. All Court decision making is done by outside-the-Court processes based on the justices' policy desires.

192. *Id.* at 896–97 tbl.1. Pragmatism is defined as "giv[ing] equal or greater weight to the potential overall impact of decision on institutions and society rather than securing just result for the litigants in the case." *Id.*

193. Scherer, *supra* note 88, at 1131; *see also* SEGAL & SPAETH, *supra* note 49, at 86–97.

194. *See supra* Part I.B.

195. *See supra* note 35 and accompanying text.

One can see some of the problems with attitudinalism in this article. Scherer starts her analysis of *Windsor* by noting there were two legal issues for the Court to consider: standing and whether DOMA was "unconstitutional under the Fifth Amendment's Due Process Clause."[196] However, we did not know what rights and polity principles the Court would find applicable. In fact, several Symposium participants were astonished that the case was not decided on equal protection grounds. In fact, the Court decided *Windsor* on both equal protection and due process liberty grounds informed by the polity principle of deference to states to decide who can marry.

Therefore, attitudinalism tries to "predict" case outcomes after the case was decided. Scherer then must "predict" Justice Kennedy's vote. No problem, Justice Kennedy is a libertarian, like the Cato Institute.[197] Therefore, he believes government should "stay out of my personal business."[198] Ask Professor Nagel whether it is so easy to characterize Justice Kennedy's political philosophy about rights. Moreover, Nagel demonstrates Justice Kennedy's polity principles along with his view of rights explain the majority opinion in *Windsor*.

Scherer continues, "by using the current metrics for judicial ideology," a code word for who is a liberal and conservative justice on the Court, and adding in "Kennedy's political leanings towards libertarianism, the attitudinal method correctly predicted the votes of the justices in *Windsor* . . . without any reference to [precedent] or constitutional method of interpretation."[199] Legal arguments "provide cover for the true rationale behind the justices' votes: to see their own policy preferences become the law of the land."[200] Not only are most Supreme Court cases unanimous decisions, but on most landmark decisions, there are non-predictable justices, that is, swing voters, and it is impossible to know what each liberal and conservative justice will do in a case.

I also want to comment on Scherer's discussion that justices shift to a strategic mode of thinking when they cannot secure the first policy outcome that they desire, as she says occurred in *Perry v. Hollingsworth*.[201] The application of the strategic model to *Perry* is educated speculation, and it is speculation given the many possible scenarios Scherer provides. The discussion of Justice Ginsburg's fear

196. Scherer, *supra* note 88, at 1140–41.

197. *Id.* at 1141–42.

198. *Id.* at 1142.

199. *Id.* at 1143.

200. *Id.*

201. 133 S. Ct. 2652 (2013); Scherer, *supra* note 88, at 1156–59.

of political backlash as proof of strategic voting also has flaws.[202] Why did Justice Ginsburg fear political backlash in *Perry*, but support the majority opinion in *Windsor,* which introduces rights for same-sex couples that are to be based on both equal protection *and* due process liberty grounds?[203] Justices do not vote simply on instrumental attitudinal or strategic grounds—and our nation is better for it.

C. Policy Analyses

1. Helen M. Alvaré

"*Same Sex Marriage and the 'Reconceiving' of Children*"

This article is a criticism of *Windsor* and *Perry* for their dramatic reversal from the long-held view that state recognition of marriage is importantly associated with the place of procreation in marriage.[204] This is a criticism of the social construction of marriage and adults' relationship to children in family law in general and, more specifically, in the right to same-sex marriage cases. It explores the shift in family law that in the past had centered on a concern for the best interests of the child.[205] Courts in the past questioned whether adults' duties to children would be fulfilled when adults exercised a claimed right.[206] The article also emphasizes that in the past family law "presumed that children's welfare was a *direct* product of adults' satisfaction of their duties toward children," while the "cases approving same-sex marriage speculated that children will benefit *indirectly* from the state's granting rights (i.e., marriage recognition) to the petitioning adults."[207]

In applying the questions, this is a Model 1 analysis because there is an assumption that changes in principles in family law will hurt children,[208] rather than seeing Court decision making as a mutual construction of rights principles and the realism of the lived lives of same-sex couples and their children. The objective of the scholar seems to be to influence courts away from the premises in family and

202. Scherer, *supra* note 88, at 1152.

203. *Cf. id.* at 1156–57 (proposing that Justice Ginsburg favored a wait-and-see approach since *Perry* "would have affected all thirty-three state laws banning same-sex marriage").

204. Alvaré, *supra* note 90, at 831–35.

205. Courts presume that "parents act in best interests of their children," *Troxel v. Granville*, 530 U.S. 57, 68 (2000), or parents will do so based on "natural bonds of affection." Parham v. J.R., 442 U.S. 584, 602 (1979).

206. Alvaré, *supra* note 90, at 845.

207. *Id.* at 843.

208. *Id.* at 851–52.

right-to-marry cases, and or garner support among advocacy groups who seek to change these premises in family law. There is no discussion of the decision making by the Court. Rather, this article centers on the negative effects of the marriage cases and the rights granted to same-sex couples in family law on children. It assumes that the Court makes decisions without the backward effects of justices and judges defining principles in light of the world outside the Court.

2. Frances Goldscheider

"*Rescuing the Family from the Homophobes and Antifeminists: Analyzing the Recently Developed and Already Eroding 'Traditional' Notions of Faily and Gender*"

These Symposium remarks briefly review sociological data on single parent families, heterosexual families with the man employed and woman at home, and families with both parents working, and ask how these findings apply to LGBT parents and families.[209] All these studies show that two parents are better for children than single parent homes, and this should apply to same-sex couples.[210] Viewing families historically, families in subsistence agriculture did not have clearly separate roles: men and woman were involved in training children to be good farmers and spouses, and women also were doing hard, physical labor.[211] This and other historical data suggest that the vision of men and woman in separate spheres was recent.[212] Now, most women expect to work and most men expect their partners to work.[213] Today, men's involvement in the family has increased, and that is good for the family.[214]

Goldscheider writes:

> Sadly, few people would bother if gay and lesbian parents were individual single parents. Having two committed parents is very helpful for children. What children need, then, is two parents who love them, who are committed to them throughout their trials and triumphs. More parents are better than fewer. In every study I have ever seen, stable, long-term committed relationships best serve the interests of children and parents.

209. Goldscheider, *supra* note 91, at 1043.

210. *Id.* at 1031, 1044.

211. *Id.* at 1037–38.

212. *Id.* at 1037 fig.1.

213. *Id.* at 1039.

214. *Id.* at 1040.

> . . . Therefore, . . . what should the law and public policy do? We want to encourage parents to stay together.[215]

These remarks are about what is best for children, without a direct discussion of the *Perry* and *Windsor* cases or how they were decided. One can surmise that the remarks suggest that the sexual orientation of a couple is less significant to the welfare children than having two parents who are committed to their relationship and the children in their home. The move away from separate gender roles also implies that, if same-sex couples can marry and gain the economic advantages of doing so, then clearly children are better off than if same-sex parents had no right to marry.

There is no discussion of *Perry* or *Windsor* or Court decision making. Any relationship between them and the best family policies must is left to the audience to surmise.

CONCLUSION

In recent years, the Supreme Court has not acted as many would have predicted. Considering that Republican presidents have appointed the majority of justices, all bets should have been on seeing a conservative shift in the Court and a substantial roll back of protection for individual rights. However, the opposite has proven true. The Court has upheld protections for individual rights in many instances and expanded protections in others. The *Windsor* decision is a prime example of this trend. Only a bidirectional analysis can fully explain these decisions. As this Article has shown, with the help of the excellent scholarship from the other contributors to this symposium, embracing a bidirectional analysis allows one to consider all factors involved and to more clearly see the reasons behind the *Windsor* decision.

215. *Id.* at 1042–43 (footnotes omitted).