

FEDERALISM AS A WAY STATION:
WINDSOR AS EXEMPLAR OF DOCTRINE IN MOTION
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ABSTRACT

This Article asks what the Supreme Court’s opinion in *United States v. Windsor* stands for. It first shows that the opinion leans in the direction of marriage equality but ultimately resists any dispositive “equality” or “federalism” interpretation. The Article next examines why the opinion seems intended to preserve for itself a Delphic obscurity. The Article reads *Windsor* as an exemplar of what judicial opinions may look like in transition periods, when a Bickelian Court seeks to invite, not end, a national conversation, and to nudge it in a certain direction. In such times, federalism reasoning and rhetoric—like declining to announce the level of scrutiny and appearing to misapply the justiciability doctrines—may be used as a way station toward a particular later resolution.

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Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare ... desire to harm" couples in same-sex marriages.¹

[Y]ou promised us bread, and you have given us a stone; you promised us a fish, and you have given us a serpent; we thought you had given us a substantial right; and you have given us the most evanescent shadow and delusion.²

INTRODUCTION

In the wake of the U.S. Supreme Court's June 2013 decision in *United States v. Windsor* (133 S. Ct. 2675), the United States is bursting at the seams with litigation directly or indirectly challenging the authority of states to prohibit same-sex marriage.³ The federal and state courts that are responsible for adjudicating those challenges are poring over Justice Anthony Kennedy's majority opinion in *Windsor*.⁴ Given the pace of the litigation, the Court may again need to confront the issue of marriage equality sooner rather than later—and sooner than the Justices themselves may prefer. When the question does return to the Court, the meaning and implications of the Court's opinion in *Windsor* will be front and center.

¹ *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (quoting *Windsor*, 133 S. Ct. at 2693).

² Robert W. Johannsen, *Stephen A. Douglas and the South*, 33 J. SOUTH. HIST. 26, 37 (1967) (quoting criticism of Stephen Douglas by a Southerner who ultimately felt deceived by his ambiguous championing of "popular sovereignty" as the best solution to the problem of slavery in the territories).

³ See *Lawsuits, MarriageEqualityUSA*, <http://www.marriageequality.org/lawsuits> (updated Feb. 3, 2014) (last visited Feb. 7, 2014) (describing federal and state lawsuits in forty-two states and DC). See also Lyle Denniston, *Nevada ends defense of marriage ban (UPDATED)*, SCOTUSblog (Feb. 11, 2014, 5:30 PM), <http://www.scotusblog.com/2014/02/nevada-ends-defense-of-marriage-ban/> ("The controversy is one of the hottest topics being tested in federal courts, with nearly four dozen cases now unfolding around the country.").

⁴ See, e.g., *Bourke v. Beshear*, No. 3:13-CV-750-H, slip op. at 11 (W.D. Ky. Feb. 12, 2014) ("[T]he focus of the Court's attention must be upon Justice Kennedy's majority opinion in *Windsor*.").

Section 3 of the federal Defense of Marriage Act (DOMA) (Pub. L. No. 104-199, §3, 110 Stat. 2419 (1996)) amended the Dictionary Act to define the terms “marriage” and “spouse” for all purposes under federal law as “only a legal union between one man and one woman as husband and wife” (1 U.S.C. § 7, i). DOMA’s definition of marriage controlled 1,138 federal statutes.⁵ Their subject matters ran the gamut from estates, healthcare, bankruptcy, Social Security, and taxation to housing, copyright, criminality, and veteran’s benefits (*see Windsor*, 133 S. Ct. at 2694). DOMA’s financial and expressive impacts on same-sex couples were substantial.⁶

For example, Edith Windsor and Thea Spyer had been in a committed relationship since 1963 (*see Windsor*, 133 S. Ct. at 2683). Forty-four years later, they were living in New York, which recognized same-sex marriages performed elsewhere but which would not itself legalize same-sex marriage for another four years (*id.* 2683, 2689 (citing Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West 2013))). Worried about Spyer’s health, Windsor and Spyer married in Ontario, Canada, and returned home to New York City (*id.* 2683). When Spyer died in February of 2009 and left Windsor all that she had, DOMA precluded Windsor from claiming the marital exemption from the federal estate tax.⁷ As a result, she had to pay \$363,053 in estate taxes that she would not have had to pay but for Section 3 of DOMA (*see Windsor*, 133 S. Ct. at 2683). After seeking and being denied a refund, she brought suit in the now-historic case that bears her name (*id.*).

In *Windsor*, the Court held that Section 3 violated the Due Process Clause of the Fifth Amendment (*id.* 2675). While that much was clear, the dissenting Justices disagreed among themselves about why the Court had found a constitutional violation. On one side, the dissent of Chief Justice Roberts seemed like an exercise in damage control. On the other side, the dissent of Justice Scalia, like his dissent in *Lawrence v. Texas*,⁸ declared that the sky is falling for those seeking to limit marriage to opposite-sex couples.

⁵ See U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (identifying 1,138 federal statutes that depend upon marital status or in which marital status is a consideration).

⁶ The First Circuit wrote that the law “prevents same-sex married couples from filing joint federal tax returns, which can lessen tax burdens, and prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits,” and “leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses.” *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012) (citations omitted).

⁷ See 26 U.S.C. § 2056(a) (excluding from federal taxation “any interest in property which passes or has passed from the decedent to his surviving spouse”).

⁸ 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”).

Roberts read Justice Kennedy's majority opinion as turning on "federalism." More precisely, he asserted that the Court invalidated Section 3 of DOMA because it inferred animus from Congress's extraordinary intrusion into a key area of state "domestic relations" law—specifically, legal determinations of who may marry whom (*Windsor*, 133 S. Ct. at 2696-97 (Roberts, C.J., dissenting)). Roberts focused exclusively on the Court's references to what might be called "extraordinary" evidence of congressional animus—extraordinary because of the nature of the evidence (federal overreach) used to infer the presence of animus. Ignoring the many references in the majority opinion to the equality, liberty and dignity of same-sex couples and their children, Roberts insisted that the majority opinion did not threaten the authority of states to prohibit same-sex marriage. On the contrary, he deemed it "undeniable that its judgment is based on federalism" (*id.* 2697). Some commentators, including some proponents of same-sex marriage, are reading *Windsor* similarly.⁹

By contrast, Scalia featured the Court's emphasis on what might be called "ordinary" evidence of animus—that is, evidence that did not turn on an inference from federal overreach. Mostly dismissing the Court's references to state domestic relations law, he underscored the majority's claims that "the supporters of this Act acted with *malice*—with *the 'purpose' 'to disparage and to injure' same-sex couples,*" and that "the motivation for DOMA was to 'demean,' to 'impose inequality,' to 'impose . . . a stigma,' to deny 'equal dignity,' to brand gay people as 'unworthy,' and to 'humiliat[e] their children'" (*Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (quoting majority opinion)). Likewise, many commentators are reading the majority opinion as turning on ordinary evidence of animus against same-sex couples, not on anything concerning federal-state relations.¹⁰

⁹ See, e.g., Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSblog (Jun. 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/> ("In short, under Justice Kennedy's reasoning, *it is the fact that states have recognized same-sex marriage* that gives rise to heightened judicial scrutiny."); Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States To Define Marriage*, SCOTUSblog (Jun. 27, 2013, 3:49 PM), <http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/> ("[T]he principles in *Windsor* of respect for state sovereignty and the authority of the people of the states to define marriage support the conclusion that the Court will affirm the constitutionality of those states that have reaffirmed the historic understanding of marriage – the union of one man and one woman."); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012-2013 CATO SUP. CT. REV. 117, 119 (concluding that federalism "played a critical role" in the Court's opinion).

¹⁰ See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 355 (5th ed. 2006 & Supp. 2013) (asking whether *Windsor* is an instance of "faux federalism" and whether "same-sex relationships would lack either sufficient dignity or sufficient constitutional protection if states had not recognized them"); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. (forthcoming 2014) (reading *Windsor* as holding that "discrimination on the basis of sexual orientation violates equal protection when it reflects or reinforces 'historical prejudice

This Article asks what the Court's opinion in *Windsor* stands for. In contrast to the many full-throated "federalism" or "equality" readings of the majority opinion, the Article finds that the opinion exemplifies a more general phenomenon, one that is easily overlooked or misunderstood, but that becomes apparent once doctrine is understood as moving in history rather than as being fully worked out at a particular point in time. *Windsor* is an exemplar of doctrine in motion during a period of social and legal transition. In addition to articulating well-established equal protection reasoning about the purposes, effects, and dominant social meaning of DOMA, the majority opinion uses federalism reasoning and rhetoric both to temporize and to facilitate constitutional change in the direction of marriage equality.

The Article begins by examining whether, as Roberts insisted, the majority opinion turns decisively on extraordinary evidence of congressional animus against same-sex couples.¹¹ The Article shows that this reading can account for much of the Court's language. Time and again Kennedy stressed that New York had elected to confer dignity upon same-sex couples by allowing them to marry, and that DOMA discriminated against lawfully married same-sex couples.¹²

Even so, the Article shows that the opinion as a whole cannot persuasively be read as turning dispositively on extraordinary evidence of animus. Kennedy invoked key equal protection precedents that had nothing

and stereotyp[es]—particularly the longstanding and widespread stereotype that sexual minorities constitute a threat to children and families”) (quoting *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009)); Deborah Hellman, *Scalia Is Right: Justice Kennedy's Opinion in Windsor Doesn't Rest on Federalism*, BALKINIZATION (June 27, 2013, 5:29 PM), <http://balkin.blogspot.com/2013/06/normal-0-false-false-false-en-us-x-none.html> (“DOMA [according to the *Windsor* Court] expresses that gay couples are second-class citizens.”); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 141 (2013) (“Justice Kennedy's *Windsor* opinion relied mainly on the assertion that DOMA was motivated by a simple desire to disparage and demean gays and lesbians.”); Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm,"* 64 CASE WES. L. REV. (forthcoming 2014) (examining “[t]he equal protection analysis upon which the Court relied” and deeming its federalism language a distraction); Michael McConnell, *Debating the Court's Gay Marriage Decisions*, THE NEW REPUBLIC, Jun. 26, 2013, available at <http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate#> (“Justice Kennedy has sought to find a formula that enables him to invalidate the denial of same-sex marriage at the national level without doing so in every state. Federalism would have provided such a path, but he did not take it.”); Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 220 (2013) (reading *Windsor* as doctrinally an equal protection case but “conceptually . . . a right-to-marry case”); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 90 (2013) (observing that “*Windsor* endeavors to give voice to perspectives of the minority, the historically excluded group, in ways the affirmative action opinions do not,” and so “is an equality opinion unlike any the Court has handed down in quite some time”).

¹¹ Stated precisely, the majority opinion turns decisively on extraordinary evidence of animus if, but only if, the presence of such animus is necessary to the Court's invalidation of Section 3.

¹² See, e.g., *Windsor*, 133 S. Ct. at 2692 (“Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”).

to do with extraordinary evidence of animus,¹³ and he emphasized DOMA's demeaning purposes and effects.¹⁴ Critically, in concluding that DOMA was motivated by animus, he did not rely only on the "federalism" concerns featured by Roberts—that is, on DOMA's "reach and extent" (*id.* at 2692). Instead, he also rested on considerations that appear to render DOMA indistinguishable from many, if not all, state denials of marriage equality: DOMA's legislative history, title, effects, and social meanings—assessed from the perspective of same-sex couples.¹⁵ In light of those aspects of the opinion, it seems logically unnecessary and less than fully convincing to insist that the equal protection principles articulated by the Court in *Windsor* safeguard same-sex *marriages* from governmental discrimination, but do not protect intimate same-sex *relationships* from discrimination.¹⁶ Notably, Kennedy underscored only the efforts of New York and a minority of other states to confer equal dignity upon same-sex couples who "long[] to marry";¹⁷ he did not similarly celebrate the choices of the majority of states to prohibit same-sex marriage. The equality reasoning and rhetoric of the *Windsor* majority render it unlikely that the Court would have upheld Proposition 8 in *Hollingsworth v. Perry* (133 S. Ct. 2652 (2013)) had it reached the merits in that case, as Justice Kennedy appeared to vote to do.¹⁸

Accordingly, this Article concludes that the majority opinion in *Windsor* is better read as turning on ordinary evidence of animus, as Scalia insisted, not on extraordinary evidence of animus, as Roberts maintained. And yet, there are limits to the explanatory power of Scalia's interpretation. The language stressing DOMA's breadth and the states' traditional power to regulate marriage is there in the majority opinion, and squinting does not make it go away. Its being there leaves room for opponents of same-sex

¹³ See *id.* at 2693 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996)).

¹⁴ See *id.* at 2695 (writing that "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage," and that "[t]his requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment").

¹⁵ See *id.* at 2693; *infra* notes 40-41 (quoting DOMA's legislative history); *infra* Part II (analyzing the Court's emphasis on the effects and social meanings of DOMA).

¹⁶ This Article focuses on the equality reasoning and rhetoric in the Court's opinion because the opinion takes more of an equality perspective than a liberty perspective, even though Justice Kennedy also blended in liberty themes. See, e.g., *Windsor*, 133 S. Ct. at 2695 ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty.").

¹⁷ *Id.* at 2689 ("When at first *Windsor* and *Spyer* longed to marry, neither New York nor any other State granted them that right.").

¹⁸ The Court held 5-4 that the official supporters of Proposition 8 lacked standing to appeal the district court's invalidation of the proposition. Justices Kennedy, Sotomayor, Thomas, and Alito dissented; they apparently would have reached the merits. By contrast, three members of the *Windsor* majority—Justices Ginsburg, Breyer, and Kagan—voted not to reach the merits in *Hollingsworth*. For an analysis of the possible meaning of that voting alignment, see *infra* Part III.D.

marriage to argue that the constitutional protections afforded same-sex marriages are greater than the protections afforded same-sex relationships.

The Court employed another, more familiar mechanism to leave open the possibility that some state bans on same-sex marriage will survive judicial review. Unlike other courts that have invalidated discrimination on the basis of sexual orientation,¹⁹ the *Windsor* Court declined to announce that it was applying heightened scrutiny. It instead chose to talk the talk of rational basis review,²⁰ even as it applied what might be called rational basis “double-plus.” In that way, too, the Court did not formally commit itself and other courts to invalidating all state bans on same-sex marriage. Overall, the majority opinion defies decisive interpretation. Indeed, the opinion appears designed to defeat domestication by disciplined legal analysis; even as it points in the direction of marriage equality, it seems to insist on preserving for itself a certain Delphic obscurity.

This Article seeks to understand why the majority opinion is written that way. It does so by examining three federalism “moves” in the opinion that seem especially perplexing. First, why did the Court invoke state control of domestic relations in order to qualify its strong endorsement of the equal dignity of same-sex couples? Second, why was the Court highly selective in using legal developments at the state level in the service of living constitutionalism, stressing only the actions of a minority of states to allow same-sex marriage? Third, why did the Court, for the first time, use concerns about federal overreach into the area of state domestic relations law as—and only as—extraordinary evidence of unconstitutional animus, even though it seemed unnecessary and unconvincing to do so?

The Article suggests that those aspects of the Court’s opinion are best approached dynamically, not statically. *Windsor* is what doctrine may look like in times of transition, when the country is in flux and the Court wants to nudge a national conversation in a certain direction rather than end it. In such periods—whether 1850s debates over “popular sovereignty”²¹ in the territories or current debates over same-sex marriage—the analytical and rhetorical resources of federalism may be used as a way station toward a particular later resolution.

¹⁹ See, e.g., *SmithKline Beecham Corp. v. Abbott Labs.*, 2014 WL 211807, slip op. at 9 (9th Cir. Jan. 21, 2014 (heightened scrutiny); *Windsor v. United States*, 699 F.3d 169 176 (2d Cir. 2012) (intermediate scrutiny); *Mass. v. U.S. Dep’t of Health & Human Servs.*, 682 U.S. 1, 11 (1st Cir. 2012) (more searching scrutiny than rational basis); *Varnum v. Brien*, 763 N. W. 2d 862, 904 (Iowa 2009) (at least intermediate scrutiny); *In re Marriage Cases*, 183 P. 3d 384, 442 (Cal. 2008) (strict scrutiny); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 477 (Conn. 2008) (at least intermediate scrutiny).

²⁰ See *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

²¹ See *supra* note 2; *infra* Part III.C (discussing Stephen Douglas’s use of federalism rhetoric in championing popular sovereignty as the proper solution to the problem of slavery in the territories).

The *Windsor* Court's various invocations of federalism are not attributable simply to Justice Kennedy's idiosyncratic ways of expressing his commitment to limited federal power and to residual state authority, or to his potential ambivalence about same-sex marriage. Indeed, the voting alignment in *Hollingsworth v. Perry* raises the possibility that Kennedy is no longer the median Justice regarding the constitutional rights of same-sex couples. Rather, the *Windsor* Court's uses of federalism are probably best understood as reflecting a statesmanlike effort to encourage but not to coerce for the time being—to allow continued deliberation and litigation over same-sex marriage in the states, and to move that deliberation toward greater equality for same-sex couples and their children.

The Court's uses of federalism rhetoric as a way station thus share certain similarities with its failure to announce the level of scrutiny in select equal protection cases and its apparent misapplication of justiciability doctrines.²² As just noted, the *Windsor* majority itself implausibly declared that Section 3 of DOMA flunked rational basis review. And as explored below,²³ certain Justices in the *Windsor* majority may have responded to prudential concerns in *Hollingsworth*. The phenomenon identified by this Article is limited neither to *Windsor* nor to federalism. The Court's federalism approach in *Windsor*, however, may result in a stronger nudge than may the use of other techniques.

Part I presents the Chief Justice's reading of the majority opinion in *Windsor* as turning on extraordinary evidence of animus. Part II argues that the opinion is better viewed as turning on ordinary evidence of animus, but that such a reading itself has limited explanatory power. Part III explores the *Windsor* Court's reliance on federalism as a way station, and compares that reliance to certain other judicial techniques. Part IV anticipates objections to the reading of *Windsor* offered here, and the Conclusion identifies a lesson of that reading. It is a lesson about the under-appreciated but potentially potent role of federalism reasoning and rhetoric as both a Bickelian passive virtue and a catalyst in managing the processes of constitutional change.²⁴

²² See *infra* Part III.C (discussing different methods that the Court may employ during transitional periods to manage constitutional change).

²³ See *infra* Part III.D (analyzing the responses of the Justices in the *Windsor* majority to the standing question in *Hollingsworth v. Perry*).

²⁴ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962) (advocating that the Court deploy "the passive virtues" in order to protect legal principles from being warped by the need to maintain public legitimacy).

I. *WINDSOR* AS A CASE ABOUT “EXTRAORDINARY”
EVIDENCE OF ANIMUS

The majority opinion in *Windsor* includes claims about the vertical constitutional structure that require careful consideration. For example, Justice Kennedy wrote for the Court that the “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States” (*Windsor*, 133 S. Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))). He further wrote that the “recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens” (*id.*), and that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations” (*id.*). He characterized DOMA as “reject[ing] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next” (*id.* at 2692). “DOMA, because of its reach and extent,” he continued, “departs from this history and tradition of reliance on state law to define marriage” (*id.*). He stressed that this departure raised concerns about a possible violation of constitutional rights, stating that “discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”²⁵ Chief Justice Roberts focused exclusively on such utterances from the Court in deeming it “undeniable that its judgment is based on federalism” (*id.* at 2697 (Roberts, C.J., dissenting)).

Because the Chief Justice’s reference to “federalism” might mean many things, it is important to be precise about how he was reading the majority opinion. “Federalism,” Judith Resnik observes, is “a capacious term not obviously pre-judging where power resides.”²⁶ And yet, “claims asserted in the name of federalism” are often “the shorthand for an argument that authority reside[s] with the subunit” (*id.*). That is what Chief Justice Roberts meant when he wrote that the Court’s opinion was clearly “based on federalism.”

Even as shorthand for privileging the authority of the states, a decision turning on “federalism” might still mean many things. It could mean, for example, a holding that a federal law violates the Tenth Amendment by commandeering state legislative or executive officials (*see New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997)). It could also mean a holding that a federal law is beyond the scope

²⁵ *Id.* (internal quotation marks omitted) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))).

²⁶ Judith Resnik, *Federalism(s)’ Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *NOMOS LV* 375 (2014).

of Congress's enumerated powers. Roberts plainly was not referring to a commandeering problem. And while several federalism scholars argued that Section 3 was beyond the scope of the Necessary and Proper Clause and was "an unconstitutional and unprecedented incursion into the States' police powers,"²⁷ that possible (albeit unlikely) holding did not attract any votes. The Court expressly stated that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."²⁸

In characterizing the Court's holding as "undeniabl[y] . . . based on federalism" (*id.* at 2697 (Roberts, C.J., dissenting)), Roberts meant something else. "The dominant theme of the majority opinion," he wrote, "is that the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells" (*id.* 2697 (quoting majority opinion)). On that interpretation of the Court's opinion, Section 3's extraordinary departure from the traditional division of regulatory authority between the federal government and the states indicated that the law was motivated by animus against gay people. In a similar vein, Justice Alito read the majority opinion as invalidating Section 3 in part for "encroach[ing] upon the States' sovereign prerogative to define marriage" (*id.* 2719 (Alito, J., dissenting))—for "impos[ing] a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and proper" (*id.* at 2720 (quoting *Windsor*, 133 S. Ct. at 2695-96 (emphasis added))). Much of Justice Kennedy's language seemed to criticize DOMA for invidiously undermining the state's agency as a dignity-conferring subject, not necessarily for violating constitutionally protected dignity regardless of any state's view of the matter.²⁹ "Here the State's decision to give this class of persons the right to marry," he wrote, "conferred upon them a dignity and status of immense import" (*id.* at 2692).

Reading *Windsor* as a case about extraordinary evidence of congressional animus—extraordinary because of the nature of the evidence (federal

²⁷ See Brief for Federalism Scholars as Amici Curiae Supporting Respondent, *United States v. Windsor* 133 S. Ct. 2675 (2013) (No. 12-307), at 3. Consistent with the focus of the question presented on equal protection, the brief argued that an enumerated powers analysis of Section 3 was directly relevant to the equal protection inquiry. The brief represents the views of Jonathan Adler, Lynn Baker, Randy Barnett, Dale Carpenter, Ilya Somin, and Ernest Young. It should be noted that many, if not all, of these scholars are in favor of same-sex marriage, as are the lawyers who worked on the brief: Roy Englert, Carina Cuellar, and Erin Blondel. It is therefore incorrect to assert that only people who were interested in "damage control" made federalism arguments against Section 3 of DOMA. But from the perspective of those who believe that state bans on same-sex marriage violate the Equal Protection Clause, the Roberts reading of the majority opinion was a cost of attacking Section 3 on federalism grounds.

²⁸ *Windsor*, 133 S. Ct. at 2692. As documented in Part II.B, the majority opinion was relatively nationalist in describing the general scope of the Necessary and Proper Clause.

²⁹ See, e.g., *id.* at 2695 (stating that DOMA "singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty").

overreach) used to infer the presence of animus—limits the Court’s reasoning to *federal* legislation that restricts marriage to opposite-sex couples. So understood, the Court’s ruling either has no implications for the constitutionality of state prohibitions on same-sex marriage, or else it implies the validity of such prohibitions. If the state is the relevant constitutional subject, then perhaps it may choose to deny dignity, just as it may choose to confer it. Or perhaps it may act upon an understanding of dignity that is different from the prevailing conception in states that permit same-sex marriage. “[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,” Roberts advised, “that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions” (*id.* at 2697 (Roberts, C.J., dissenting)). “So too,” he insisted, “will the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case” (*id.*). Roberts seemed eager to encourage a narrow reading of *Windsor*. To reiterate, he deemed it not just correct on balance, but “undeniable” that the Court’s “judgment is based on federalism” (*id.*).

In the wake of the Court’s decision, some commentators have likewise interpreted *Windsor* as authority for the constitutionality of state bans on same-sex marriage, or at least as no authority for their invalidity.³⁰ Consider, for example, the interpretation of Justice Kennedy’s opinion offered by Randy Barnett just after the Court handed down its decision. Barnett opined that the Court had selected a different means to the same end of limiting its holding to DOMA: “under Justice Kennedy’s reasoning, *it is the fact that states have recognized same-sex marriage* that gives rise to heightened judicial scrutiny.”³¹ “In essence,” Barnett wrote, “state law is being used to identify a protected liberty or right within its borders against a federal statute,” meaning that the Court’s opinion “both relied on and preserved the states’ prerogatives to define and protect liberty.”³² That view has the same consequences (although not necessarily the same intent) as the Chief Justice’s emphasis on extraordinary evidence of animus: *Windsor* is not authority for heightened judicial scrutiny of state laws excluding same-sex couples from the institution of marriage. “By adopting this federalism approach to identifying protected liberty,” Barnett concluded, “states remain free to continue deciding the marriage question” (*id.*), for “the logic of

³⁰ See, e.g., *supra* note 9 (citing examples).

³¹ Barnett, *supra* note 9. See Young & Blondel, *supra* note 9, at 119 (“Federalism principles played a critical role in defining the contours of the equality right at stake, limiting which governmental interests could weigh against that right, and influencing the level of deference that the Court owed to how Congress had weighed those rights and interests.”).

³² Barnett, *supra* note 9.

today's opinion implicitly turns on the absence of any articulated *federal* interest in disregarding state laws defining marriage" (*id.*).

Barnett read the Court's opinion as analytically akin to Judge Boudin's opinion for the First Circuit invalidating Section 3 of DOMA, an opinion that Barnett quoted (*id.*). Boudin's analysis turned substantially on concerns about federal overreach, even as his court held that Section 3 violated equal protection principles (*see* *Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012)). Specifically, he expressly raised the level of equal protection scrutiny based in part on the concern that "DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation" (*id.* 12). "Given that DOMA intrudes broadly into an area of traditional state regulation," he wrote, "a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns."³³

Is a "federalism" reading of *Windsor* truly "undeniable," as the Chief Justice insisted? Is it even the best reading available? Talk of "the best reading" raises the question of the meaning of "best." Likewise, talk of "the meaning of *Windsor*" raises the question of the meaning of "meaning." This Article is not interested in predicting how a future Court, however (re)constituted, ultimately will decide the constitutionality of state bans on same-sex marriage. Nor is the Article following Ronald Dworkin by interpreting the majority opinion in *Windsor* to be the best it can be in light of the Article's general view of the practice of constitutional adjudication.³⁴

Instead, the Article asks which potential reading of Justice Kennedy's opinion is most persuasive from the standpoint of the likely collective intent of the members of the majority coalition. To be sure, the *Windsor* majority is a "they," not an "it," and the potential difficulty of discerning the collective intent of a group is well known.³⁵ But the small number of people at issue may ameliorate that problem, and the absence of concurring opinions may suggest a coalition whose members are generally moving together once they decide to reach the merits.³⁶ Assuming Justices Kennedy, Ginsburg, Breyer,

³³ *Id.* at 14. *See id.* at 15 ("[I]f we are right that in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.")

³⁴ *See* RONALD DWORKIN, *LAW'S EMPIRE* 52 (1986) ("[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."); *id.* at 90 ("[C]onstructive interpretations . . . try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.")

³⁵ *See, e.g.,* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214-15 (1980).

³⁶ Those five Justices obviously were not moving together regarding whether to reach the merits in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). For a discussion, see *infra* Part III.D.

Sotomayor, and Kagan are all still serving when the issue of marriage equality returns to the Court, their likely collective intent in *Windsor* may provide the best basis for predicting whether they will invalidate state bans on same-sex marriage. In the meantime, the issue of *Windsor*'s meaning, as this Article has just defined the issue, is directly relevant to the lower courts charged with adjudicating marriage equality litigation.

From the standpoint of the shared intent of the author and joiners, did extraordinary evidence of congressional animus in the face of New York's decision to recognize same-sex marriage play a key role in the Court's de facto—though not de jure—decision to raise the level of scrutiny that it applied to Section 3? One can be forgiven for drawing such a conclusion based on much of Justice Kennedy's language.³⁷ But such a reading fails to consider key features of the Court's reasoning and rhetoric. There is a more persuasive reading of the majority opinion in *Windsor*, a reading that is more expansive in its approach to constitutional equality. The next Part develops that reading and identifies its limits.

II. *WINDSOR* AS A CASE ABOUT "ORDINARY" EVIDENCE OF ANIMUS

A. *Equality Talk*

To see the limits of the Chief Justice's reading of the majority opinion, a good place to begin is with Justice Scalia's dissent:

[T]he majority says that the supporters of this Act acted with *malice*—with *the "purpose"* "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," to "impose inequality," to "impose . . . a stigma," to deny "equal dignity," to brand gay people as "unworthy," and to "*humiliat[e]* their children." (*Windsor*, 133 S. Ct. at 2675, 2708 (Scalia, J., dissenting) (quoting majority opinion)).

Scalia, as analytically sharp and colorful as ever, wrote that "the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages" (*id.* 2709). He added: "How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status" (*id.*). In short, Scalia read the majority opinion as turning on the conclusion that DOMA reflected animus against gay people in the form of moral disapproval of

³⁷ For an account of why the state-regarding language is in the Court's opinion and why the Court declined to announce a level of scrutiny, see *infra* Parts III.C and III.D.

homosexuality. In his view, the opinion did not turn on anything having to do with federalism, including animus evidenced decisively by an extraordinary federal intrusion into state domestic relations law.³⁸

Substantial evidence supports Justice Scalia's reading. For example, the Court justified its invalidation of Section 3 in substantial part by pointing to conventional evidence of an unconstitutional legislative purpose—namely, the legislative history and the title of the statute.³⁹ In the Court's view, "[t]he history of DOMA's enactment and its own text demonstrate" that the statute's "essence" was "interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power" (*id.*). Specifically, the Court focused on statements in the legislative history that expressed a desire "to defend the institution of traditional heterosexual marriage"⁴⁰ and that voiced moral opposition to homosexuality.⁴¹ Quoting the legislative history, the Court wrote that "[t]he stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'" (*id.*).

Certain consequences logically follow if the *Windsor* Court invalidated Section 3 of DOMA primarily because the statute was motivated by moral disapproval of same-sex marriage, sometimes rephrased as a desire to preserve traditional, heterosexual marriage. Many relatively recent state bans on same-sex marriage around the nation appear to be similarly motivated. Like DOMA, those bans were designed to prevent same-sex couples from marrying after other state courts or legislatures recognized their right to do so.⁴²

³⁸ *Id.* at 2705 ("My guess is that the majority, while reluctant to suggest that defining the meaning of 'marriage' in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term)." (footnote omitted)); *id.* at 2709 ("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.").

³⁹ *See id.* at 2693 ("Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.")

⁴⁰ *Id.* (quoting H.R. REP. NO. 104-664, at 12-13 (1996)) ("[I]t is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.").

⁴¹ *Id.* (quoting H.R. REP. NO. 104-664, at 16) (stating that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality").

⁴² *See, e.g.,* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 5-6 (1st Cir. 2012) ("In 1993, the Hawaii Supreme Court held that it might violate the Hawaii constitution to deny marriage licenses to same-sex couples. Although Hawaii then empowered its legislature to block such

Even so, did not the Court's analysis depend upon the conclusion that DOMA interfered with a "dignity conferred by the States in the exercise of their sovereign power"? (*Windsor*, 133 S. Ct. at 2693). In other words, did not the Court's reasoning rest on the fact that New York had elected to recognize same-sex marriage? Much of Justice Kennedy's language (recorded above and in Part I) might cause one to draw that conclusion. But other rhetoric and reasoning point in a different direction.

In an under-noticed sentence in the opinion, Justice Kennedy wrote that "[w]hen New York adopted a law to permit same-sex marriage, it sought to eliminate inequality" (*id.* 2694). The Court thereby showed its hand, rejecting the submission of opponents of same-sex marriage that marriage is "an intrinsically opposite-sex institution," as Justice Alito sympathetically characterized their position.⁴³ Kennedy did not write that New York sought to eliminate inequality "as New York understood equality," nor did he use other language suggesting neutrality on the question of whether bans on same-sex marriage are discriminatory. The Court appeared to be speaking for itself.

On the other hand, maybe such a qualifier was implicit, or maybe omitting it was a mere oversight. Such an explanation may be difficult to credit, however, when one reads on. Kennedy asserted provocatively that "DOMA writes inequality into the entire United States Code" (*id.* 2694). The Court did not observe that "DOMA writes inequality into the entire United States Code as Congress understands inequality." Presumably, the DOMA Congress did not understand itself to be doing any such thing, and presumably a mere oversight does not explain that passage.

There is more. The *Windsor* Court stressed not only the purpose of DOMA and the capacity of the institution of marriage to include same-sex couples, but also DOMA's effects on same-sex couples and its dominant social meaning:

By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of

a ruling—which it did—the Hawaii decision was followed by legalization of same-sex marriage in a small minority of states, some by statute and a few by judicial decision; many more states responded by banning same-sex marriage by statute or constitutional amendment." (footnotes and citations omitted)).

⁴³ *See id.* at 2716 (Alito, J., dissenting) ("Our equal protection framework . . . is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is."); *id.* at 2718 ("[T]he 'traditional' or 'conjugal' view . . . sees marriage as an intrinsically opposite-sex institution . . . essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.") (citing SHERIF GIRGIS, RYAN ANDERSON, & ROBERT GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23-28 (2012)).

federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple. . . . 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 (*id.*).

In that pivotal passage, the Court moved beyond Congress's purpose in passing DOMA to the impacts that DOMA had on same-sex couples and their children, and on the expressive message that DOMA sent to them. Those impacts and meanings do not seem limited to DOMA.

On the contrary, all state laws that have been authoritatively interpreted to preclude same-sex marriage, even those enacted long before a Hawaii state court essentially held that prohibiting same-sex couples from marrying violated the state constitution,⁴⁴ would seem to “tell[]” gay “couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition.” All state bans on same-sex marriage, whenever enacted, would seem to “place[] same-sex couples in an unstable position of being in a second-tier [relationship].” The “differentiation” in all state bans on same-sex marriage, whenever enacted, would seem to “demean[] the couple” and “humiliate[] tens of thousands of children now being raised by same-sex couples.” All such bans would seem to “make[] 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.”⁴⁵ Notably, the final two sentences in the block quotation above do not reference a state-conferred right to marry.⁴⁶

B. Caution, Too, about State Control of Domestic Relations

⁴⁴ *Baehr v. Lewin*, 74 Haw. 530, 557 (1993) (holding that state law's discriminatory definition of marriage triggered strict scrutiny under the state constitution).

⁴⁵ See Siegel, *supra* note 10, at 88-91 (reading *Windsor* similarly).

⁴⁶ See *Windsor*, 133 S. Ct. at 2695 (“DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.” (citations omitted)).

But how does one reconcile the foregoing reading of the majority opinion with the Court's celebration of state regulation of domestic relations? It may be challenging to do so, but it is noteworthy that the Court's celebration is more nuanced than most of the dissenting Justices understood it to be.⁴⁷ In "discuss[ing] the extent of the state power and authority over marriage as a matter of history and tradition," the Court qualified its invocation of state control with the observation that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons" (*Windsor*, 133 S. Ct. at 2691). What is more, the Court cited *Loving v. Virginia* as an illustration (*id.* (citing *Loving v. Virginia* 388 U.S. 1 (1967))). That citation was likely pointed and purposeful given the core claim of gay rights advocates that state bans on same-sex marriage are constitutionally indistinguishable from state bans on interracial marriage, which the Court invalidated in *Loving*.⁴⁸ Indeed, the *Loving* Court invalidated Virginia's anti-miscegenation statute not only on equal protection grounds, but also on substantive due process grounds.⁴⁹ It did so even though allowing a black person and a white person to marry could hardly be thought of as deeply rooted in American history and tradition—whether in 1967 or today. The deeply rooted tradition was, to our national shame, exactly the opposite.⁵⁰

Perhaps the above observations read too much into an obvious, blackletter qualification. "Of course," to quote Justice Kennedy,⁵¹ states must respect constitutional rights, just as the federal government must honor them. A few pages later, however, the Court reminded the reader again that state regulation of marriage is "subject to constitutional guarantees" (*Windsor*, 133 S. Ct. at 2692). And three paragraphs after that, the Court qualified its commentary a third time: "The States' interest in defining and regulating the marital relation, *subject to constitutional guarantees*, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits" (*id.* (emphasis added)). That last time, the Court invoked the authority of *Lawrence*. "Private, consensual sexual intimacy between two adult persons of the same sex," the Court wrote, "may not be punished by the State, and it can form 'but one element in a personal

⁴⁷ See *supra* Part I (quoting the dissenting opinions of Chief Justice Roberts and Justice Alito).

⁴⁸ See, e.g., *Bostic v. Rainey*, No. 2:13-cv-395, slip op. at 1 (E.D. Va. Feb. 13, 2014) (opening its opinion invalidating Virginia's ban on same-sex marriage with a long quotation from Mildred Loving).

⁴⁹ *Loving*, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

⁵⁰ For a discussion of the consistency of *Loving* with tradition, see Neil S. Siegel, *The New Textualism, Progressive Constitutionalism, and Abortion Rights: A Reply to Jeffrey Rosen*, 25 YALE J.L. & HUM. 55 (2013).

⁵¹ *Windsor*, 133 S. Ct. at 2691.

bond that is more enduring” (*id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003))).

Although there is a risk of reading too much into those features of the opinion, it is nonetheless striking that, within the span of a few pages in a relatively short opinion, the Court thrice qualified its discussion of state power to regulate domestic relations by noting that states must respect individual constitutional rights. It is also striking that the Court adorned its reminders with *Loving* on the front end and *Lawrence* on the back end. At a minimum, those three reminders and two citations indicate that the Court did not offer a full-throated endorsement of state control over domestic relations. Instead, the Court qualified its extended discussion of state power to regulate marriage by underscoring federal judicial power to protect intimate relationships—including relationships that state law prohibits, and including relationships that would not have enjoyed constitutional protection throughout most of American history.

Something else is noteworthy about the Court’s discussion of state control over domestic relations. Not once did the Court state or imply that states are constitutionally free to define marriage as limited to opposite-sex couples. On the contrary, the Court stressed—over and over again—only what a minority of states like New York had done to dignify same-sex relationships. “By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages,” the Court wrote, “New York sought to give further protection and dignity to that bond.”⁵² (Note the use of the adjective “further,” which suggests that the relationship warrants protection and possesses dignity even absent a state-conferred right to marry.) The one-sided nature of the Court’s discussion implies potential limits on the regulatory discretion that states enjoy. It portends that what the Court viewed as a constitutional virtue in New York’s democratic process it will view as a constitutional vice in the processes of states that deny same-sex couples the option to marry.⁵³

In expressing caution about state control over domestic relations, the Court may have had in mind the “volumes of history” (*United States v. Virginia*, 518 U.S. 515, 531 (1996)) that justify such caution. Legal scholars have documented numerous historical instances in which the category of

⁵² *Id.* See *id.* at 2689 (“And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”). For further discussion of the Court’s selectivity in discussing state practices, see *infra* Part III.A.

⁵³ Of course, all bets are off if a member of the *Windsor* majority is replaced by a Justice who would have dissented in *Windsor*.

“domestic relations” was successfully invoked by those who sought to insulate certain inequality-enforcing status relations from federal oversight.⁵⁴ For example, defenders of slavery invoked state control over domestic relations—specifically, the relationship between slave owner and slave—to protect slavery from federal interference.⁵⁵ So did later defenders of American apartheid in enforcing racial segregation and banning interracial marriage.⁵⁶

During the *Lochner* Era, proponents of *laissez faire* invoked state control of domestic relations—specifically, the relationship between employer and employee—to defeat progressive federal legislation, which sought to ameliorate the imbalance of bargaining power between owners and workers.⁵⁷ Similarly, in the decades between ratification of the Fourteenth Amendment and ratification of the Nineteenth, opponents of women’s suffrage invoked state control of domestic relations—specifically, the relationship between husband and wife.⁵⁸ As Reva Siegel has documented, “the states long enforced women’s subordinate status through the law of the family, and a tradition of federal deference to state law grew up at least in part to preserve the status order that state law enforced” (*id.* at 1036). Part and parcel of that tradition was denying women the right to vote—the most basic right of citizenship in a democracy—from 1789 until 1920 on the

⁵⁴ See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 62 (2000) (“Slavery fell under the ‘master-servant’ category in the law, which also included employer/employee relations. Master-servant and husband-wife relations were categorized together as domestic relations, because the authority vested in the household head determined them all.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1038 (2002) (noting that “slavery was once denominated a ‘domestic relation’ beyond the reach of federal law, as was the labor relationship as the Court reminded us in *Carter Coal*” (referencing *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936))).

⁵⁵ See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297, 1319 (1998) (“[T]o many nineteenth-century Americans, especially Southerners, slavery was a domestic relation. For decades before the Civil War, opponents of federal intervention into slavery made this point consistently. Although never ignoring race, they importantly framed the legitimacy of federal antislavery efforts as turning on whether the federal government could regulate the family law of the states.” (footnotes omitted)).

⁵⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 6, 7 (1967) (noting that “[p]enalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period,” and reporting that the Supreme Court of Appeals of Virginia upheld Virginia’s ban on interracial marriage partly because “marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment”). The *Loving* Court referenced *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955), an appeal the Warren Court infamously dismissed, despite an apparent absence of discretion to dismiss, just after deciding *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court was proceeding with the sort of Bickelian caution discussed in Parts III.C and III.D.

⁵⁷ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (“The relation of employer and employee is a local relation. At common law, it is one of the domestic relations.”).

⁵⁸ See Siegel, *supra* note 54, at 1038 (observing that “[a]rguments for local control of domestic relations once shielded chattel slavery, gender restrictions on voting, and child labor from federal regulation”).

grounds that women were virtually represented by their husbands and that allowing women to vote would cause marital discord (*id.* at 977-997).

The *Windsor* Court may have been quietly cognizant of at least some of that history. It also may have registered, however, that the category of domestic relations is fluid—that “the particular relationships this tradition insulates from federal regulation are constantly in flux.”⁵⁹ The future is different from the past when states change their own laws, as New York did in *Windsor*; when Congress passes transformative civil rights legislation; when the Supreme Court protects rights that previously went unprotected; and, much less frequently, when Americans amend the Constitution.⁶⁰

The *Windsor* Court appeared to embrace *that* American tradition, too.⁶¹ It seemed quietly to understand the lesson of American history that state legislative power over domestic relations must co-exist with supreme federal power to ensure that the Constitution includes within its embrace persons who previously did not count, or count for much, in constituting “the People” in whose name the Constitution claims to govern.⁶²

Other passages in the majority opinion evidence the Court’s caution about state control over domestic relations. It is easy to read past those passages, but their presence makes it difficult to conclude that the Court viewed marriage as an institution that the Constitution leaves to the states. Rather than invalidate Section 3 of DOMA as beyond the scope of the Necessary and Proper Clause (which was possible but admittedly unlikely given the focus of the question presented on equal protection), the Court endorsed broad federal power under that clause as a general matter, including in the area of domestic relations, and including with respect to marriage.

“By history and tradition,” the Court began its analysis by noting, “the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States” (*Windsor*, 133 S. Ct. at 2689-90). And yet, immediately upon recording that observation, the Court reminded

⁵⁹ *Id.* at 1038. See Resnik, *supra* note 26, at 382 (“Just as in the nineteenth century, the question of slavery moved from the category of master-servant relationships to that of civil rights, so too in the twentieth century did women become ‘persons’ protected by the Fourteenth Amendment. VAWA marked another of equality’s frontiers by insisting that ‘domestic violence’ cease to be a matter of ‘private’ relationships and become a matter of equal treatment under national law.”); Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1768 (2005) (“[T]he state sovereignty paradigm is not a fixed federalism principle, but has evolved over time in the context of heated debates over various proposed federal regulations that, in some respect, touched on domestic relations.”).

⁶⁰ See, e.g., U.S. CONST. amends. XIII, XIV, XV, XIX.

⁶¹ See, e.g., RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 193 (1987) (“[A] prime portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women.”)

⁶² U.S. CONST. preamble.

the reader of another legal proposition that is firmly established. “[I]n enacting discrete statutes,” the Court wrote, Congress “can make determinations that bear on marital rights and privileges” (*id.* 2690).

The Court used as a first example its unanimous decision from earlier in the Term, *Hillman v. Maretta* (*id.* 1943). The Court there held that federal law preempted Virginia law on the question whether a former wife could retain life insurance proceeds that were claimed by a subsequent wife who had survived the husband (*id.* 1955). The Federal Employees’ Group Life Insurance Act of 1954 (FEGSLIA) (5 U.S.C. § 8701 *et seq.*) establishes a life insurance program for federal employees. It allows an employee to designate a beneficiary to receive the proceeds of the policy when the employee dies.

State law also regulates the designation of beneficiaries in life insurance policies. For example, Section 20–111.1(D) of the Virginia Code addresses what happens when an employee’s marital status changed, but the employee did not update his beneficiary designation before dying. The Virginia law renders a former spouse liable for insurance proceeds to whomever would have received them under applicable law, typically a widow or widower, but for the beneficiary designation (Va. Code Ann. §20–111.1(D) (Lexis Supp. 2012)).

In *Hillman*, the Court held unanimously that FEGSLIA and its implementing regulations preempt the remedy created by §20–111.1(D), notwithstanding the “‘presumption against preemption’ of state laws governing domestic relations.”⁶³ Because Congress had acted within the constitutional scope of its enumerated powers, and because the state law “interfere[d] with Congress’s objective that insurance proceeds belong to the named beneficiary,” the Court allowed the former spouse to retain the proceeds of the life insurance policy (*id.* 1955).

The *Hillman* Court’s decision—in opposition to state law—that the first of two spouses would enjoy life insurance proceeds could be characterized as a significant federal intrusion into the state’s traditional authority to regulate the institution of marriage. The *Windsor* Court, however, characterized its decision in *Hillman* as an ordinary application of its reasoning in two previous cases from the 1950s and 1980s.⁶⁴ It characterized its ruling as but “one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the

⁶³ *Hillman*, 133 S. Ct. at 1950. See Mark Strasser, *Congress, Federal Courts, and Domestic Relations Exceptionalism*, 12 CONN. PUB. INT. L.J. 193, 230 (2012) (“The Court frequently discusses the importance of reserving family law for the states but rarely strikes down federal legislation [displacing state domestic relations law], rigorous standard for upholding such laws notwithstanding.”).

⁶⁴ The *Hillman* Court, *see id.* at 1950–51, relied on *Ridgway v. Ridgway*, 454 U.S. 46 (1981), and *Wissner v. Wissner*, 338 U.S. 655 (1950).

mechanisms and means to adopt. See *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)” (*Windsor*, 133 S. Ct. at 2675, 2690).

The Court’s invocation of *McCulloch* might also seem ordinary, but it was significant in light of another recent decision. Four Justices—including Justice Kennedy—concluded in *NFIB v. Sebelius* (132 S. Ct. 2566 (2012)) that the minimum coverage provision in the Patient Protection and Affordable Care Act⁶⁵ was beyond the scope of the Necessary and Proper Clause in part because it was not truly necessary—that is, because Congress could have sought to achieve its objectives in other ways.⁶⁶ The State of Maryland had proposed a similarly narrow reading of the term “necessary” in *McCulloch*, but the Marshall Court rejected it and no subsequent Court accepted it.⁶⁷ After arguably neglecting in *NFIB* that “it is a *Constitution* we are expounding” (*id.* at 407), Kennedy, now writing for the Court, appeared to return to long-settled law in *Windsor*. He made clear that “Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue” (*Windsor*, 133 S. Ct. at 2690).

The *Windsor* Court noted “[o]ther precedents involving congressional statutes which affect marriages” to further illustrate the point that Congress may make decisions bearing on marital rights (*id.*). Notwithstanding state domestic relations law, the Court wrote, Congress permissibly determined that marriages “entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant” will not entitle the noncitizen to admission (*id.*). It is of no consequence, the Court asserted, that “the noncitizen’s marriage is valid and proper for state-law purposes” (*id.*).

The Court cited another example. “[I]n establishing income-based criteria for Social Security benefits,” the Court observed, Congress decided that “state law would determine in general who qualifies as an applicant’s spouse,” but that “common-law marriages also should be recognized, regardless of any particular State’s view on these relationships” (*id.*). Like the previous illustrations, that one is significant to the individuals involved and to the states that seek to maintain regulatory control over the institution of marriage. Major financial and expressive consequences may attach to federal determinations of the meaning of marriage in particular circumstances. Even so, the Court insisted that all “these discrete examples

⁶⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered Sections of 21, 25, 26, 29, and 42 U.S.C.).

⁶⁶ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2647 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[T]here are many ways other than this unprecedented Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved.”).

⁶⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-25 (1819).

establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy” (*id.*).

As discussed in Part I, the Court stated that Section 3 of DOMA was constitutionally problematic in part because it had “a far greater reach” than those other federal laws (*id.*). In the Court’s telling, DOMA “enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations” (*id.*). It was in part because of DOMA’s extraordinary reach that the Court deemed it “necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition” (*id.* 2691).

Note the key fact that inspired the Court’s discussion of state law governing domestic relations: in today’s world, it is possible for an all-purpose federal definition of marriage to control a vast number of federal statutes and regulations. That fact speaks directly to the modern constitutional scope of federal power to intervene in the realm of “domestic relations.” DOMA’s reach was vast because, in modern America, federal regulation of marriage is vast. The Court accepted that reality.⁶⁸

Significantly, the Court accepted that reality in a discussion that preceded and put into perspective its assertion that “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States” (*Windsor*, 133 S. Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))). Rather than call into constitutional question any of the 1,138 federal statutes or regulations controlled by DOMA’s federal definition of marriage, the Court leveraged their presumptive constitutionality—their ordinary, “discrete” constitutional natures (*id.* 2690, 2692)—to criticize DOMA’s extraordinary reach.

What emerges from the Court’s response to *Windsor* is a broad understanding of the constitutional scope of Congress’s enumerated powers, including under the Necessary and Proper Clause, and including in the area of domestic relations. The majority opinion in *Windsor* did not continue to narrow the scope of the Necessary and Proper Clause, as five Justices did to an uncertain extent in *NFIB*.⁶⁹ The *Windsor* Court’s understanding of congressional power was broad and flexible, even if it was not as broad and

⁶⁸ See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 644-45 (2001) (“[C]ontemporary federal family law is a mélange of national norms aimed at affirming certain conceptions about how families are constituted, what relationships within families have primacy, and the material consequences of family life.”).

⁶⁹ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591-93 (2012) (opinion of Roberts, C.J.); *id.* at 2644-47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (*quoted supra* note 66). For a critical discussion of the Chief Justice’s rationale, which differed from that of the joint opinion, see generally Neil S. Siegel, *More Law than Politics: The Chief, the “Mandate,” Legality, and Statesmanship*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 192, 201-05 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

flexible as that of Chief Justice Marshall's in *McCulloch*.⁷⁰ It evidences the Court's view that the area of "domestic relations" is not free of federal oversight—that marriage is not an institution that the Constitution simply leaves to the states.

C. *Implications of the Reading*

According to the foregoing reading of *Windsor*, the Court concluded that Section 3 of DOMA violated the Fifth Amendment because it had not only the purpose, but also the effect and social meaning, of diminishing the equality and demeaning the dignity of gay people by excluding them from an institution that is not inherently unsuitable to their inclusion.⁷¹ Neither extraordinary evidence of animus nor New York's decision to legalize same-sex marriage is critical to that conclusion. If *Windsor* is so understood, what distinguishable interest does any state have in prohibiting same-sex marriage?

There does not appear to be a persuasive answer to that question—at least as long as the Court continues to focus upon the actual interests animating laws that discriminate against gay people, and not on any conceivable legitimate state interest.⁷² The key assumption of this section, in other words, is that the Court will continue to apply de facto heightened scrutiny, as it did in *Romer*, *Lawrence*, and *Windsor* itself.⁷³

⁷⁰ The Court used the language of rational basis review in *Sabri v. United States*, 541 U.S. 600 (2004), and *United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949 (2010), which Justice Kennedy resisted in his opinion in *Comstock*. See 130 S. Ct. at 1967 (Kennedy, J., concurring in judgment) (stressing the importance of "a demonstrated link in fact, based on empirical demonstration," which, "[w]hile undoubtedly deferential . . . may well be different from the rational-basis test").

⁷¹ Analysis of purposes, effects, and social meanings formed the analytic spine of arguably the greatest defense of *Brown*. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) ("Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been 'equal' in intent, in total social meaning and impact? 'Thy speech maketh thee manifest. . .'; segregation, in all visible things, speaks only haltingly any dialect but that of inequality.").

⁷² In traditional rational basis cases, courts accept as adequate any conceivable legitimate governmental interest for a law, without regard to the legislature's actual purposes. See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

⁷³ The *Windsor* Court rejected or ignored asserted federal interests in uniformity and stability, which were conceivable if not actual. See, e.g., *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) ("Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."); *Id.* at 2708 (Scalia, J., dissenting) ("To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage." (citing William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012))); Merits Brief of Bipartisan Legal Advisory Group at 28-49, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (citing numerous possible federal interests). Precedent disabled BLAG from defending the statute on moral grounds. See *supra* notes 40-41 (quoting the legislative history).

For example, the official sponsors of California's Proposition 8 made the procreation argument for restricting marriage to opposite-sex couples.⁷⁴ That argument is difficult to credit given its significant under- and over-inclusiveness, which suggests that it is not an actual state interest animating such restrictions. "If moral disapprobation of homosexual conduct is no legitimate state interest for purposes of proscribing that conduct," Justice Scalia asked in his *Lawrence* dissent, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."⁷⁵

While many married couples do not procreate, many same-sex couples do. They procreate through artificial insemination, surrogacy, and adoption. Registering that reality, Justice Kennedy criticized DOMA's humiliation of "tens of thousands of children now being raised by same-sex couples," who may find it more difficult "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives" (*Windsor*, 133 S. Ct. at 2694). Accordingly, the procreation rationale for determining access to the institution of marriage may cut in favor of same-sex marriage.

The New York Court of Appeals, writing before New York legalized same-sex marriage, hypothesized that limiting marriage to opposite-sex couples might serve another state interest. The court speculated that a legislature might rationally conclude that opposite-sex couples have more of a need for marriage than same-sex couples in order to stabilize their relationships for the sake of their children.⁷⁶ That hypothesis seems difficult to credit as an actual state interest. No state appears to limit marriage to opposite-sex couples for that reason.

The New York Court of Appeals offered another rationale. "The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father," the court reasoned, because "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like" (*id.*). That interest seems neither actual nor permissible. No state appears to ban same-sex marriage for that reason. Moreover, it seems

⁷⁴ See Brief of Petitioners at 53, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (No. 12-144) (asserting that marriage traditionally has had a procreative purpose and that allowing same-sex marriage would undermine that purpose by focusing the institution on satisfying adult desires, not on raising children).

⁷⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting) (internal quotation marks omitted).

⁷⁶ See *Hernandez v. Robles*, 7 N.Y. 3d 338, 359 (2006) (writing that "the Legislature could rationally offer the benefits of marriage to opposite-sex couples only" because only they "become parents as a result of accident or impulse," so that "promoting stability in opposite-sex relationships will help children more").

to rest on the very traditional sex-role stereotypes that the Court has held to violate the Equal Protection Clause in sex discrimination cases (*see, e.g., United States v. Virginia*, 518 U.S. 515 (1996)). In any event, it is not clear how prohibiting gay people from marrying (as opposed to parenting) advances the hypothesized interest.⁷⁷

This discussion of arguments for limiting marriage to opposite-sex couples is intended to be illustrative, not exhaustive. Perhaps there are better arguments out there. But it is not evident what legitimate, let alone important, interest states can have in prohibiting same-sex couples from marrying when the Court has taken off the table both moral opposition to homosexuality, which DOMA sought to express (as did Colorado and Texas in previous cases),⁷⁸ and the constitutive conviction that marriage is inherently an opposite-sex institution, such that there is no discrimination and resulting inequality to speak of. Moreover, the Court has deemed constitutionally pertinent not only the purposes, but also the effects and social meanings of laws excluding gay people from the institution of marriage. Finally, it has examined those effects and social meanings from the perspective of those who are excluded. It has *not* told same-sex couples that if they think their exclusion from the institution of marriage “stamps [them] with a badge of inferiority, . . . it is not by reason of anything found in the act, but solely because [they] choose[] to put that construction upon it” (*Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

D. *Limits of the Reading*

For all of the foregoing reasons, the Chief Justice’s “federalism” reading of the Court’s opinion in *Windsor* is less persuasive than one that views the Court as focused on ordinary evidence of legislative animus. There are, however, definite limits to the equality reading as well. The Court did not formally commit itself and other courts to invalidating all state bans on same-sex marriage; it has left open the possibility that at least some such bans may

⁷⁷ A distinct claim invokes empirical evidence for the assertion that the children of opposite-sex parents are better off than the children of same-sex parents. That claim is hotly contested in the scientific literature. *See, e.g.,* Brief of American Psychological Ass’n et al., *United States v. Windsor*, No. 12-307, 133 S. Ct. 2675 (2013), at 5, <http://www.apa.org/about/offices/ogc/amicus/windsor-us.pdf> (“[T]he claim that legal recognition of marriage for same-sex couples undermines the institution of marriage and harms their children is inconsistent with the scientific evidence.”).

⁷⁸ *See* H.R. REP. No. 104-664, at 15-16 (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”). The Court also rejected moral opposition to homosexuality as a legitimate state interest in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

be supported by sufficient—and sufficiently distinguishable—state interests. It has left open that possibility for two reasons.

First, as in *Lawrence*,⁷⁹ the Court declined to announce that it was applying heightened scrutiny to discrimination on the basis of sexual orientation. It instead chose to talk the talk of rational basis review,⁸⁰ even as it applied what might appropriately be called rational basis “double-plus.” As will be explained in Part III, Justice Kennedy likely would have lost his majority had he explicitly embraced heightened scrutiny, and he himself seems more inclined to encourage than to compel for the time being.

Second, the state-regarding language is there in the majority opinion.⁸¹ The language may seem logically unnecessary to the Court’s equal protection analysis and less than entirely convincing: it is not clear why same-sex *marriages* would be constitutionally protected from governmental discrimination when intimate same-sex *relationships* were not. Few people on either side of the constitutional debate over same-sex marriage appear to believe in such a distinction. It seems arbitrary, and it has failed in the past—specifically, when the Court began protecting access to contraception as a fundamental right.⁸² But the language is there, and its being there leaves room for opponents of same-sex marriage to argue that the equality protections afforded same-sex marriages are more robust than the protections afforded same-sex relationships.

Overall, Justice Kennedy’s majority opinion in *Windsor* resists all dispositive interpretations. It is sufficiently undisciplined when evaluated according to conventional categories of constitutional analysis that it actually seems designed that way. One cannot be certain about the motivations of a single Justice, let alone a group of them, but the opinion does appear purposely to preserve for itself a certain Delphic abstruseness. This Article

⁷⁹ See *Lawrence*, 539 U.S. at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

⁸⁰ See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

⁸¹ See, e.g., *Windsor*, 133 S. Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)); *id.* at 2692 (“Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”).

⁸² Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the right of married couples to use contraception), with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (protecting the right of all individuals to use contraception). As with the issue of contraception in *Griswold*, it may have reassured the *Windsor* Court that the facts involved married couples. In that sense, it may matter that *Griswold* came before *Eisenstadt*, and that *Windsor* came before a challenge to a state ban on same-sex marriage whose constitutionality the Court is prepared to decide. But the logic of neither *Griswold* nor *Windsor* seems persuasively limited to married couples. To continue the analogy, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), may be playing the role of *Poe v. Ullman*, 367 U.S. 497 (1961), in which the Court declared the absence of standing in initially declining to decide the constitutionality of the Connecticut law. For a discussion of *Hollingsworth*, see *infra* Part III.D.

will next attempt to understand why the opinion seems to view partial opacity as a virtue.

III. FEDERALISM AS A WAY STATION

Three features of the majority opinion in *Windsor* are particularly puzzling. First, as discussed extensively in Part II, the Court qualified a strong endorsement of the equal constitutional dignity of same-sex couples by stressing (even as it qualified) the tradition of state control over domestic relations. In so doing, the Court potentially enabled others to draw a distinction between discrimination against same-sex couples and discrimination against same-sex marriages.

Second, rather than understand history in “deeply rooted” traditionalist terms,⁸³ the Court invoked certain state developments in the service of living constitutionalism. It celebrated the vertical constitutional structure for enabling states like New York to evolve towards greater respect for the equal dignity of same-sex couples. It also seemed to regard certain state-level practices of living constitutionalism as sources of learning for the nation, including the federal courts, about the content of constitutional rights. The Court was highly selective in attending to state developments, however, and it offered no explanation for ignoring the laws of the majority of states.

Third, the *Windsor* Court expressed its concerns about federal overreach in a way that could advance, but never undermine, the equal citizenship stature of gay Americans. Specifically, it used those federalism concerns only to support a finding of congressional animus, which violates equal protection principles protected against federal infringement by the Fifth Amendment’s Due Process Clause (*see Bolling v. Sharpe*, 347 U.S. 497 (1954)). The Court’s use of federalism reasoning as a one-way ratchet appears neither essential to the outcome nor likely to do much work in future cases. Such use, therefore, raises the question of what it was doing in the Court’s opinion.

This Article has already discussed the first puzzle at length and will return to it in Part III.C. The next two sections discuss the second and third puzzles in greater detail than the Article has so far.

A. *Federalism in the Service of Living Constitutionalism*

⁸³ See, e.g., *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (“[T]he opinion does not argue that same-sex marriage is ‘deeply rooted in the Nation’s history and tradition,’ a claim that would of course be quite absurd.” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997))).

The *Windsor* Court used federalism in the service of living constitutionalism. Specifically, the Court leveraged changes in how certain states regulate marriage in order to expand the scope of constitutional rights protected at the national level. Living constitutionalists believe that the meanings of many constitutional provisions change in practice, and often should change in practice, in response to changes in social conditions and values.⁸⁴

An example of living constitutionalism is Justice Kennedy's majority opinion in *Lawrence v. Texas* (539 U.S. 558 (2003)). After holding that the Due Process Clauses protect the "moral and sexual choices"⁸⁵ of gay people, Kennedy wrote for the Court that the Constitution's Framers and ratifiers, in both 1791 and 1868, knew what they did not know:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom (*Lawrence v. Texas*, 539 U.S. 558 (2003)).

For the *Lawrence* Court, the high level of generality at which the Framers wrote the Due Process Clauses reflects the humility with which they regarded their own understandings of constitutional liberty. Instead of trying to figure it all out themselves, they endowed each subsequent generation of Americans with the constitutional authority partially to define the "liberty" protected by those clauses.⁸⁶

Justice Kennedy's majority opinion in *Windsor* approached the constitutionality of Section 3 of DOMA in the same interpretive fashion. In turning from the threshold question of justiciability to the merits,⁸⁷ the Court documented the changes over time in public values regarding same-sex

⁸⁴ See, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 226 (2011) ("Living constitutionalists argue that the practical meaning of the Constitution changes—and should change—in response to changing conditions. . . . The central concern of living constitutionalism is adjusting to change—whether to changed social conditions or changed values.")

⁸⁵ *Windsor*, 133 S. Ct. at 2694 (characterizing the holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

⁸⁶ For a sophisticated development of that position, see generally JACK M. BALKIN, LIVING ORIGINALISM (2011) (distinguishing among the rules, standards, and principles in the Constitution).

⁸⁷ The Court first had to decide whether it lacked jurisdiction given the government's agreement with Ms. Windsor that Section 3 violated equal protection. See *Windsor*, 133 S. Ct. at 2684-89.

marriage. Those values, the Court wrote, had at first frustrated the “long[ing]” (*id.* at 2689) of Edith Windsor and Thea Spyer to marry:

It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged (*id.*).

If the Court had cared only about whether same-sex marriage falls within the original meaning of the Due Process Clause, or whether same-sex marriage is “deeply rooted” in the nation’s history and tradition, the Court’s initial observations would have been a conversation stopper. The Court took that conservative traditionalist approach in *McDonald v City of Chicago*.⁸⁸ So did Justice Alito, joined by Justice Thomas, in *Windsor*.⁸⁹

For the *Windsor* Court, by contrast, the older view of marriage was only the beginning of the constitutional conversation:

For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.⁹⁰

Writing with evident sympathy, the Court noted that the Empire State, “slowly at first and then in rapid course, . . . came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community” (*id.*). After deliberating over the question statewide, the Court wrote, “New York acted to enlarge the definition of marriage to

⁸⁸ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (“[W]e must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’” (citations omitted)).

⁸⁹ See *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (“It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition.”).

⁹⁰ *Id.* at 2689. One might wonder whether the passages quoted in the text are autobiographical.

correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood” (*id.*). In those passages, the Court embraced living constitutionalism.⁹¹

But the Court did more than that. It also celebrated the Constitution’s federal structure for enabling states to practice living constitutionalism:

In acting first to recognize and then to allow same-sex marriages, New York was responding “to the initiative of those who [sought] a voice in shaping the destiny of their own times.” These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other (*Windsor*, 133 S. Ct. at 2692 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011))).

Rather than consult only Founding era or nineteenth century views to understand how the states may exercise their regulatory authority over the institution of marriage today,⁹² the Court regarded the states as appropriately moving to include within that institution persons who were excluded for almost all of American history—and who remain excluded in most states at present. The Court commended New York for acting on “the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality” (*id.* 2692-93 (emphasis added)).

The Court did not discuss, let alone celebrate, the decisions of other states to exclude same-sex couples from the institution of marriage. Reading

⁹¹ Justice Kennedy did not distinguish state judicial decisions protecting a right to same-sex marriage from state statutes permitting same-sex couples to marry. *See, e.g., Windsor*, 133 S. Ct. 2675, 2690 (reproducing the citations to state cases and laws in the majority opinion). Both interventions may qualify as instances of living constitutionalism, which draw from the constitutional convictions of judicial and non-judicial actors. *See, e.g., BALKIN, supra* note 86, at 279 (offering a living constitutionalist “theory about how the entire system of constitutional construction—including the work of the political branches, courts, political parties, social movements, interest groups, and individual citizens—is consistent with democratic legitimacy”). State political decisions to allow same-sex marriage, however, are also compatible with originalism and conservative traditionalism. For example, when Justice Scalia dissents in equal protection cases, he often endorses democratic incorporation of changing societal attitudes. *See, e.g., United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.”).

⁹² Justice Alito, by contrast, “suspect[ed] it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view [of marriage] for granted.” *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

the majority opinion, one might be inclined to forget the historical fact of the matter, which is that even as states are legitimating same-sex marriage, they are also banning it. The Court, in other words, attended to constitutional culture and debate, but it attended to only one side.⁹³ That partiality is puzzling, and it raises the question whether the Court was just using federalism (conceived as attention to state practices and developments) in the service of living constitutionalism, or whether it was doing something more.

An answer supporting the first characterization might begin by noting how much Congress taught the Court about sex equality in the years before the Court began invalidating sex classifications that reflected or reinforced the sex-role stereotypes of the separate spheres tradition.⁹⁴ Congress moved before the Court did, and the Court invoked congressional action as relevant constitutional authority when it decided to intervene.⁹⁵ Centuries earlier, the Court learned from the political branches about the constitutionality of a national bank.⁹⁶ The supremacy rhetoric in cases like *City of Boerne v. Flores*⁹⁷ may occlude the dialectical relationship between constitutional politics and constitutional law, but it is present in the horizontal constitutional structure.

The *Windsor* Court may have been suggesting that similar lines of constitutional communication can be present within the vertical constitutional structure. More specifically, the Court may have been reasoning that one of the roles of the states in the federal system is to inform the judgment of the rest of the country, including the federal courts, about the content of constitutional rights. On that view, New York and other states that have allowed same-sex marriage are modeling for the rest of the nation, and for the Court, a fuller understanding of the Constitution's protections of equality and liberty. Just as the Court during the 1970s learned from

⁹³ Cf. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1168 (1993) (envisioning state constitutionalism as “a process of giving voice to the state court’s understanding of the values and principles of the national community,” which enriches “the meaning of American citizenship” particularly “because fifty different courts will talk with each other, as well as with the federal courts, about the meaning of a common enterprise”).

⁹⁴ See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (“We draw on both history and theory to show that Section 5 legislation has in the past helped to establish democratic foundations for the Court’s own articulation of constitutional rights.”).

⁹⁵ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion of Brennan, J.) (“Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”).

⁹⁶ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the Judicial Department, in cases of peculiar delicacy, as a law of undoubted obligation.”).

⁹⁷ See, e.g., 521 U.S. 507, 519 (1997) (declaring that Congress has no authority “to determine what constitutes a constitutional violation”).

Congress about the content of constitutional rights when it began to hold that the Equal Protection Clause protects women, too, so Congress in the 19th Century and (belatedly) the Court in the 20th Century learned from Jefferson's and Madison's opposition to the Sedition Act of 1798—which was embodied in the Kentucky and Virginia Resolutions.⁹⁸ Likewise, the Court today may be learning from an increasing number of states that the Equal Protection Clause protects gay people, too. One might think of the states as serving as “laboratories of constitutionalism.”⁹⁹

The legal acceptance of same-sex marriage in twelve states (as of the date of the Court's decision) partially reflected substantial changes in popular constitutional convictions about the meaning of equality and liberty in the United States. The Court underscored—and seemed to endorse—those transformations by including a long string citation in the text of its opinion (*Windsor*, 133 S. Ct. at 2675, 2690). The Court seemed to be implying that, in the American federal system, certain states may see clearly when “times . . . blind” the rest of “us to certain truths” (*Lawrence v. Texas*, 539 U.S. 558, 579 (2003)). On that interpretation, New Yorkers and likeminded citizens in other states have led by invoking the Constitution's “principles in their own search for greater freedom” (*id.* 579), and the Court is electing to follow—although not entirely just yet.¹⁰⁰

Up until the Twentieth Century, federal courts routinely cited state supreme courts on such constitutional questions as the meaning of due process and the limits of the states' police powers.¹⁰¹ Today, however, it is relatively uncommon for the Justices to view state-level constitutional interpretations as relevant to the meaning of the U.S. Constitution.¹⁰² Federal

⁹⁸ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (invoking “the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment”); *id.* at 274 (noting that “the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison”).

⁹⁹ Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁰⁰ Of course, the Court also played a leadership role in *Romer* and *Lawrence*.

¹⁰¹ During the Nineteenth Century, it was thought that state and federal courts shared a general constitutional law tied to notions of natural rights. See, e.g., *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874); *BREST ET AL.*, *supra* note 10, at 330-32. After the New Deal, federal courts cited state court decisions on constitutional questions far less frequently than in the past, presumably in part because of the association of the practice with natural law/*Lochner* Era reasoning.

¹⁰² State law does, however, furnish the predicate for various federal constitutional claims under the Contracts Clause, the Fourth Amendment, the Takings Clause, and the Due Process Clauses. That is because property and contract interests are generally a function of state law. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (holding, based on the common law trespass rationale of *United States v. Jones*, 132 S. Ct. 945 (2012), that a dog sniff at the front door of a house where the police suspected marijuana was being grown was a search under the Fourth Amendment); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (adjudicating a Contracts Clause claim by first looking to state law for the existence of a valid contract). As discussed in Part I, Randy Barnett read the majority opinion in

courts “do not use . . . state constitutional doctrine to nearly the same degree as state courts have used federal doctrine.”¹⁰³ Even so, there are “some notable exceptions to the general [modern] history of neglect” in the areas of the First Amendment, criminal procedure, substantive due process, and the Eighth Amendment.¹⁰⁴ Sometimes, as in the criminal procedure context, the Court engages in “a pragmatic form of learning from the states’ experience and growing unanimity about [various] practical matters” (*id.* 371). Other times, as in its substantive due process and Eighth Amendment jurisprudence, “the Court has looked to widely shared state practice as ‘objective’ evidence of whether a particular right is fundamental or a particular punishment is cruel or unusual” (*id.*). The *Windsor* Court seemed to look to the laws of New York and similarly situated states for a third, distinct purpose: for normative guidance about the constitutional meaning of equality and liberty for same-sex couples who wish to marry.

The foregoing interpretation of *Windsor* “cuts” only one way—namely, in favor of legal protection of same-sex marriage—because that is the only way in which the *Windsor* Court deemed it appropriate to draw from state experience. Perhaps, however, the interpretation cuts only one way in an appropriate fashion because it ultimately turns on the content of constitutional rights¹⁰⁵—which, of course, will not always be “progressive” rights.¹⁰⁶ Moreover, while such an account is ultimately “about” the content of rights, not the content of structure, it may also be about the vertical constitutional structure. The account locates within the vertical constitutional structure an important potential source of wisdom about judicially enforceable constitutional rights. Just as changes in rights consciousness profoundly affect understandings of the constitutional

Windsor as reasoning decisively that New York had created an equality and liberty interest, which the federal government lacked sufficient reason to destroy.

¹⁰³ Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 370-71 (2011).

¹⁰⁴ *Id.* at 371; *see id.* at 371-80 (discussing the Court’s doctrine in those areas).

¹⁰⁵ The line between federal provisions that support rights and those that undermine them may be difficult to draw when rights conflict, such as when anti-discrimination norms clash with free exercise values. For example, the Religious Freedom Restoration Act of 1993 (RFRA) can be used as a defense against fair housing or anti-discrimination laws. *See* RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4). In cases of conflict, constitutional interpreters have no choice but to balance incommensurable values.

¹⁰⁶ Consider, for example, the right to keep and bear arms. *See* U.S. CONST. amend. II.

structure,¹⁰⁷ so the structure presents opportunities for a variety of constitutional actors to shape rights consciousness.¹⁰⁸

The idea of the states as laboratories of constitutionalism has much to commend it. Such a defense of the Court's approach in *Windsor*, however, does not explain why the Court's consultation of state practices was so one-sided. The Court, to reiterate, discussed only the experience of the minority of states that have recognized same-sex marriage. In theory, however, drawing from state law need not cut only in favor of expanding constitutional rights. State experience may constitute persuasive authority for declining to recognize certain claims to constitutional attention, or for limiting the scope of pre-existing rights.¹⁰⁹

One might defend the Court by noting that it was not consulting state laws and judicial decisions as evidence of an existing or emerging national consensus, as it does in substantive due process and Eighth Amendment cases (*id.*). In those contexts, the states are presumably data points of equal weight. Instead, the *Windsor* Court was imagining the states as laboratories, a metaphor implying that there is a truth out there waiting to be discovered.¹¹⁰ In such a setting, it is coherent to conclude that even one state

¹⁰⁷ See Resnik, *supra* note 26, at 367-68 (critiquing as “*federalism-essentialism*” the view “that rights have fixed relationships to jurisdictional lines,” because “competencies are always in motion, and in more than one direction, as the import of rights and the functions of government shift”; see also *supra* note 59 and accompanying text (citing scholarship that examines how perceived structural boundaries are altered by changes in rights consciousness).

¹⁰⁸ Important recent scholarship identifies what Heather Gerken has called “the discursive benefits of structure.” Heather K. Gerken, *Federalism as the New Nationalism: An Overview of the Nationalist School of Federalism*, 123 YALE L.J. 1889 (2014); Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958 (2014). Gerken stresses how federalism and localism help frame political and constitutional debates and move them forward. Her work focuses not just on the development of rights consciousness at the local level, but also on governance. See, e.g., Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY: A JOURNAL OF IDEAS (Spring 2012), <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all> (arguing that “racial minorities and dissenters can wield more electoral power at the local level than they do at the national,” and that “they can rule at the state and local level”). For contributions developing that theme, see generally Heather K. Gerken, Lecture, *Exist, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6 (2010); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); and Heather K. Gerken, *Dissenting By Deciding*, 57 STAN. L. REV. 1745 (2005). For related work by others, see *infra* note 111.

¹⁰⁹ See, e.g., Blocher, *supra* note 103, at 383-84 (recommending that the U.S. Supreme Court adopt the unanimous approach of state courts, which permits “reasonable” regulations of firearms).

¹¹⁰ It may make more sense to imagine states as laboratories when there is disagreement over facts and means than when disagreements concern values and ends. One does not typically enter a laboratory to discover what one's values are. That said, a greater awareness of facts can change values, at least over time. For example, it seems likely that the more people realize they know gay people, the harder it is for them to stay morally opposed to homosexuality. Similarly, people may become less resistant to same-sex marriage the more they observe that American society is not imperiled when certain states allow same-sex couples to marry.

has it right and forty-nine have it wrong. Moreover, such a conclusion does not indicate the absence of a genuine commitment to federalism.

Again, there is force to such an account, at least in principle; using select state developments in the service of living constitutionalism appears to constitute a coherent doctrinal move. The question, however, is whether the account fully explains what the Court was doing in *Windsor*.¹¹¹ The account may have incomplete explanatory power as applied to *Windsor* because the Court did more than ultimately side with a minority of states after due public deliberation: it did not engage the vast majority of them. It seemed uninterested in the “results” being produced in the majority of state “labs.” Given the Court’s failure to acknowledge what was going on in most states, there may be cause to question whether the *Windsor* Court was doing more than using federalism in the service of living constitutionalism. The Court may have favored state power primarily because states like New York were acting to protect the dignity of same-sex couples. In that case, the Court may have revealed more of a commitment to certain outcomes than a commitment to a structural arrangement that it hopes will produce the best outcomes—at least on balance and over the long run. To be sure, structural commitments presumably exist, at least in part, to produce favorable outcomes. There is a difference, however, between leveraging structure to secure good outcomes in general, and doing so to get the “right” outcome in a particular case.

Put differently, the Court’s reasoning may signal a commitment to a certain conception of constitutional rights all the way down. There is nothing wrong with such a conception, but it does not seem best described only in terms of federalism. Something more was being expressed by the *Windsor* majority.

B. *Federalism in the Service of Equality*

The *Windsor* Court deployed federalism—specifically, concerns about federal overreach—as a one-way ratchet. That is, the Court voiced federalism concerns only in the service of advancing equal citizenship for same-sex couples, not as a means of enforcing their continued inequality. In that way, too, the Court used federalism as a tool to protect rights at the national level.

¹¹¹ This Article analyzes what was likely moving the *Windsor* majority. It does not suggest that work such as Heather Gerken’s, which emphasizes “the discursive benefits of structure,” see *supra* note 108, is less about federalism and more about something else. For other work that stresses the discursive benefits of federalism and localism, see generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); and Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006).

To better understand the significance of what the Court did, first note what the Court did not do. The Court did not hold, on specified federalism grounds, that governments may permit same-sex marriage but may not prohibit it. Such a declaration would indeed amount to the use of federalism as a one-way ratchet. It would not, however, be obviously defensible because the relevant federalism considerations would seem to cut both ways.

Nor, to reiterate, did the Court invalidate Section 3 of DOMA as beyond the scope of the Necessary and Proper Clause. Such a ruling may potentially have been principled, but it would not have amounted to the use of federalism as a one-way ratchet. Equally unjustified by the Necessary and Proper Clause would be a federal Declaration of Marriage Equality Act (DOMEA) that defined “marriage” for all purposes under federal law as including same-sex marriages.¹¹²

Instead, the Court expressed its concerns with the extraordinary breadth of DOMA by identifying non-decisive evidence of congressional animus, which violates the “basic due process and equal protection principles” protected by the Fifth Amendment’s Due Process Clause (*Windsor*, 133 S. Ct. at 2675, 2693). “DOMA, because of its reach and extent,” the Court wrote, “departs from this history and tradition of reliance on state law to define marriage” (*id.* 2692). Twice quoting its decision in *Romer v. Evans* (517 U.S. 620 (1996)), the Court stated that “discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”¹¹³

The Court described DOMA as indeed “unusual,” as “a system-wide enactment with no identified connection to any particular area of federal law” (*id.* at 2694). And it perceived not mere irrationality, but “strong evidence” of animus in the form of moral disapproval:

DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon

¹¹² Such a statute, however, might be valid enforcement legislation under Section Five of the Fourteenth Amendment, depending on how the Court was prepared to interpret Section One. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (articulating the “congruence and proportionality” test, according to which the scope of the Court’s understanding of equal protection and due process principles assumes great significance in evaluating the constitutionality of Section Five legislation).

¹¹³ *Windsor*, 133 S. Ct. at 2692, 2693 (internal quotation marks omitted) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))).

all who enter into same-sex marriages made lawful by the unquestioned authority of the States (*id.* at 2693).

As Part II observed, however, the Court indicated that “discriminations of an unusual character” do not exclusively or even primarily “suggest careful consideration” (*id.* at 2692, 2693 (internal quotation marks omitted)). The Court also stressed ordinary evidence of animus, including statements of moral disapproval of homosexuality and same-sex marriage. The Court did not place decisive emphasis on the lack of any distinctly federal (as opposed to state) interest in regulating same-sex marriage.

The Court’s evidentiary use of federal overreach is innovative and intriguing. Contrary to Madison’s theorizing in *Federalist 10* and elsewhere that individual rights in the extended republic would be better protected at the national level than at the state level,¹¹⁴ the Court seemed to be suggesting that an unusual intervention by the federal government into an area long subject to significant regulation by the states may constitute evidence of an unconstitutional congressional purpose and thus a violation of individual constitutional rights.¹¹⁵ On that view, DOMA’s definition of “marriage” for more than 1,000 purposes under federal law¹¹⁶—the vast majority of which Congress did not even consider in enacting DOMA—raises questions about Congress’s actual purposes in passing the provision, and raises further questions about the consistency of those purposes with constitutional principles of equal protection and substantive due process.

The Court’s innovation, however, is also under-developed in the majority opinion and vulnerable in certain ways. One potential problem with using concerns about federal overreach in the service of equality is that it is difficult to think of other examples involving over-broad federal laws. If that is right, the *Windsor* Court’s approach may reflect more of a response to this case than an ongoing commitment to federalism.

One might argue that a potential candidate is the federal Partial-Birth Abortion Ban Act of 2003 (18 U.S.C. § 1531 (Supp. IV 2004)). That statute, the argument would run, amounts to an unprecedented intrusion by the federal government into an area—abortion legislation—typically regulated by the states (subject to judicial protection of constitutional rights). The federal ban on so-called partial birth abortion is valid Commerce Clause

¹¹⁴ See THE FEDERALIST NO. 10 (Madison) (arguing that a diverse, extended republic would best protect minority rights from majority tyranny).

¹¹⁵ Cf. Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 209-10 (2013) (cautiously defending the idea of “federalism [a]s a one-way ratchet toward liberty” while *Windsor* was pending before the Court).

¹¹⁶ See *supra* note 5 and accompanying text (identifying the number of federal statutory provisions to which Section 3’s definition of marriage applied).

legislation,¹¹⁷ but the lack of any apparent need for novel regulatory action at the federal level may constitute a red flag that should have triggered skepticism about the purposes of the federal intervention. As it turned out, the Court in *Gonzales v. Carhart* (127 S. Ct. 1610 (2007)) deferred much more substantially to congressional factfinding on the medical necessity of the banned procedure than it did to state factfinding when it reviewed a similar state ban seven years earlier (*see Stenberg v. Carhart*, 530 U.S. 914 (2000))—even though the medical evidence had not changed in any significant respect in the intervening years.¹¹⁸

The abortion example, however, may just suggest another vulnerability of the *Windsor* Court’s approach: it may have less to do with federalism, and more to do with constitutional rights. Imagine a novel federal law, enacted under Section Five of the Fourteenth Amendment, that prohibited states from imposing various restrictions on abortion. Such a law might be as unusual as the 2003 federal statute, and it might initially raise a constitutional red flag on that ground. But the red flag would quickly come down because the law could not plausibly be viewed as undermining any judicially declared constitutional rights. In that case, a commitment to certain substantive rights appears to be doing the analytical work, not a commitment to a certain view of the constitutional structure. Unless the Court can identify a case in which federalism concerns render unconstitutional an otherwise permissible law that adversely affects equality or liberty interests—and *Windsor* does not appear to have been such a case—its appeal to federalism seems somewhat strained.

Finally, the *Windsor* Court’s evidentiary use of federalism relies on notions of “unusual” federal action and “traditional subjects of state concern.” Those notions ought to be viewed with skepticism, as illustrated by the sheer number of presumably constitutional federal laws implicated by DOMA’s definition of marriage. It is generally unworkable and undesirable for constitutional analysis to turn on whether Congress is regulating “traditional subjects of state regulation.”¹¹⁹ In general, Congress’s enumerated powers are best understood to confer upon Congress broad authority to solve national problems, including by intervening as necessary in such “traditional” areas of state regulation as criminal law, education, and

¹¹⁷ *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 560 (1995) (holding that the Commerce Clause allows Congress to regulate economic activity that substantially affects interstate commerce in the aggregate). *But cf.* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007) (Thomas, J., concurring) (stressing “that whether the [Partial-Birth Abortion Ban] Act constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court,” because “[t]he parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it”).

¹¹⁸ Of course, the composition of the Presidency and the Court had changed.

¹¹⁹ For a discussion, see generally Neil S. Siegel, *Distinguishing the “Truly National” from the “Truly Local”*: Customary Allocation, Commercial Activity, and Collective Action, 62 DUKE L.J. 797 (2012) (symposium on law and custom).

family law,¹²⁰ the last category of which includes the law of “domestic relations.”¹²¹ Constitutional interpreters should be less concerned about whether the states have traditionally regulated a certain subject matter or whether federal action is unprecedented, and they should be more concerned about whether federal intervention presently is justified and sensible. Federal intervention may be justified and sensible because the problem at issue spills across state borders, or because equal citizenship values are at stake.¹²²

The foregoing observations are not meant to reject decisively any role for the use of federalism concerns as a rights-protecting ratchet. That facet of the *Windsor* Court’s response to Section 3 of DOMA was creative and intriguing. But the approach is sufficiently vulnerable and unnecessary that it raises the question of why the Court elected to employ it. To answer that question, it may help to take a step back and consider the Court’s opinion in *Windsor* in a broader context, one that seeks to understand the processes of constitutional change.

C. *A Dynamic Reading of Windsor*

To reiterate, why did the Court qualify a strong endorsement of constitutional equality for same-sex couples by stressing state control over domestic relations, thereby potentially permitting others to draw a distinction between discrimination against same-sex couples and discrimination against same-sex marriages? Why was the Court selective in using state-level developments in the service of living constitutionalism, validating the choices of the minority of states that allow same-sex marriage but not the decisions of the majority of states that prohibit it? Why did the Court, for the first time, use concerns about federal overreach as evidence of unconstitutional animus? There may be no fully satisfactory answers to those questions if one thinks about constitutional doctrine statically—that is, as coherent and fully developed when considered at a single point in time.

The above questions may seem less perplexing, however, if one thinks about doctrine dynamically—that is, as moving in history and changing over time. When doctrine is considered from that perspective, it becomes

¹²⁰ See, e.g., BALKIN, *supra* note 86, at 172 (“[T]he federal government has regulated family law since at least Reconstruction, and it has regulated education heavily in the last fifty years. And, of course, the federal government has attacked crime since the beginning of the Republic and with increasing frequency in the twentieth century.” (footnote omitted)); see generally Hasday, *supra* note 55 (noting that the federal government has been significantly involved in regulating the family since Reconstruction).

¹²¹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 615-16 (2000) (describing “family law,” including “marriage, divorce, and childrearing,” as an “area[] of traditional state regulation”).

¹²² For a discussion, see generally Siegel, *supra* note 119.

apparent that there are periods of doctrinal stability and periods of doctrinal change. It also becomes apparent that doctrine may look different at those different times. In periods of transition, when the country and the law are in flux, the Court's doctrine may be in conversation with other participants in the constitutional system, including courts, politicians, social movements, and citizens.

In several respects, the majority opinion in *Windsor* is what constitutional doctrine looks like when it is in conversation. In finding a Fifth Amendment violation, for example, the opinion did not announce a level of scrutiny. Instead, it implausibly concluded that Section 3 of DOMA flunked even rational basis review notwithstanding asserted federal interests in uniformity and stability, which were conceivable if not actual.¹²³ In that regard, the opinion is like the Court's 1971 opinion in *Reed v. Reed* (404 U.S. 71 (1971)), which purported to apply only rational basis review when, for the first time in American history, it invalidated a sex classification as violating the Equal Protection Clause. Two years later, four Justices adopted strict scrutiny for sex classifications (*see Frontiero v. Richardson*, 411 U.S. 677 (1973)), and three years after that, the Court settled upon intermediate scrutiny (*see Craig v. Boren*, 429 U.S. 190 (1976)). In *Romer v. Evans* as well (517 U.S. 620 (1996)), the Court purported to apply only rational basis review, even though many laws express moral disapproval of a disfavored group yet survive rational basis review.¹²⁴ Similarly, the Court in *Lawrence v. Texas* found a violation of substantive due process without declaring the existence of a fundamental right subject to heightened scrutiny (539 U.S. 558 (2003)). *Windsor* is thus not a one-off; it is, rather, an example of a more general phenomenon, which becomes apparent once it is understood that legal doctrine can be used as a way station toward a particular later resolution.¹²⁵

There are several methods that the Court may employ to use legal doctrine as a way station. As just noted, one familiar technique is to invalidate legislation while purporting to apply only rational basis review. Another well-known device, explored below in an analysis of the Court's decision in *Hollingsworth v. Perry* (133 S. Ct. 2652 (2013)), is to apply principles of justiciability so as to avoid deciding the merits.¹²⁶ A third, less

¹²³ See *supra* note 73 (noting that the *Windsor* Court rejected or ignored asserted federal interests in uniformity and stability).

¹²⁴ For a discussion, see Franklin, *supra* note 10, at *29.

¹²⁵ There are unsuccessful attempts at doctrinal development, too. The path of constitutional law is determined by contingency, not teleology. For example, whether and when the Court holds that states may not ban same-sex marriage will depend upon, among other things, the continuation of current popular trends, the timing of vacancies on the Court, and the political party that controls the White House and the Senate when those vacancies occur.

¹²⁶ See BICKEL, *supra* note 24, at 111-98 (advocating use of the "passive virtues").

well-recognized method potentially allows the Court to send a stronger signal about its view of the merits than those other two. It is to invoke the rhetorical resources of federalism in the service of nudging the national conversation in the direction of enhanced equality and liberty.

In American politics, federalism can serve as a temporizing way station. Politicians, for example, may argue for leaving certain controversial questions to the states in order to avoid having to make a firm substantive commitment one way or the other at the national level for the time being. A historical case in point was the idea of “popular sovereignty” as a solution to the politically explosive question of slavery in the territories. In 1848, popular sovereignty was associated primarily with Michigan Senator Lewis Cass. He won the Democratic nomination for President over James Buchanan because the idea of popular sovereignty was, at that point, sufficiently acceptable to a sufficient number of southerners.¹²⁷ “The Democratic Party,” James McPherson explains, “continued the tradition of trying to preserve intersectional unity by avoiding a firm position on slavery” (*id.*).

Senator Stephen Douglas also embraced popular sovereignty as the preferred approach to resolving the issue of slavery in the territories. In his view, the *Dred Scott* Court correctly invalidated the Missouri Compromise, “there being no power delegated to Congress in the Constitution authorizing Congress to prohibit slavery in the Territories.”¹²⁸ Douglas publicly declared that “he cared not whether slavery was voted down or up in Kansas—his concern was that Kansas have a fair vote.”¹²⁹ That compromise position became unacceptable to Southerners by the end of the 1850s,¹³⁰ especially after Douglas led the effort to prevent the admission of Kansas as a slave state.¹³¹

Lincoln, too, recoiled at the idea of a federalism solution to a question of such great moral and political moment. In his view, Douglas’s “care not” policy had promoted the evil of slavery’s expansion. By way of response, Lincoln insisted that the country required the election of leaders who were prepared to make the correct substantive commitment at the national level. He championed Republicans, “whose hearts are in the work—who *do care* for the result,” who “consider slavery a moral, social, and political wrong,”

¹²⁷ See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 58 (1988).

¹²⁸ Stephen A. Douglas, *The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories*, *HARPER’S MAGAZINE* 529-30 (1859), <http://harpers.org/sponsor/balvenie/stephen-douglas.1.html>.

¹²⁹ MCPHERSON, *supra* note 127, at 181.

¹³⁰ Johannsen, *supra* note 2, at 34 (“By the end of the 1850’s, . . . Douglas’ doctrine [of popular sovereignty] was regarded as rank heresy in the South and as inimical to the section’s interests.”).

¹³¹ See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 40-41 (2006).

and who will combat “the modern Democratic idea that slavery is as good as freedom, and ought to have room for expansion over all the continent.”¹³²

Unlike Lincoln, Douglas made use of federalism’s temporizing function; he appeared to use federalism as a way station in the sense meant by this Article. The Oxford English Dictionary defines “way station” as “[a]n intermediate station on a railway route, a way-side station.”¹³³ The OED notes that the first recorded use of the term occurred in 1850, in the annual report of a railroad corporation (*id.*). Similarly, the Merriam-Webster Dictionary defines “way station” first as “a station set between principal stations on a line of travel (as a railroad),” and second as “an intermediate stopping place.”¹³⁴ Way stations are located between main stations, and one knows the identity of the next main station in the line based on the direction in which the train is going when it arrives at the way station. Douglas was motivated not only to hold the country (and the northern and southern wings of the Democratic Party) together through compromise. He also believed that popular sovereignty would result in the territories being controlled by free state settlers. As Mark Graber explains, Douglas made “repeated assertions that popular sovereignty was the least controversial means for obtaining free states.”¹³⁵ In Douglas’s own words, “the people would decide against slavery if left to settle the question for themselves.”¹³⁶ Accordingly, Douglas was trying to nudge national politics in the direction of slavery’s containment while simultaneously preventing dissolution of the union.

Notably, in the early 1850s “Southern doubts and fears had been partially allayed by the ambiguity of popular sovereignty itself.”¹³⁷ Whereas Douglas believed that the doctrine empowered territories qua territories to decide for themselves whether to allow slavery, many Southerners equated popular sovereignty with noninterference with slavery, whether by a territorial legislature or by Congress (*id.*). “Only when a territory moved into

¹³² Abraham Lincoln, *quoted in* MCPHERSON, *supra* note 127, at 181-82 (internal quotation marks omitted). See Abraham Lincoln, *Address at Cooper Institute, New York City* (1860), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., (1953) (“Wrong as we think slavery is, we can yet afford to let it alone where it is, because that much is due to the necessity arising from its actual presence in the nation; but can we, while our votes will prevent it, allow it to spread into the National Territories, and to overrun us here in these Free States?”).

¹³³ OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/226520> (last visited Jan. 30, 2014).

¹³⁴ MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriamwebster.com/dictionary/way%20station> (last visited Jan. 30, 2014).

¹³⁵ GRABER, *supra* note 131, at 43.

¹³⁶ Douglas, *quoted in* Johannsen, *supra* note 2, at 35. See *id.* (“Popular sovereignty, he was convinced, would extend freedom, not slavery, at the same time that it broadened the limits of self-government for those who lived in the territories. Territorial developments bore out Douglas’ prediction, so that by 1860 even many Republicans recognized the value of his position.” (footnote omitted)).

¹³⁷ *Id.* at 35.

statehood, they maintained, could the slavery question be decided” (*id.*). Accordingly, popular sovereignty “meant different things to Douglas and to the South; its ambiguity was carefully preserved, . . . allowing what later was termed a ‘double construction’” (*id.*). As noted at the outset of this Article, one Southern critic—James M. Mason of Virginia—would later say of Douglas: “[Y]ou promised us bread, and you have given us a stone; you promised us a fish, and you have given us a serpent; we thought you had given us a substantial right; and you have given us the most evanescent shadow and delusion” (*id.* 37). Other Southern leaders ultimately declared: “no Douglas dodges—no double constructions” (*id.* at 40).

In more recent times as well, national politicians have sought temporary, federalism resolutions of divisive issues; they have not invoked federalism merely in the service of resistance or an indefinite compromise.¹³⁸ For example, it is well known that many opponents of same-sex marriage have invoked federalism themes.¹³⁹ It is less well known that some politicians who support same-sex marriage have invoked federalism frames as a way station in urging that regulation of the issue should be left to the states for the time being.¹⁴⁰

For example, in the months before the 2012 Presidential Election, President Obama appeared to make temporary use of federalism’s temporizing function when discussing same-sex marriage. In May of 2012, he told ABC’s Robin Roberts that he had “evolved” to the point of supporting same-sex marriage.¹⁴¹ After making that announcement on national television, he went on to explain that he viewed the issue through the lens of federalism:

What you’re seeing is, I think, states working through this issue — in fits and starts, all across the country. Different communities are arriving at different conclusions, at different

¹³⁸ In the abortion context, by contrast, politicians today tend to invoke federalism to take a decisive stand against continued judicial protection of abortion rights. See, e.g., Michael James, *Rick Perry Categorizes Abortion as a States’ Rights Issue*, ABC NEWS, July 27, 2011, <http://abcnews.go.com/blogs/politics/2011/07/rick-perry-categorizes-abortion-as-a-states-rights-issue/> (“Despite holding personal pro-life beliefs, Texas Gov. Rick Perry categorized abortion as a states’ rights issue today, saying that if *Roe v. Wade* was overturned, it should be up to the states to decide the legality of the procedure.”).

¹³⁹ See, e.g., Maggie Haberman, *Romney Calls Gay Marriage a “State Issue,”* POLITICO, May 12, 2012, <http://www.politico.com/blogs/burns-haberman/2012/05/romney-calls-gay-marriage-a-state-issue-123041.html>.

¹⁴⁰ See, e.g., Liz Marlantes, *Hillary Clinton Backs Gay Marriage. A Sign She’s Serious About 2016?*, DC DECODER, March 18, 2013, <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0318/Hillary-Clinton-backs-gay-marriage.-A-sign-she-s-serious-about-2016-video> (“When Mrs. Clinton ran for president in 2008, her official position (like Mr. Obama’s) was to favor civil unions, not gay marriage, saying she thought the matter should be left to the states.”).

¹⁴¹ Reid J. Epstein, *Supreme Court, Like Obama, Leaves Marriage to States*, POLITICO, June 26, 2013, <http://www.politico.com/story/2013/06/prop-8-ruling-california-93458.html>.

times. And I think that's a healthy process and a healthy debate. And I continue to believe that this is an issue that is going to be worked out at the local level, because historically, this has not been a federal issue, what's recognized as a marriage (*id.*).

That interview took place one day after voters in North Carolina overwhelmingly approved Amendment 1, a constitutional amendment prohibiting same-sex marriage (N.C. CONST. art. XIV, § 6). At the time, "Obama declined to second-guess the state's voters."¹⁴²

By contrast, on the day that the Court decided *Windsor*, the President spoke in the register of individual rights, not federalism. "This was discrimination enshrined in law," he said of Section 3 of DOMA (*id.*). "It treated loving, committed gay and lesbian couples as a separate and lesser class of people. The Supreme Court has righted that wrong, and our country is better off for it" (*id.*). Obama even invoked the Declaration of Independence for good measure: "We are a people who declared that we are all created equal—and the love we commit to one another must be equal as well" (*id.*). The President's more recent, equality-infused understanding of the issue of same-sex marriage seemed to have little to do with federalism. The President spoke disapprovingly of DOMA's discrimination against same-sex couples, not its discrimination against state-sanctioned same-sex marriages.¹⁴³

The use of federalism as a way station is distinct from the expression of normative ambivalence, which politicians and citizens alike may voice by appealing to federalism values. For instance, according to the New York Times/CBS News poll of June 6, 2013, "[a] solid majority of Americans opposes a broad national right to same-sex marriage, saying the power to legalize gay unions should rest with the states."¹⁴⁴ The poll so found "even as most support marriage equality for gay people" (*id.*). Based on how the polling data continue to trend, one can predict that Americans will eventually endorse a broad national right to same-sex marriage, just as they endorse the

¹⁴² Epstein, *supra* note 141.

¹⁴³ As the Republican nominee for president in 2012, Mitt Romney used federalism rhetoric in a different way to explain his position on health care reform. Perhaps bowing to political necessity, he stressed constitutional limits on Congress's enumerated powers to reconcile his support of an "individual mandate" in Massachusetts with his opposition to a similar federal mandate. *See, e.g.,* Paul West, *Romney Tells Virginians Healthcare Is "States' Rights" Issue*, L.A. TIMES, June 26, 2012, <http://articles.latimes.com/2012/jun/26/news/la-pn-romney-tells-virginians-healthcare-is-states-rights-issue-20120626> ("I'm going to get rid of the cloud of Obamacare and get us back to personal responsibility and states' rights as it relates to health care . . .").

¹⁴⁴ Sheryl Gay Stolberg, *Same-Sex Marriage Is Seen in Poll as an Issue for the States*, N.Y. TIMES, June 6, 2013, http://www.nytimes.com/2013/06/07/us/politics/states-should-decide-gay-marriage-poll-finds.html?_r=0.

broad national right to interracial marriage that the Court vindicated at long last in *Loving*.¹⁴⁵

In contrast to expressions of normative ambivalence, *Windsor* illustrates that courts, like Presidents, may use the rhetorical resources of federalism as a way station. And it is fascinating to examine *how* the *Windsor* Court used federalism as a way station toward greater equality for same-sex couples and their families. With that objective in mind, it is instructive to revisit the three questions flagged at the beginning of this Part.

First, why did the Court qualify a strong endorsement of constitutional equality for same-sex couples by stressing state control of domestic relations, thereby potentially permitting other courts to distinguish discrimination against same-sex couples from discrimination against same-sex marriages? From the perspective of a Court that is in conversation with the country, the distinction may make good sense. From that vantage point, the Court's references to state conferrals of dignity may reflect a statesmanlike effort to "persuad[e] before it attempts to coerce."¹⁴⁶ The Court may have wanted to leave open the possibility that the implications of the decision are limited, thereby giving resistant judges and litigants some ability to distinguish *Windsor* in constitutional litigation over state bans on same-sex marriage.

As explained in Part II.B, however, the Court's references to state control over domestic relations were sufficiently qualified as to render the possibility of limited implications an improbability. Justice Kennedy appeared to write the Court's opinion affirmatively to encourage constitutional challenges to state bans on same-sex marriage and to increase the chances that they will succeed—but not yet to require their success. Perhaps the Justices in the majority, like the Justices in *Brown*, have already made up their minds about the constitutionality of state bans.¹⁴⁷ Or perhaps they are skeptical of them

¹⁴⁵ In a nationwide CBS News Poll conducted from July 18, 2013 through July 22, 2013, fifty-five percent of respondents opined that it should be legal for same-sex couples to marry. Thirty-nine percent opined that it should not be legal, and six percent were unsure. POLLINGREPORT.COM, <http://www.pollingreport.com/civil.htm> (last visited Aug. 18, 2013). See also PEW RESEARCH CENTER, IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS "INEVITABLE," June 6, 2013, at 1, <http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf> ("[N]early three-quarters of Americans – 72% – say that legal recognition of same-sex marriage is 'inevitable.' This includes 85% of gay marriage supporters, as well as 59% of its opponents."); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 193-207 (2013) (canvassing the evidence and concluding that same-sex marriage is inevitable in the United States).

¹⁴⁶ BICKEL, *supra* note 24, at 28 (observing that "the Court has ways of persuading before it attempts to coerce").

¹⁴⁷ In *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955), the Warren Court dismissed an appeal challenging Virginia's ban on interracial marriage, despite an apparent absence of discretion to dismiss, just after deciding *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Brown* Court itself knew where it was headed (that is, invalidating all de jure racial segregation), but for reasons of legitimacy and social cohesion declined to fully disclose the destination by focusing on the special importance of public education. The *per curiam* opinions extending *Brown* to parks, swimming pools,

but have not yet made up their minds completely. Either way, they appear self-consciously to be moving in a particular direction—and urging the country to continue moving in the same direction.

An increasing number of litigants and lower courts are doing just that. When the Court heard oral argument in *Windsor* in March 2013, same-sex marriage was allowed in nine states and the District of Columbia. If recent federal district court decisions invalidating Utah's,¹⁴⁸ Oklahoma's,¹⁴⁹ Virginia's,¹⁵⁰ Texas's,¹⁵¹ and Michigan's¹⁵² bans on same-sex marriage survive appellate review, the number of states allowing such marriages will have more than doubled, to twenty-two.¹⁵³ Since the Court handed down *Windsor*, there is, or has been, litigation concerning state bans on same-sex marriage and related issues in federal and state courts all around the country.¹⁵⁴ Not all of those challenges will prevail, at least initially,¹⁵⁵ but an increasing number already have.¹⁵⁶ Over the next year or two, some more socially conservative or cautious judges may uphold certain state bans on

etc., followed in short order, but the Court's invalidation of Virginia's ban on interracial marriage was delayed another thirteen years. See *supra* note 56 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

¹⁴⁸ See *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

¹⁴⁹ See *Bishop v. United States ex rel. Holder*, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014).

¹⁵⁰ See *Bostic v. Rainey*, No. 2:13-cv-395 (E.D. Va. Feb. 13, 2014).

¹⁵¹ See *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex. Feb. 26, 2014).

¹⁵² See *Deboer v. Snyder*, No. 12-CV-10285 (E.D. Mich. Mar. 21, 2014). See also *Bourke v. Beshear*, No. 3:13-CV-750, slip op. at 2 (W.D. Ky. Feb. 12, 2014) (holding that Kentucky's denial of recognition for same-sex marriages performed out of state violates the federal Equal Protection Clause); *Obergefell v. Wymyslo*, 2013 WL 6726688, slip op. at 1 (S.D. Ohio Dec. 23, 2013) (holding that Ohio's denial of recognition for same-sex marriages performed out of state violates the federal Due Process and Equal Protection Clauses as applied to death certificates).

¹⁵³ See Erik Eckholm, *Oklahoma's Ban on Gay Marriage Is Unconstitutional, Judge Rules*, N.Y. TIMES, Jan. 14, 2014, at A15; Adam Liptak, *Utah Ruling Means No Respite for the Supreme Court on Same-Sex Marriage*, N.Y. TIMES, Dec. 27, 2013, at A1. See National Map, MarriageEqualityUSA, <http://www.marriageequality.org/national-map> (updated Jan. 7, 2014) ("Although 38% of Americans live in 18 states that have adopted full, state-level equality (CA, CT, DC, DE, HI, IA, IL, MA, MD, ME, MN, NH, NM, NJ, NY, RI, VT, WA), and more live in cities, counties, or states with partial equality (mainly CO, NV, OR, WI), 51% live in 34 jurisdictions that still ban all types of unions except one-man-one-woman couples."). MarriageEqualityUSA includes DC in its count but excludes Utah, Oklahoma, Virginia, Texas, and Michigan.

¹⁵⁴ See *supra* note 3 (noting the forty-two states in which there presently are federal or state lawsuits bearing on the issue of marriage equality).

¹⁵⁵ See, e.g., *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nv. 2012) (upholding the state's ban on same-sex marriage). To be clear, however, this case was decided before the Supreme Court handed down *Windsor*.

¹⁵⁶ For example, same-sex marriage is now permitted in New Jersey and New Mexico in light of recent decisions by their state supreme courts. In New Jersey, the state declined to appeal a state Superior Court decision requiring the state to allow same-sex couples to marry once the New Jersey Supreme Court held that there was no reasonable probability that the state would win on the merits. See *Garden State Equality v. Dow*, 2013 WL 5687193 (N.J. Oct. 18, 2013). In New Mexico, the State Supreme Court held that the Equal Protection Clause of the state constitution requires the state "to allow same-gender couples to marry and [to] extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law." *Griego v. Oliver*, 2013 WL 6670704, slip op. at 9 (N.M. Dec. 19, 2013).

same-sex marriage by distinguishing *Windsor* on the grounds advanced by Chief Justice Roberts and discussed in Part I. But one can also expect other such bans to fall, generating splits of authority and returning the question to the Court—sooner than the *Windsor* majority may wish in light of the Nevada appeal currently pending before the Ninth Circuit on an expedited basis,¹⁵⁷ and the Utah and Oklahoma appeals currently pending before the Tenth Circuit.¹⁵⁸

Turning to the second question, why was the Court selective in using state practices in the service of living constitutionalism, discussing and then validating the choices of the minority of states that allow same-sex marriage but not mentioning the decisions of the majority of states that do not? Part III.A suggested that the Court's examination of state developments might be understood as a coherent doctrinal move on its own terms. But Part III.A also suggested that such an interpretation raises difficult questions about the Court's partiality in looking to only certain states—questions that it did not acknowledge, let alone address.

From a dynamic vantage point, viewing that part of the Court's opinion as only a doctrinal move may miss the big picture. The Court's invocation of state developments is probably better understood as a signal from the Court to states and courts to continue deliberating about same-sex marriage—and to deliberate with a thumb on the scale in favor of same-sex couples who want to marry. By using federalism as a way station in that manner, the Court was able to intimate its view of the merits—without yet committing to that view—to a greater extent than it would have been able to accomplish merely by declining to announce the level of scrutiny or misapplying the justiciability doctrines. It communicated its view of the merits by stressing the minority of states that have allowed same-sex marriage and ignoring the majority that have not.

Third, why did the Court, for the first time, use concerns about federal overreach as—and only as—non-decisive evidence of unconstitutional animus? It makes good sense if the objective is to use federalism as a way station toward greater equality for same-sex couples and their children. By avoiding a ruling based decisively on federalism concerns, the Court was able to cast doubt upon the constitutionality of at least some state bans on same-sex marriage. The Court was also able to avoid indicting a potential

¹⁵⁷ See Denniston, *supra* note 3 (noting that “the Nevada case in the Ninth Circuit is one of the furthest along among cases unfolding in federal appeals courts in the wake of [*Windsor*],” and that the court of appeals “has agreed to expedite the hearing date for this case, and has allowed Nevada officials to withdraw their brief defending the state ban”).

¹⁵⁸ Political scientist Martin Shapiro once cautioned those “fascinated by the Court as a political actor” not to forget “that it is also acted upon politically.” Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 603 (1963).

future federal law of equivalent breadth to DOMA that will define “marriage” to include same-sex marriages. Such a law might be just as “unusual” as DOMA from the perspective of Article I, Section 8, but it could not plausibly be interpreted as violating the Fifth Amendment by having the purpose, effect, or social meaning of demeaning gay people.¹⁵⁹ By regarding federalism concerns as non-decisive to the proper resolution of the case, the Court was able to use those concerns in—and only in—the service of equality. At the same time, by declaring federalism concerns pertinent and thus avoiding a ruling based only on constitutional rights conventionally conceived, the Court was able to avoid committing itself to invalidating all state bans on same-sex marriage at this time.

D. *Why the Way Station?*

The foregoing reading of the Court’s opinion has begged an important question: why would the *Windsor* majority want to use federalism as a way station toward greater equality for gay Americans, as opposed to simply resolving the ultimate question of equality? The opinion reflects the fact that there are not yet settled doctrines in this area of the law, but why did the *Windsor* majority elect not to settle them?

One possible and perhaps popular answer points to the author of the majority opinion in *Windsor*, Anthony Kennedy. On that view, the Court’s opinion simply reflects the moral and constitutional ambivalence about same-sex marriage of the Court’s “swing Justice.”¹⁶⁰ One potential problem with such an explanation, however, is that Kennedy may no longer be the median Justice in this area of constitutional law. That inference can plausibly be drawn from the voting alignment in *Hollingsworth v Perry* (133 S. Ct. 2652 (2013)), the companion case to *Windsor* that presented both a threshold question for federal courts enthusiasts and a merits question potentially for all the marbles in the constitutional debate over same-sex marriage.

Proposition 8 amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California” (CAL. CONST. art. I, § 7.5). Fracturing 5-4, the Court in *Hollingsworth* held that the official proponents of Proposition 8 lacked standing under Article III, Section 2, of the U.S. Constitution to appeal the district court’s order declaring Proposition 8 unconstitutional and enjoining public officials from enforcing it (133 S. Ct. at 2668). Chief Justice Roberts wrote the majority opinion, which was joined by Justices Scalia, Ginsburg, Breyer, and Kagan.

¹⁵⁹ See *supra* note 112 (noting that such a federal statute might constitute valid enforcement legislation under Section Five of the Fourteenth Amendment).

¹⁶⁰ See, e.g., Barnett, *supra* note 9 (opining that “Justice Kennedy was the swing vote”).

Justice Kennedy wrote the dissenting opinion, which was joined by Justices Thomas, Alito, and Sotomayor. Roberts reasoned that the Court had “never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to” (*id.*). Kennedy thought “the Court’s reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied” (*id.* (Kennedy, J., dissenting)).

On first glance, it might appear that someone randomly assigned the Justices to those two coalitions. On second glance, there is meaning to be made. In *Hollingsworth*, Justice Kennedy seemed prepared to decide whether Proposition 8 violated the Equal Protection Clause or the Due Process Clause notwithstanding his suggestion at oral argument that the Court should not have taken the case.¹⁶¹ He may not have been eager to decide the merits, but he appeared prepared to do so. (One might object that Kennedy merely voiced his disagreement with the majority without stating what he was prepared to do instead. But if he had preferred to dismiss the case as improvidently granted instead of deciding the merits, he likely would have said so even at the cost of sacrificing a wholly united front among the dissenters.) Given the equality commitments in his *Windsor* opinion, it is unlikely that he would have voted to uphold Proposition 8. One cannot know for certain whether he would have endorsed the Ninth Circuit’s one-state solution,¹⁶² the federal government’s eight-state solution,¹⁶³ or the gay plaintiffs’ fifty-state solution.¹⁶⁴ One suspects, however, that he would not have gone all the way; at oral argument, he described the Ninth Circuit’s opinion as “very narrow” in suggesting that the Court should proceed with more caution than the plaintiffs were urging.¹⁶⁵ Even so, he seemed to think that the Court, having agreed to take the case, should address the merits. The

¹⁶¹ See Tr. of Oral Argument, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), at 48 (“I just wonder if -- if the case was properly granted.”).

¹⁶² See *Perry v. Brown*, 671 F.3d 1052, 1083-84 (9th Cir. 2012) (“[T]he Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place.”).

¹⁶³ See Brief for the United States As Amicus Curiae Supporting Respondents at 11, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“Proposition 8’s denial of marriage to same-sex couples, particularly where California at the same time grants same-sex partners all the substantive rights of marriage, violates equal protection.”); *id.* (“Seven other states provide, through comprehensive domestic partnership or civil union laws, same-sex couples rights substantially similar to those available to married couples, yet still restrict marriage to opposite sex couples . . .”).

¹⁶⁴ See Brief for Respondents at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“Proposition 8 is an arbitrary, irrational, and discriminatory measure that denies gay men and lesbians their fundamental right to marry in violation of the Due Process and Equal Protection Clauses.”).

¹⁶⁵ Tr. of Oral Argument, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), at 48.

only Justice in the *Windsor* majority who agreed with him was Justice Sotomayor.

Justices Ginsburg, Breyer, and Kagan defected from the *Windsor* majority coalition, voting not to reach the merits in *Hollingsworth*. Because the Court fractured 5-4, each of their votes was essential to the outcome. It is possible that the split reflected just a genuine disagreement about Article III standing doctrine. In *Arizonaans for Official English v. Arizona*,¹⁶⁶ Justice Ginsburg, in her opinion for a unanimous Court, expressed skepticism about the standing of initiative sponsors to defend the constitutionality of initiatives on appeal.¹⁶⁷ Popular initiatives may raise distinct legal concerns for Ginsburg, Breyer, and Kagan; the standing of the official sponsors of such initiatives to appeal when government officials refuse to do so may raise constitutional concerns for those Justices that do not track their general views on Article III standing.

That said, the standing question in *Hollingsworth* was sufficiently difficult, the dicta in *Arizonaans for Official English* were sufficiently distinguishable,¹⁶⁸ and the general views of Justices Ginsburg, Breyer, and Kagan on Article III standing are sufficiently permissive,¹⁶⁹ that one suspects one or more of them were disinclined to reach the merits, at least in part, for prudential reasons. Mindful, perhaps, of the direction in which public opinion continues to trend,¹⁷⁰ they may have been loath to shift the national conversation from substance to process—from the merits to the propriety of the Court’s having decided the merits for the country. Justice Kennedy presumably spoke at the post-argument Conference in *Hollingsworth* before Justices Ginsburg, Breyer, and Kagan.¹⁷¹ “Of course,” he wrote in dissent, “the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject” (*Hollingsworth*, 133 S. Ct. at 2674).

¹⁶⁶ 520 U.S. 43 (1996).

¹⁶⁷ See *id.* at 66 (expressing “grave doubts” about the standing of the initiative sponsors to appeal, but not deciding the question).

¹⁶⁸ Compare *Arizonaans for Official English*, 520 U.S. at 65 (“[W]e are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”), with *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (“In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”).

¹⁶⁹ See, e.g., *Az. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (holding that taxpayers lack Article III standing to bring Establishment Clause challenges to tax credits, as opposed to government spending). Justice Kagan wrote a blistering dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor.

¹⁷⁰ See *supra* note 145 (citing polling data).

¹⁷¹ At Conference, the Justices speak in order of seniority. In *Hollingsworth*, however, it is not publicly known whether each Justice addressed both justiciability and the merits as an initial matter, or whether each addressed only justiciability and did not discuss the merits.

“But,” he insisted, “it is shortsighted to misconstrue principles of justiciability to avoid that subject” (*id.*). He thereby chided some of his colleagues in the majority for avoiding the merits for prudential reasons. There is, as noted in the previous section, nothing new about using standing doctrine for such purposes.¹⁷²

Justice Ginsburg may have already made up her mind on whether state bans on same-sex marriage violate the Constitution. She recently became the first Justice to officiate a same-sex wedding ceremony.¹⁷³ Her cause for caution may lie elsewhere than the legal difficulty of the merits question. While *Windsor* and *Hollingsworth* were pending, she spoke publicly about the political backlash that she believes the Court needlessly caused by acting decisively in *Roe v. Wade*.¹⁷⁴ It does not matter whether she is right about *Roe*,¹⁷⁵ or whether a Supreme Court decision invalidating some or all state bans on same-sex marriage would be about as likely to cause political backlash as *Roe*.¹⁷⁶ What matters is what she believes.¹⁷⁷

True, standing was not the only “way out” if certain Justices were looking for one. They might have attended to concerns about judicial overreach on the merits by endorsing either the Ninth Circuit’s one-state

¹⁷² See, e.g., *supra* note 24 (citing the relevant work of Alexander Bickel).

¹⁷³ See *Gay Vows, With Ginsburg Officiating*, N.Y. TIMES, Aug. 31, 2013, at A11, http://www.nytimes.com/2013/08/31/us/gay-vows-with-ginsburg-officiating.html?_r=1& (“Justice Ruth Bader Ginsburg will preside over a same-sex wedding on Saturday in what is believed to be a first for a member of the Supreme Court.”).

¹⁷⁴ 410 U.S. 113 (1973). See Geoffrey R. Stone, Justice Ginsburg, *Roe v. Wade* and Same-Sex Marriage, HUFFINGTON POST (May 12, 2013, 11:42 PM), http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html (recounting the public conversation he had with Ginsburg the previous day, and noting that her “critique of *Roe* is especially interesting at this moment because it has implications for the same-sex marriage cases currently pending before the Court”).

¹⁷⁵ Several scholars have rejected the conventional wisdom that *Roe* in particular was responsible for the backlash associated with the liberalization of abortion restrictions. See generally David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833 (1999); Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

¹⁷⁶ For an argument that “a broad marriage-equality ruling by the Supreme Court in *Hollingsworth* probably would not have fomented a backlash as extreme as those ignited by *Brown* and *Roe*,” see Klarman, *supra* note 10, at 143-54.

¹⁷⁷ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376, 381 (1985) (opining that “*Roe v. Wade* sparked public opposition and academic criticism, in part, I believe, because the Court ventured too far in the change it ordered and presented an incomplete justification for its action,” and that “[t]he sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures”); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (Madison Lecture) (“A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy.”). See also Jeffrey Toobin, *Heavyweight*, THE NEW YORKER (Mar. 11, 2013), http://www.newyorker.com/reporting/2013/03/11/130311fa_fact_toobin (“When Ginsburg and I spoke in her chambers, she noted her Madison Lecture’s relevance for major cases before the Supreme Court this term: ‘I’m sure you’re aware that what I said in that Madison Lecture is being trotted out now in the same-sex-marriage issue.’”).

solution¹⁷⁸ or the Solicitor General's eight-state solution.¹⁷⁹ Those approaches, however, are sufficiently difficult to defend that no Justice other than possibly Kennedy¹⁸⁰ expressed sympathy for either of them at oral argument. The Ninth Circuit's approach does not convincingly explain why withdrawal of a right or benefit from some people triggers greater judicial scrutiny than declining to extend the right or benefit to those people as an original matter. Interpretation of the Equal Protection Clause would not seem to turn on such matters of timing or potential loss aversion.¹⁸¹ The federal government's solution would have the perverse consequence of subjecting to heightened scrutiny only the laws of those states that have done the most to protect same-sex couples short of recognizing same-sex marriage. While there is certainly more to be said about those two rationales, standing does seem like the legally preferred way for the Justices to have addressed concerns about backlash.

For better or for worse, Justice Kennedy does not appear to be as troubled by such concerns as some of his colleagues. He is the greatest believer in judicial supremacy on a Court of judicial supremacists. For example, in explaining why the Court had jurisdiction to hear *Windsor* notwithstanding the President's determination that Section 3 of DOMA was unconstitutional, he wrote that "if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's."¹⁸² "This," he wrote, "would undermine the clear dictate of the separation-of-powers principle that 'when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"¹⁸³ Justice Scalia deemed "jaw-dropping"¹⁸⁴ such a robust law declaration, as opposed to dispute resolution, conception of the scope of the Court's interpretive authority.¹⁸⁵ True, Justices Ginsburg, Breyer, Sotomayor, and Kagan joined all of Kennedy's opinion, including that part.

¹⁷⁸ See *supra* note 162 (quoting the opinion of the Ninth Circuit).

¹⁷⁹ See *supra* note 163 (quoting the brief of the Solicitor General).

¹⁸⁰ See *supra* text accompanying note 165.

¹⁸¹ See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 283-286, 300-309 (2011) (discussing the concept of loss aversion, according to which people would pay more not to lose an item they value than they would to obtain it in the first place).

¹⁸² *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

¹⁸³ *Id.* at 2688 (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

¹⁸⁴ *Windsor*, 133 S. Ct. at 2698 (Scalia, J., dissenting).

¹⁸⁵ For a discussion of those two models of judicial review, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72-76 (6th ed. 2009).

But it seems unlikely that any of them would have included such an assertion had the pen been in their hands.

Rather than focusing only on Justice Kennedy, a better explanation of why the *Windsor* Court used federalism as a way station is that one or more of the Court's more liberal Justices also do not want a final judicial resolution just yet. And they may not want a final judicial resolution just yet because, in their view, the nation is not ready for one, and because imposing it prematurely would do more harm than good—to the Court, to the country, and to constitutional values that they deem worthy of judicial protection. “Judicial statesmanship means that judges must seek not only the ‘right answer’ to legal questions as a matter of professional reason but also an answer that sustains the social legitimacy of law.”¹⁸⁶ In conditions of cultural conflict, maintaining social solidarity and sustaining the social legitimacy of law may require judges, for the time being, partially to validate the sincerely held moral beliefs of both sides—or, at least, not to entirely invalidate the convictions of one side.¹⁸⁷ Assuming some responsibility to mediate social tension over same-sex marriage, and perceiving the need to take some account of the conditions of their own public legitimacy, certain Justices may decide that the best course is to delay a decisive resolution.

IV. OBJECTIONS

The Part anticipates and responds to three potential objections to the foregoing analysis of *Windsor*. First, it may seem contradictory to argue on the one hand that the Court's opinion is better read on balance as turning on equal protection reasoning (“ordinary” evidence of animus) than on federalism reasoning (“extraordinary” evidence of animus), and on the other hand that the opinion uses federalism as a way station and so lacks full transparency. If one can discern through close textual analysis what an opinion is better read as turning on, then ultimately there may not be any lack of transparency in the eyes of sufficiently sophisticated readers.

Recall, however, that this Article does not fully embrace an equality reading of the majority opinion. Instead, the Article stresses the limits of such a reading and ultimately concludes that the opinion resists any decisive

¹⁸⁶ Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979 (2008).

¹⁸⁷ See *id.* at 987-88; Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983) (admiring Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), because it “both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides”); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 76 (2003) (observing that in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court “intervene[d] into a fierce controversy within constitutional culture about the legitimacy of affirmative action in a way that recognize[d] and legitimate[d] concerns on both sides of the dispute”).

interpretation. Put differently, the claim is that an equality reading better accounts for more of the Court's reasoning and rhetoric than does a federalism reading, but that neither reading accounts for all of the evidence.

If this Article had fully embraced an equality reading, then the objection under consideration would have great force to the extent that all readers are sophisticated consumers of judicial opinions. It seems unlikely, however, that such is the case. For better or for worse, the sophistication of the reader may partially determine the relative transparency or opacity of judicial speech. It has often been observed that judicial opinions, like political rhetoric, may mean different things to different audiences.¹⁸⁸ "The distinction between what the Court says to the public about what it is doing and what scholars say to one another about what it is doing must be held firmly in mind," political scientist Martin Shapiro once remarked in offering an unblinking appreciation of the realities of judicial practice.¹⁸⁹ "The politician is not usually asked to speak the language of political science or condemned for not doing so" (*id.*).

In any event, this Article is interested in what the Court was intending to accomplish in *Windsor*, not whether it has succeeded. The Court sometimes seems to make statements that presuppose a lack of sophistication on the part of the general public. For example, there seems no better way to explain the unpersuasive ways in which majority opinions sometimes "distinguish" precedents that the Court wants to ignore but not expressly overrule.

Turning to the second objection, a skeptic might insist that the Court is not necessarily using federalism as a way station just because the presence of federalism reasoning and rhetoric in a majority opinion clouds what would otherwise have been a clearer legal analysis. On that view, seemingly odd federalism analyses may show up in judicial opinions for any number of reasons.

That observation is doubtless true, but the foregoing argument is consistent with it. This Article claims that a logically unnecessary or unconvincing federalism analysis in a majority opinion *may* indicate the use of federalism as a way station—especially when the culture and the legal system are in a time of transition regarding the issue under consideration. The Article does not claim that a federalism analysis is necessarily playing such a role whenever the Court deploys it in questionable ways.

For example, *Massachusetts v. EPA* (549 U.S. 497 (2007)) was another recent case in which Justice Kennedy joined the Court's four liberal Justices at the time (Stevens, Souter, Ginsburg, and Breyer). The question presented was whether Massachusetts had Article III standing to challenge the position of the Environmental Protection Agency (EPA) that it lacked statutory

¹⁸⁸ For citations to relevant discussions, see *infra* notes 190-193.

¹⁸⁹ Shapiro, *supra* note 158, at 601.

authority to regulate greenhouse gas emissions from new motor vehicles (*id.* 505, 518). Writing for the Court, Justice Stevens answered that question affirmatively, in part because of “Massachusetts’ stake in protecting its quasi-sovereign interests,” which meant that “the Commonwealth is entitled to special solicitude in our standing analysis” (*id.* 520). The Court’s invocation of federalism appeared to be a one-off rejection of EPA’s assertion that it lacked authority to regulate global warming, not a way station to anything else. Because the four liberal Justices likely would have upheld the standing of a private party to challenge EPA’s position, the Court’s references to federalism appeared designed to attract Justice Kennedy’s vote.

That last observation—about who is more or less likely to be attracted to federalism language when Kennedy joins the four liberal Justices—is related to a third objection to the reading of *Windsor* offered in this Article. According to that objection, there is a contradiction between Justice Kennedy’s apparent preference to “bite the bullet” in *Hollingsworth* instead of temporizing, and the argument of this Article that federalism was playing a temporizing role in *Windsor*. Why would Kennedy want to temporize with federalism language in *Windsor* if he did not want to temporize in *Hollingsworth*?

One way to dissolve the asserted contradiction is to insist that the Court is a “they,” not an “it,” so that Justices other than Kennedy wanted the temporizing federalism language in the *Windsor* majority opinion. But, the objection insists, it is implausible to suppose that Justices Ginsburg, Breyer, or Kagan—the most plausible candidates to want to temporize given their votes in *Hollingsworth*—wanted Kennedy to include the federalism language in his *Windsor* opinion, just as it is implausible to suppose that Kennedy included the federalism language just to secure their votes. Reliance on federalism reasoning and rhetoric is characteristic of Kennedy’s approach to judging; it is not characteristic of the approaches of Ginsburg, Breyer, or Kagan.

Under those circumstances, how is one to account for the genesis and motivations of the federalism language in the *Windsor* majority opinion? According to the objection under consideration, it is more likely that the federalism language was included because it was central to Kennedy’s reasoning than because it was playing the role of a temporizing way station. Indeed, there is abundant evidence that Kennedy genuinely does care a lot about various federalism doctrines.

Several responses to this objection are warranted. First, it may be mistaken to assume that Kennedy was not interested in temporizing in *Windsor*. As noted in Part III.D, he questioned whether the Court should have granted certiorari in *Hollingsworth*, and although he appeared to prefer

to decide the merits than to endorse a standing analysis that he found unpersuasive and harmful across a range of subject matters, he likely would have tried to decide *Hollingsworth* narrowly—perhaps by embracing the Ninth Circuit’s one-state solution notwithstanding its analytical problems. In other words, the inference that he had already committed himself to going “all the way” in *Hollingsworth* likely overreads the meaning of his dissent in that case.

Second, while some of the federalism language in the *Windsor* majority opinion temporized, other federalism language in the opinion seemed designed to encourage challenges to state bans on same-sex marriage. Specifically, the emphasis on state control over domestic relations served a temporizing function, as did the assertion of “extraordinary” animus. But the several qualifications to state control over domestic relations that he included in the opinion sent a very different message, as did the particular way in which he deployed federalism in the service of living constitutionalism. It is plausible—indeed, likely—that Kennedy and the liberal Justices shared the general objective of both temporizing and encouraging in *Windsor*. (Hence the absence of concurring opinions or concurrences in the judgment.) On balance, Kennedy’s invocations of federalism, like his use of the language of rational basis review, accomplished the majority’s apparent goal of fueling challenges to state bans on same-sex marriage without committing federal and state courts to invalidating all of them at this time.

This does not mean the liberal Justices insisted that Kennedy put the federalism language in the opinion, or that he focused on federalism in particular just in order to attract their votes. More likely, it means that all of the Justices in the majority had the same general ends in mind. It also likely means that Kennedy used federalism reasoning and rhetoric as one particular means (among others) to achieve those ends because he is personally attracted to federalism frames, and because the ways in which he used those frames were sufficiently congenial on balance to the Justices whose votes he required.

Time may tell. If the Court upholds state bans on same-sex marriage in the years ahead, then the interpretation offered here will have been decisively falsified. If the Court invalidates state bans, and in doing so invokes as partial authority the results of the litigation and legislation around the country that the majority contributed to inspiring in *Windsor*, then it will seem less probable that the Court’s opinion in *Windsor* was limited to Section 3 of DOMA and more probable that its various invocations of federalism were doing other work.

CONCLUSION

This Article has offered a reading of the U.S. Supreme Court's opinion in *United States v. Windsor*. That reading views the majority opinion as combining equal protection reasoning with the analytical and rhetorical resources of federalism both to self-consciously lean in the direction of marriage equality and to not yet embrace it entirely. If persuasive, the interpretation offered here raises difficult normative questions about whether and when the Court's uses of federalism as a way station are consistent with judicial role.¹⁹⁰ On the one hand, a lack of judicial transparency may corrode the integrity of the Court's conversation with the country. Just as Southerners eventually accused Senator Stephen Douglas of deception in touting popular sovereignty as the best solution to the controversy over slavery in the territories,¹⁹¹ so many defenders of state bans on same-sex marriage may come to feel misled by the *Windsor* Court if it invalidates those bans on equal protection or substantive due process grounds. On the other hand, there may be times when full transparency wars with other pressing concerns. Those concerns may include maintaining political legitimacy and some measure of social cohesion amidst intense cultural disagreement—concerns that may be present even though the union is not threatened with dissolution.¹⁹² Those concerns may also include doing one's judicial best to vindicate constitutional values in a fallen world that is not yet prepared to fully recognize them.

Rather than aim to resolve such questions, this Article has sought to clarify the processes of constitutional change by identifying the potential role of invocations of federalism in those processes. The most interesting theoretical point about *Windsor* may be its uses of federalism as both a Bickelian passive virtue and an enabling device—as a way station toward greater equality for same-sex couples and their children. Just as politicians may invoke federalism values because they are not yet ready to take a decisive stand on a divisive issue at the national level, so too may Justices temporarily avail themselves of federalism's temporizing and facilitating functions in nudging the country in a certain direction. Federalism reasoning and rhetoric, like declining to announce the level of scrutiny and appearing to misapply the justiciability doctrines, may make the difference between a nudge and a shove. But the federalism approach—because it may not only

¹⁹⁰ For discussions of some of the relevant normative considerations, see generally Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 Calif. L. Rev. 1973 (2007) (analyzing the law/politics distinction in constitutional adjudication); Siegel, *supra* note 69 (conceptualizing statesmanship and partisanship as distinct ways in which judges may act “politically”).

¹⁹¹ See text following note 137 (discussing eventual Southern hostility to ambiguities in the meaning of Senator Stephen Douglas's doctrine of popular sovereignty).

¹⁹² See generally Siegel, *supra* note 186 (defending the practice of judicial statesmanship while acknowledging its potential perils).

restrain but also enable—may prove a stronger nudge than the use of those other devices.

Viewed only at the time of decision, judicial opinions issued when doctrine is in motion may include analyses that seem logically unnecessary, less than fully convincing, and unlikely to decide many future cases. But viewed as part of a conversation between the Court and the country,¹⁹³ the shape of opinions during transition periods may reveal not only their reason for being, but also the location of the station beyond the way.

¹⁹³ See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970) (“Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”).

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