Loyola of Los Angeles Law Review

Volume 47
Number 2 *SUPREME COURT—OCTOBER TERM 2012*

Article 3

October 2014

"Amorphous Federalism" And The Supreme Court's Marriage Cases

David B. Cruz
University of Southern California Gould School of Law

"Amorphous Federalism" And The Supreme Court's Marriage Cases

Cover Page Footnote

Professor of Law, University of Southern California Gould School of Law. I thank Nancy Marcus and Doug NeJaime for thoughtful comments on the Article, John Korevec for valuable research assistance, and the editors of the Loyola of Los Angeles Law Review for their professional editorial work. Any remaining errors are my responsibility.

"AMORPHOUS FEDERALISM" AND THE SUPREME COURT'S MARRIAGE CASES*

*David B. Cruz***

This Article addresses the U.S. Supreme Court's decisions in Hollingsworth v. Perry *and* United States v. Windsor*, the two cases in the October 2012 Term that took up issues of marriage rights of same-sex couples. After Part I of the Article provides a brief Introduction, Part II examines the Supreme Court's opinion in* Perry*. It summarizes the litigation; teases out divergent views of the relevance of federalism for the Court's standing ruling in the case; identifies the problematic constitutional underpinnings of the* Perry *dissenters' views of federal court standing, which rely on an unjustified constitutional privileging of initiative lawmaking; and explains why* Perry *is likely to have but limited impact on the Supreme Court's Article III standing doctrine. Part III then summarizes the* Windsor *litigation; defends what should have been the self-evident conclusion—though denied by Justice Scalia in his dissent—that the majority opinion is based on equal protection (even if it perhaps also rests on substantive due process protection of "liberty") and in so doing unpacks its treatment of federalism—something Scalia derided as "amorphous"—to show how the majority's treatment of states' predominant historical role in marriage regulation fits within an evidentiary framework the Court used to help establish the impropriety of the purpose of the Defense of Marriage Act; and explores some potential ramifications of the* Windsor *decision for challenges to state refusals to recognize same-sex couples' marriages from other states and to state refusals to allow same-sex couples to marry within their territory.*

** Professor of Law, University of Southern California Gould School of Law. I thank Nancy Marcus and Doug NeJaime for thoughtful comments on the Article, John Korevec for valuable research assistance, and the editors of the *Loyola of Los Angeles Law Review* for their professional editorial work. Any remaining errors are my responsibility.

TABLE OF CONTENTS

I. INTRODUCTION

On June 26, 2013, one decade to the day after the Supreme Court of the United States decided its landmark "gay rights" case *Lawrence v. Texas*,[1] the Court decided a pair of cases concerning whether the Constitution guarantees same-sex couples rights to civil marriages equal to those of different-sex couples. *Hollingsworth v. Perry*[2] presented equal protection and substantive due process challenges to California's Proposition 8 ("Prop 8"), which amended the state constitution to strip same-sex couples of the right to marry that the state supreme court had previously held the constitution guaranteed. *United States v. Windsor*[3] presented an equal protection challenge to section 3 of the federal so-called Defense of Marriage Act (DOMA),[4] which defines marriage for virtually all federal law as limited to male-female couples,[5] thus excluding same-sex couples lawfully married under state, Indian tribal, or foreign law from federal legal rights and responsibilities conditioned upon marriage.

In *Perry*,[6] the governor and the attorney general of California had refused to defend Prop 8,[7] which was instead defended by the individual sponsors or "proponents" of the initiative. When

1. 539 U.S. 558 (2003) (holding that Texas's "homosexual conduct" law unconstitutionally deprived the men who challenged the law of liberty in violation of the Fourteenth Amendment's Due Process Clause).

2. 133 S. Ct. 2652 (2013).

3. 133 S. Ct. 2675 (2013). By way of disclosure, I was a member of the board of directors during much of and an elected general counsel for the ACLU throughout the *Windsor* litigation, and the ACLU represented Edie Windsor in her challenge to DOMA section 3, although I did not help with that litigation.

4. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

5. Section 3 of DOMA defines "marriage" for most federal law purposes to "mean[ ] only a legal union between one man and one woman as husband and wife, and the word 'spouse' [to] refer[ ] only to a person of the opposite sex who is a husband or a wife." *Id.* § 3.

6. I depart here from the convention of referring to cases by the first (nongovernmental) party named in the caption to honor Kris Perry, along with her now wife Sandy Stier, and their coplaintiffs Jeff Zarillo and Paul Katami, also now married, whose bravery (and perhaps incaution) in litigating against California's Proposition 8 led to the Supreme Court's jurisdictional decision in *Perry* clearing the way for same-sex couples to resume marrying in the state. I do not see any need to honor Dennis Hollingsworth, one of the official proponents of Proposition 8 who qualified that odious measure for the ballot and subsequently doggedly tried to ensure its discrimination would continue.

7. Bob Egelko, *Same-Sex Marriage Fuels Debate over Path to Change*, SFGATE (Sept. 8, 2013, 5:40 PM), http://www.sfgate.com/news/article/Same-sex-marriage-fuels-debate-over-path-to-change-4797401.php#page-2.

Proposition 8 was held unconstitutional following a bench trial,[8] the state defendants refused to appeal, leaving the proponents to attempt to do so themselves. When the U.S. Supreme Court granted their petition for a writ of certiorari, it directed the parties not simply to address whether Proposition 8 was unconstitutional but also to brief whether the proponents had standing.[9] After arguments in March 2013, a majority of the Court ruled that the measure's proponents lacked Article III standing,[10] dismissed the appeal,[11] and ultimately left the district court injunction against Proposition 8 intact,[12] clearing the way for same-sex couples to resume marrying in California.

Windsor also presented standing issues, because after Edie Windsor filed the lawsuit, Attorney General Eric Holder and President Barack Obama concluded that section 3 of DOMA was unconstitutional and therefore refused to defend it.[13] The House Bipartisan Legal Advisory Group (BLAG) then intervened to defend it.[14] Although BLAG lost on summary judgment, where the district judge vindicated the administration's position,[15] the Department of Justice (DOJ) did not comply with the judgment but instead sought to appeal the case, as did BLAG.[16] The Second Circuit Court of Appeals agreed with the district court that DOMA's section 3 was unconstitutional,[17] and DOJ and BLAG sought Supreme Court review. Answering a question it had directed the parties to address,[18] the Supreme Court ruled in *Windsor* that there was a proper case or

8. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

9. Hollingsworth v. Perry, 133 S. Ct. 786, 786 (2012) ("In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners have standing under Article III, § 2 of the Constitution in this case.").

10. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

11. *Id.*

12. Perry v. Brown, 725 F.3d 1140, 1141 (9th Cir. 2013).

13. *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

14. United States v. Windsor, 133 S. Ct. 2675, 2684 (2013).

15. Windsor v. United States, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

16. *Windsor*, 133 S. Ct. at 2684.

17. Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012).

18. United States v. Windsor, 133 S. Ct. 786, 787 (2012) ("In addition to the question presented by the petition, the parties are directed to brief and argue the following questions: Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.").

controversy before it, despite the administration's agreement with the plaintiff's constitutional interpretation.[19] On the merits, the Court held that section 3 of DOMA violated the Constitution's equal protection guarantee as applied to same-sex couples validly married under state law.[20]

Although Justice Scalia joined the majority in *Perry* holding that Proposition 8's sponsors lacked standing to appeal the trial court ruling striking it down,[21] he did not agree with the majority in *Windsor*.[22] Dissenting from the decision even to reach the merits, as well as from the Court's conclusion that on the merits section 3 of DOMA was unconstitutional,[23] he had nothing but disdain for the majority opinion.[24] After criticizing much of the majority's discussion of federalism, he leveled this (no pun intended) blistering indictment at the *Windsor* majority opinion:

> Some might conclude that this loaf [i.e., the opinion] 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 maybe with some amorphous federalism component playing a role) because it is motivated by a "bare . . . desire to harm" couples in same-

19. *Windsor*, 133 S. Ct. at 2686 ("In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court."); *id.* at 2688 ("For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.").

20. *See id.* at 2693 (concluding that DOMA section 3 "violates basic due process and equal protection principles applicable to the Federal Government"). Part III.B *infra* discusses at length the equal protection grounding of the Supreme Court's *Windsor* decision.

21. Hollingsworth v. Perry, 133 S. Ct. 2652, 2658 (2013).

22. *Windsor*, 133 S. Ct. at 2697–98 (Scalia, J., dissenting).

23. *See id.* ("We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation.").

24. Rather than close his opinion with the customary "I respectfully dissent," *e.g.*, *id.* at 2720 (Alito, J., dissenting), Justice Scalia ended his *Windsor* dissent with the more blunt "I dissent." *Id.* at 2711 (Scalia, J., dissenting). Even that was prefaced by the recriminatory assertion that "[w]e owed both [sides in this controversy] better." *Id. See also id.* at 2698 (labeling Court's reasoning as "jaw-dropping"); *id.* at 2701 ("The majority's discussion of the requirements of Article III bears no resemblance to our jurisprudence."); *id.* at 2705 ("There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are.").

sex marriages.[25]

This Article takes up Justice Scalia's concern for the allegedly "amorphous" role of federalism in the *Windsor* opinion. First, though, Part II turns to the Supreme Court's opinion in *Perry*. It summarizes the litigation, teases out divergent views of federalism's relevance of federalism for the Court's standing ruling, identifies the problematic constitutional underpinnings of the *Perry* dissenters' view, and touches on *Perry*'s limited impact for the Supreme Court's Article III standing doctrine. Part III summarizes the *Windsor* litigation, defends what should have been the self-evident conclusion that the Supreme Court's *Windsor* opinion is based on equal protection, and unpacks its treatment of federalism. Part III also explores some potential ramifications of the decision for challenges to states' refusals to recognize same-sex marriages from other states or to allow same-sex couples to marry within their territory.

II. FEDERALISM CONCERNS IN *HOLLINGSWORTH V. PERRY*

Although the role of federalism in *Hollingsworth v. Perry* is more "amorphous" or inchoate than in *United States v. Windsor*, the Justices' opinions in *Perry* might nonetheless be usefully addressed through a federalism lens. The majority opinion by Chief Justice Roberts perhaps could be read to say we serve federalism by keeping federal courts out of disputes lacking properly aggrieved parties, as doing so keeps federal courts in a limited role that does not call for them broadly to superintend state governance.[26] The ideologically mixed *Perry* dissenters invoke federalism, suggesting the majority disserves federalism by disparaging states' initiative processes.[27] The dissenters' position presupposes that the Constitution values initiative mechanisms, or at least a state's freedom to choose one. But as Hans Linde and others have argued, the initiative process is constitutionally quite problematic.[28] So, even if it is not constitutionally forbidden, we certainly should not see the initiative as constitutionally guaranteed (say in the same way the independence of state legislatures from federal "commandeering" is held to be

25. *Id.* at 2707.
26. *Cf. infra* text accompanying notes 75–76.
27. *See infra* notes 98–112 and accompanying text.
28. *See infra* Part II.C.

guaranteed),[29] and so denying federal court standing to initiative sponsors seeking to defend discriminatory measures should not be seen as a harm to the constitutional order.

Section A of this part summarizes the *Perry* litigation up to and including in the Supreme Court. Section B identifies and analyzes a disagreement among the Justices about how the Court should apply principles of federalism to state initiative processes. Section C recounts some of the constitutional concerns about state initiatives, especially ones like Proposition 8 that target minority populations for unfavorable treatment, concerns which undermine the dissent's view on this issue. Section D then explains why the Court's Article III standing holding is likely to have only minor effects on the cases that can come before the federal courts. *Perry* thus may ultimately be more significant for the large numbers of people it allows to be married than for its doctrinal holding.

A. The Perry *Litigation*

In May of 2008, the California Supreme Court ruled in *In re Marriage Cases* that the state constitution's equal protection guarantee and its fundamental right to marry required that the exclusion of same-sex couples from civil marriage be subjected to strict scrutiny. The court held that the exclusion failed such scrutiny and was therefore unconstitutional.[30] From June 2008 through November 4, 2008, an estimated 18,000 same-sex couples were married in the state.[31] On November 4, 2008, election day, the voters of the state were asked to approve Proposition 8, an initiative that would amend the California Constitution to strip away same-sex couples' right to marry. And the voters did so, supporting Prop 8 by a vote of approximately 52 percent to 48 percent.[32]

The next day, a number of persons filed suit in state court,[33] arguing that Prop 8 was impermissibly adopted via the initiative process because it was not a mere "amendment" to the state

29. Printz v. United States, 521 U.S. 898 (1997).

30. 183 P.3d 384, 452 (Cal. 2008).

31. David B. Cruz, *Californians Enshrine Discrimination in Constitution*, CRUZLINES.ORG (Nov. 5, 2008), http://cruz-lines.blogspot.com/2008/11/californians-enshrine-discrimination-in.html.

32. *Id.*

33. Strauss v. Horton, 207 P.3d 48, 65–66 (Cal. 2009).

constitution, but a more profound "revision," requiring approval by the legislature.[34] Proposition 8's proponents or official sponsors defended their measure in court because the governor thought the state supreme court should invalidate it[35] and the attorney general affirmatively argued that it was unconstitutional.[36] After oral arguments in which former U.S. Solicitor General Kenneth Starr argued for the measure's defenders, the California Supreme Court rejected the revision argument and upheld Prop 8.[37] Justice Carlos Moreno was the sole dissenter.[38]

Four days before the California Supreme Court rejected that last state-law challenge to Proposition 8,[39] two same-sex couples, Kris Perry and Sandy Stier, and Paul Katami and Jeff Zarillo, filed suit in federal court.[40] The plaintiffs were represented by the political odd couple of David Boies and Ted Olson, the attorneys who had represented rival presidential candidates before the Supreme Court in *Bush v. Gore* in 2000.[41] They argued that Prop 8 violated same-sex couples' *federal* constitutional right to equal protection and fundamental right to marry.[42] Boies and Olson were hoping to fast-track the litigation up to the U.S. Supreme Court,[43] but Chief Judge

34. *Id.* at 60–62, 68, 88.

35. Maura Dolan, *Justices Will Hear Prop. 8 Challenges: State Supreme Court Agrees to Take Up the Lawsuits Next Spring but Refuses to Stay a Ban on Same-Sex Marriages*, L.A. TIMES, Nov. 20, 2008, http://articles.latimes.com/2008/nov/20/local/me-prop8-supreme-court20.

36. *Strauss*, 207 P.3d at 63, 116 (presenting the attorney general's argument that state constitutional amendments that abrogate fundamental rights must pass a "compelling interest" test that Proposition 8 fails).

37. *Id.* at 48; David Edwards & Stephen P. Webster, *Arguing for Prop. 8, Ken Starr Says Any Right Can Be Taken*, RAW STORY (Mar. 5, 2009), http://rawstory.com/news/2008 /Ken_Starr_argues_for_Prop_8_0305.html.

38. David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 S. CAL. REV. L. & SOC. JUSTICE 45, 48 (2010) (recounting the background to the Proposition 8 litigation through the California Supreme Court decision rejecting the revision argument).

39. *See Strauss*, 207 P.3d at 48.

40. Complaint for Declaratory, Injunctive, or Other Relief at 1, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010), 2009 WL 1490740, at *1.

41. Ross Todd, *Marriage Brokers*, AM. LAW. (Mar. 2011), http://www.gibsondunn.com/ news/Documents/GibsonDunnMarriageBrokers-AmLaw-3-11.pdf.

42. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929–30 (N.D. Cal. 2010).

43. *See, e.g.*, *Prop 8 on Trial*, EQUAL. CAL., http://www.eqca.org/site/pp.asp?b= 5716101&c=kuLRJ9MRKrH (last visited Nov. 8, 2013) (noting for July 2009 that "Counsel for plaintiffs and the intervenor-defendants (Prop 8's proponents) say the case instead should be resolved quickly in the district court based on legal briefs without evidentiary findings" rather than have a factual trial); Margaret Talbot, *Closing Time*, NEW YORKER (June 16, 2010), http://www.newyorker.com/online/blogs/newsdesk/ 2010/06/closing-time.html (noting during the

Vaughn Walker of the U.S. District Court for the Northern District of California insisted that the parties have a full trial.[44]

The parties included the City and County of San Francisco, which intervened as a plaintiff challenging Prop 8, as well as the initiative's proponents, the private individuals who had qualified the measure for the ballot.[45] The proponents intervened as defendants seeking to uphold the law at least in part because neither the governor nor the attorney general of California was going to defend Prop 8 in the litigation.[46] At the close of a trial in which the plaintiffs' witnesses dramatically outnumbered[47] and were more

---

Perry trial that "Boies and Olson hope the Perry case will be appealed all the way up to the Supreme Court"); Todd *supra* note 41 ("When Boies and Olson filed suit in San Francisco federal district court on May 22, 2009, they thought a ruling on their motion for preliminary injunction would create grounds for a quick appeal to the U.S. Court of Appeals for the Ninth Circuit. Neither expected the case to go to trial.").

44. Scott Shafer, *Prop 8 Judge Vaughn Walker: Courts' Change on Same-Sex Marriage Was 'Utterly Unimaginable,'* KQED NEWS FIX (June 12, 2013), http://blogs.kqed.org/newsfix/2013/06/11/vaughn-walker (noting that "Walker ch[o]se to hold a trial with witnesses, rather than just take briefs and make a ruling").

45. *See Perry*, 704 F. Supp. 2d at 928–29.

46. *See id.* at 928.

47. Maura Dolan, *Prop. 8 Judge Wants a Discussion of 'Choice' in Sexual Orientation*, L.A. TIMES, June 15, 2010, http://articles.latimes.com/2010/jun/15/local/la-me-prop8-trial-20100615 ("Opponents of Proposition 8 called 16 witnesses and supporters two."). "Plaintiffs presented eight lay witnesses, including the four plaintiffs, and nine expert witnesses." *Perry*, 704 F. Supp. 2d at 932. "Historian Nancy Cott testified about the public institution of marriage and the state's interest in recognizing and regulating marriages." *Id.* at 933. "Psychologist Letitia Anne Peplau testified that couples benefit both physically and economically when they are married. . . . Economist Lee Badgett provided evidence that same-sex couples would benefit economically if they were able to marry and that same-sex marriage would have no adverse effect on the institution of marriage or on opposite-sex couples." *Id.* at 934. "Psychologist Gregory Herek . . . . conclu[ded] that the vast majority of people are consistent in their sexual orientation." *Id.* at 934–35. "Social epidemiologist Ilan Meyer testified about the harm gays and lesbians have experienced because of Proposition 8. . . . Psychologist Michael Lamb testified that all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents and that the gender of a parent is immaterial to whether an adult is a good parent." *Id.* at 935. "San Francisco economist Edmund Egan testified that states receive greater economic benefits from marriage than from domestic partnerships." *Id.* at 936. "Historian George Chauncey testified about a direct relationship between the Proposition 8 campaign and initiative campaigns from the 1970s targeting gays and lesbians; . . . the advertisements relied on a cultural understanding that gays and lesbians are dangerous to children. [¶] This understanding, Chauncey observed, is an artifact of the discrimination gays and lesbians faced in the United States in the twentieth century." *Id.* at 937. "Political scientist Gary Segura . . . . conclu[ded] that gays and lesbians lack political power." *Id.* In contrast, "[d]espite the multitude of benefits identified by [think tank founder David] Blankenhorn that would flow to the state, to gays and lesbians and to American ideals were California to recognize same-sex marriage, Blankenhorn testified that the state should not recognize same-sex marriage. Blankenhorn reasoned that the benefits of same-sex marriage are not valuable enough because

credible than the defense's two witnesses,[48] Judge Walker held that Prop 8 unconstitutionally violated same-sex couples' rights under the Equal Protection Clause and fundamental constitutional right to marry.[49]

The state defendants declined to appeal, but the proponents of Prop 8 sought to do so, even though it was unclear to various observers (and the plaintiffs challenging Prop 8) whether the proponents had standing under Article III of the U.S. Constitution.[50] Because the standing issue was also unclear to the court of appeals, that court certified a question to the California Supreme Court as to the proponents' authority to defend Prop 8 under state law.[51] Eventually, the state supreme court held that state law authorized the proponents to assert the state's interests and file appeals in defense of Prop 8 when the state defendants refused to do so.[52] The U.S. Court of Appeals for the Ninth Circuit subsequently held that this was good

---

same-sex marriage could conceivably weaken marriage as an institution." *Id.* at 934 (identification at 933). And proponent's proffered expert "[p]olitical scientist Kenneth Miller disagreed with Segura's conclusion that gays and lesbians lack political power, pointing to some successes on the state and national level and increased public support for gays and lesbians, but agreed that popular initiatives can easily tap into a strain of antiminority sentiment and that at least some voters supported Proposition 8 because of anti-gay sentiment." *Id.* at 937.

48. *Perry*, 704 F. Supp. 2d at 940 ("[T]he court finds that each of plaintiffs' proffered experts offered credible opinion testimony on the subjects identified."); *id.* at 946–47 ("The court now determines that [proponents' proffered expert David] Blankenhorn's testimony constitutes inadmissible opinion testimony that should be given essentially no weight. . . . None of Blankenhorn's opinions is reliable."); *id.* at 950 ("Blankenhorn's opinions are not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore finds the opinions of Blankenhorn to be unreliable and entitled to essentially no weight."); *id.* at 952 ("[T]he court finds that [proponents' proffered expert Kenneth P.] Miller's opinions on gay and lesbian political power are entitled to little weight and only to the extent they are amply supported by reliable evidence."). *See also id.* at 937 ("Proponent Hak-Shing William Tam testified about his role in the Proposition 8 campaign. . . . Tam testified that he is the secretary of the America Return to God Prayer Movement, which operates the website '1man1woman.net.' 1man1woman.net encouraged voters to support Proposition 8 on grounds that homosexuals are twelve times more likely to molest children, and because Proposition 8 will cause states one-by-one to fall into Satan's hands.").

49. *Id.* at 991, 993–94, 1002–03.

50. *See, e.g.*, David B. Cruz, *Do the Prop 8 Proponents Have Standing to Appeal?*, CRUZLINES.ORG (Aug. 13, 2010), http://cruz-lines.blogspot.com/2010/08/do-prop-8-proponents-have-standing-to.html.

51. *See* David B. Cruz, *California Supreme Court to Hear Prop 8 Case, Again*, CRUZLINES.ORG (Feb. 16, 2011), http://cruz-lines.blogspot.com/2011/02/california-supreme-court-to-hear-prop-8.html.

52. David B. Cruz, *CA Supreme Court's Disappointing Standing Decision*, CRUZLINES.ORG (Nov. 17, 2011), http://cruz-lines.blogspot.com/search?q=ca+supreme+court%27s+disappointing+standing+decision.

enough to give the proponents standing in federal court, but that Prop 8 was unconstitutional, although based on California-specific grounds narrower than Judge Walker's ruling relied on.[53]

The proponents then asked the U.S. Supreme Court to review that decision, and the Court agreed to do so on the same day it agreed to hear *United States v. Windsor*.[54] In granting review in *Perry*, the Supreme Court also provided that "[i]n addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners have standing under Article III, § 2 of the Constitution in this case."[55] The Court heard arguments in March 2013, and three months later by a five-to-four vote it dismissed the proponents' appeal, vacated the judgment of the court of appeals, and remanded the case to that court with instruction to dismiss the proponents' appeal from the trial court ruling invalidating Prop 8.[56]

The primary problems for the Supreme Court majority were that the proponents had no concrete personal injury from the decision holding Prop 8 unconstitutional and enjoining its enforcement and that they were not state officials who might properly assert the state's interests in defense of the law in federal court.[57] For decades, the Court has interpreted Article III of the Constitution to impose certain requirements for someone to have standing to invoke the federal judicial power.[58] Among those is the requirement that a plaintiff or appellant have suffered a personal injury that is concrete and particularized, not an abstract ideological grievance.[59] The couples who filed suit in federal court to challenge Prop 8 had such an injury, as the measure compelled the state to deny them marriage licenses and the rights that would have accompanied being married.[60] But

53. *See* Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).

54. David B. Cruz, *Supreme Court to Hear Challenges to Prop 8 and DOMA Section 3*, CRUZLINES.ORG (Dec. 7, 2012), http://cruz-lines.blogspot.com/2012/12/supreme-court-to-hear-challenges-to.html.

55. Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

56. Hollingsworth v. Perry, 133 S. Ct. 2652, 2658, 2668 (2013).

57. *Id.* at 2662, 2665–66.

58. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

59. *See, e.g.*, *id.* at 560, 573–77.

60. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010). California law did offer same-sex couples and couples one member of whom was at least sixty-two years of age the option of entering into a registered "domestic partnership," which provided the state-controlled rights of marriage to couples who enter one, *see, e.g.*, *id.* at 994, though that would not

when the trial court ruled in their favor and entered a permanent injunction, the proponents of the measure were not comparably harmed. They strongly favored the law they had championed, believed it constitutional, and wished to see it enforced.[61] But those are ideological concerns, not Article III injuries under the Court's case law.

The proponents' only alternative route to standing would have been to wrap themselves in the mantle of the state's authority. The litigants on both sides did not doubt that a state has Article III standing to defend its laws and is sufficiently injured by federal court rulings holding them unconstitutional that it could appeal such decisions in federal court.[62] The problem for the Supreme Court in *Perry*, however, was that the Justices in the majority did not view the proponents as the state, agents of the state, or the people of the state.[63] In arguing that they had standing the proponents,[64] like the Ninth Circuit Court of Appeals,[65] had relied on the California Supreme Court decision[66] holding that California law authorized initiative sponsors in their position to assert the state's interests in defense of their initiative and to take appeals from decisions ruling it unconstitutional. For the majority of the U.S. Supreme Court Justices, however, this was insufficient.[67] In the majority's eyes, the proponents "hold no office and have always participated in this litigation solely as private parties."[68] Besides holding no office, the

---

generally qualify them for benefits that other states or the federal government provide only to married couples.

61. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (mentioning that the Ninth Circuit held that proponents had standing to appeal).

62. Brief of Petitioners at 12, 15, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) 2013 WL 457384; Brief in Opposition at 12, Hollingsworth v. Perry 133 S. Ct. 2652 (2013) (No. 12-144).

63. *Perry*, 133 S. Ct. at 2666. Although the litigation most commonly referred to "the state's interests," this is really shorthand for the interests of the people of the state. *Cf.* Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012) ("It is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing to bring this appeal on behalf of the State. We therefore conclude that, through the proponents of ballot measures, the People of California must be allowed to defend in federal courts, including on appeal, the validity of their use of the initiative power.").

64. Brief of Petitioners, at 12, 15–16, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 457384.

65. Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).

66. Perry v. Brown, 265 P.3d 1002, 1006–07 (Cal. 2011).

67. *Perry*, 133 S. Ct. at 2664.

68. *Id.* at 2665.

proponents lacked "the most basic features of an agency relationship."[69] The proponents "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals—or elected at all. No provision provides for their removal."[70]

B. The Justices' Disparate Views of Federalism: State Law and Federal Standing

Chief Justice Roberts's majority opinion opened with recognition that the underlying substantive issue in the case is currently subject to political contestation: "The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry."[71] From a federalism perspective, this might counsel in favor of allowing federal appellate courts to reverse the trial court decision and to uphold California's adoption of Proposition 8. Instead, separation of powers trumped the democratic process concern, and the Court held that Proposition 8's sponsors lacked Article III standing to appeal in order to litigate its constitutionality: "Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual 'case' or 'controversy.'"[72] The Court characterized the policymaking concern behind its standing doctrine in terms of separation of powers: "It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."[73] But this policymaking concern could also be thought of in terms of federalism; after all, the "elected representatives" who are largely responsible for regulating marriage in our constitutional order are state legislators, not members of Congress.[74]

---

69. *Id.* at 2666.

70. *Id.* at 2666–67 (internal citations omitted).

71. *Id.* at 2659.

72. *Id.*

73. *Id.*

74. Of course, such reasoning would not be expressly supported by current standing doctrine, where the Court has said that the standing limitation derived from Article III "is built on a single basic idea—the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984).

The statement in the main text is of course a bit of an oversimplification. Congress could

The *Perry* majority recounted the Ninth Circuit's standing analysis, which had relied on the California Supreme Court's answer to the Ninth Circuit panel's certified question regarding the proponents' authority under state law.[75] California, the U.S. Supreme Court reasoned, "has standing to defend the constitutionality of its [laws]," and states have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests."[76] The Ninth Circuit thought that "[a]ll a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm."[77] But the majority in *Perry* rejected the view that a state is free to authorize whomever it wants to represent its interests and thereby create federal standing.[78]

To repeat, the Court spoke of standing in separation of powers terms: "The doctrine of standing, we recently explained, 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'"[79] The Court referred to "this 'overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . .'"[80] But a federal court's—even the Supreme Court's—"proper constitutional sphere" respects both horizontal separation of powers and vertical separation, known as federalism.

The Court recognized that California law, constitutional and statutory, gave the proponents "a 'unique,' 'special,' and 'distinct' role in the initiative process"—"but only when it comes to the

---

exercise its plenary power over the District of Columbia, *see* U.S. CONST. art. I, § 8, cl. 17, to prescribe eligibility criteria for marriage within the District. Indian tribes also prescribe eligibility criteria for marriages, and some tribes have allowed same-sex couples to marry. *See, e.g.*, David B. Cruz, *Getting Sex "Right": Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL'Y 203, 203–04 n.1 (2010) (discussing the Coquille Tribe); Steven Gardner, *Suquamish Tribe Approves Same-Sex Marriage*, KITSAP SUN (Aug. 1, 2011), http://www.kitsapsun.com/news/2011/aug/01/suquamish-tribe-approves-same-sex-marriage/.

75. *Perry*, 133 S. Ct. at 2660.

76. *Id.* (quoting Perry v. Brown, 671 F. 3d 1052, 1070, 1071 (2012) and Diamond v. Charles, 476 U.S. 54, 62 (1986)).

77. *Id.* at 2664 (quoting *Perry*, 671 F.3d at 1072).

78. *Id.* at 2667.

79. *Id.* at 2661 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)).

80. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

process of enacting the law."[81] Under the California Supreme Court's authoritative construction of state law, the proponents had "no role—special or otherwise—in the enforcement of Proposition 8."[82] This meant that they had no "personal stake" in defending Prop 8's enforcement that was not shared by California voters at large. Their complaint that the lower federal courts had enjoined Prop 8 was therefore a mere generalized grievance insufficient to confer federal standing,[83] even though the state was content to have the proponents represent its interests.

The majority agreed that "a State must be able to designate agents to represent it in federal court," and that "state law may provide for [certain] *officials* to speak for the State in federal court."[84] Yet the Supreme Court refused to view the proponents of Proposition 8 as "agents of the people" of California.[85] The majority opinion in *Perry* did not see the proponents as substantive or formal agents of the state.[86] The California Supreme Court did not describe the proponents as agents.[87] Moreover, the proponents "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them.[88] Unlike California's attorney general, they are not elected at regular intervals—or elected at all.[89] No provision provides for their removal."[90] As one amicus explained, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it."[91] The proponents, who never took any oath of office, had no fiduciary obligation to the

81. *Id.* at 2662 (quoting Reply Brief at 5 (quoting Perry v. Brown, 52 Cal. 4th 1116, 1126, 1142, 1160 (2011))).

82. *Id.* at 2663.

83. *Id.*

84. *Id.* at 2664 (emphasis added).

85. *Id.* at 2666.

86. *Cf.* Erwin Chemerinsky, Op-Ed, *Prop. 8 Deserved a Defense*, L.A. TIMES, June 28, 2013, http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628 (agreeing that the proponents of Prop. 8 lacked standing and suggesting that states appoint a special state attorney when other officials refuse to defend an initiative).

87. *Perry*, 133 S. Ct. at 2666.

88. *Id.*

89. *Id.*

90. *Id.* at 2667.

91. *Id* at 2667 (quoting Brief for Walter Dellinger as Amicus Curiae in Support of Respondents at 23, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144)).

people of California.[92] This was not purely a formalistic distinction devoid of potential consequence; as the majority in *Perry* explained, the proponents were accordingly "free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[93] Their litigation decisions and arguments thus might differ from those of someone facing more accountability constraints.

The Justices in the majority rejected the dissent's suggestion that by denying federal standing to the proponents of Prop 8 they were "disrespect[ing]" or "disparag[ing]" the reasons the California Supreme Court relied upon in authoritatively construing state law to give the proponents authority to defend the proposition.[94] The majority was at pains not to "question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply."[95] But "no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary."[96] In conclusion, Chief Justice Roberts wrote, "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."[97]

As just suggested, the *Perry* dissenters, including both conservative and more liberal Justices,[98] saw things very differently from the majority. After opening by lavishing unwarranted praise on the California Supreme Court opinion responding to the Ninth Circuit Court of Appeals,[99] the dissent charged that the majority

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 2667.
97. *Id.* at 2668.
98. Justice Kennedy authored the dissent in *Perry* and was joined by Justices Thomas, Alito, and Sotomayor. *Id.* (Kennedy, J., dissenting).
99. *Id.* (asserting that the "state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California"). I described many of that opinion's shortcomings on my blog. *See* David B. Cruz, *CA Supreme Court's Disappointing Standing Decision*, CRUZLINES.ORG, (Nov. 17, 2011, 11:55 PM), http://cruz-lines.blogspot.com/2011/11/ca-supreme-courts-disappointing.html (concluding that the state Supreme Court "does not even

opinion's "reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California."[100] And the dissenters worried not only about California but also about the "implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation."[101]

The *Perry* dissenters complained that "[t]here is no basis for this Court to set aside the California Supreme Court's determination of state law."[102] That phrasing implies that, in the dissenters' view, the majority had told California that its law was not what the state supreme court interpreted it to mean. But the *Perry* majority did nothing of the sort. Rather, the U.S. Supreme Court held that, even assuming California law is as the state high court ruled, that is insufficient to satisfy the standing requirements the Court has interpreted Article III to impose.[103]

If this language about "setting aside" an authoritative state law interpretation is dismissed as merely infelicitous, the dissent's core complaint was that the *Perry* majority wrongly refused to interpret Article III to allow a state to do what the majority believed California had attempted to do here: grant certain private parties the state's authority to defend a law, even in federal court, but not the authority to enforce it. To prevent elected officials such as the governor and the attorney general of a state like California from having a "*de facto* veto" over state law adopted through the initiative process,[104] the dissenters believed that "California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative's proponents when the State Executive declines to do

pretend to try to parse the meaning of the provisions of law on which it claims it is basing its decision").

100. *Perry*, 133 S. Ct. at 2668 (Kennedy, J., dissenting).

101. *Id.*

102. *Id.* at 2670.

103. *Id.* at 2667 (majority opinion) ("[S]tanding in a federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.").

104. Cruz, *supra* note 99 (explaining why it is incorrect, at least in the posture of cases such as *Perry*, to believe that "veto" or "nullification" of Proposition 8 was really at issue).

so."[105] In the dissenters' view, the majority's refusal "to allow a State's authorized representatives to defend the outcome of a democratic election,"[106] here Prop 8, "disrespects and disparages both the political process in California and the well-stated opinion of the California Supreme Court in this case."[107]

The dissenters believed the majority interpreted Article III to deny states the latitude they required to craft initiatives that aligned with citizens' goals regardless of what elected representatives might conclude about the constitutionality of such desires.[108] The dissenters reasoned that through California's choice (discerned or imposed by the state supreme court[109]) to let private sponsors of initiatives defend their measures in court, the state "define[d] itself as a sovereign."[110]Article III ought therefore to be interpreted to allow states such choices. It is this vision of federalism that animated the *Perry* dissenters.[111] Thus, for them, "Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with . . . this Court's view of how a State should make its laws or structure its government."[112]

---

105. *Perry*, 133 S. Ct. at 2671 (Kennedy, J., dissenting).

106. *Id.* at 2674.

107. *Id.*

108. *See, e.g.*, *id.* at 2675 ("In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from the government.").

109. *See* Cruz, *supra* note 99 ("[T]he [state supreme] court is not interpreting but clearly adding to the words of the state constitution and the Election Code.").

110. *Perry*, 133 S. Ct. at 2675 (Kennedy, J., dissenting) (internal quotation marks omitted).

111. *See e.g.*, *id.* ("In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice . . . ."); *id.* at 2668 (insisting that "the State Supreme Court's definition of proponents' powers is binding on this Court"); *id.* at 2669 ("It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two. That, too, is for the State to decide." (internal citations omitted)). Although the dissent charges that the majority "fails to abide by precedent and misapplies basic principles of justiciability," *id.* at 2675, even some people who believe that initiative sponsors ought to have standing have nonetheless concluded that they do not given current California law and Article III standing doctrine. *See, e.g.*, Chemerinsky, *supra* note 86 ("The Supreme Court's decision to dismiss a challenge to Proposition 8 on Wednesday followed well-established law with regard to standing in federal court.").

112. *Perry*, 133 S. Ct. at 2668 (Kennedy, J., dissenting).

The majority, however, does not say that Article III or anything else in the Constitution prevents states from vesting such authority in proponents of initiative measures. It simply says that, without more, a state's decision to grant such authority does not vest those proponents with federal standing to invoke the jurisdiction of the federal courts to defend such measures against constitutional challenge. The majority and dissenting Justices' disagreement over the propriety of this holding stems from their apparent disagreement over the nature of federalism dictated by the Constitution, and the place of initiative measures in that scheme of federalism.

C. The Constitutional Problematics of Direct Democracy and Proposition 8

If the Constitution guaranteed states the prerogative to adopt initiative and referendum lawmaking, and if federal court standing for the sponsors of such measures to defend them, including by appealing adverse trial court rulings when elected officials refuse to do so, were necessary to make such lawmaking effective, then the *Perry* dissenters would have a more powerful argument that the majority's denial of standing disserved "Our Federalism."[113] If those preconditions were met, then the majority's ruling arguably would have deprived states of the constitutionally protected power to empower initiative sponsors to appeal federal court rulings holding their measures unconstitutional. Yet both of these argumentative preconditions are deeply questionable.

I have previously detailed reasons that California's initiative power should not be understood to have been vitiated by the denial of Article III standing for sponsors to defend their initiatives.[114] Briefly: As the same-sex couple plaintiffs in *Perry* noted and the California Supreme Court conceded, "invalidation of Proposition 8 in the underlying federal litigation did not result from any action or inaction by the Governor or Attorney General but from a decision by the federal district court after a contested trial."[115] Clearly "there is

113. *See generally* Younger v. Harris, 401 U.S. 37, 44 (1971) (discussing the origins of the term "Our Federalism," and how this term conceptualizes a national government that will act "in ways that will not unduly interfere with the legitimate activities of the States").

114. *See generally* Cruz, *supra* note 99 (arguing that a proponent's lack of standing in federal court will not undermine California's initiative process).

115. Perry v. Brown, 265 P.3d 1002, 1024 n.18 (Cal. 2011) (internal quotation marks

no risk of 'effective nullification'" in state courts,[116] where California can grant proposition sponsors standing to defend. And in federal court, a case would only be litigated if the plaintiffs have an adequate injury for standing, in which case the proponents of the measure would not need to have standing on their own to intervene as defendants, after which the measure would receive "a 'competent and spirited defense,' and a federal judicial decision invalidating the measure therefore cannot be pejoratively labeled a state officer 'nullification.'"[117] It is therefore unlikely that federal standing to appeal is necessary for the second precondition of the *Perry* dissenters' reasoning to be satisfied.

Nor is the first precondition likely satisfied. It is doubtful that the Constitution guarantees states the prerogative to adopt initiative and referendum lawmaking, at least in the context of a measure targeting lesbigay people for disfavorable treatment.[118] As former state supreme court Justice Hans Linde argued two decades ago,[119] such measures may well violate the Guarantee Clause of the U.S. Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[120] Republican government in the states was distinguished by the Clause's drafters from direct democracy.[121] And certain usages of direct democracy are problematic for the same kinds of reasons that motivated the Guarantee Clause's framers. "A statewide initiative may be a legitimate process for enacting a gross receipts tax and not for raising social barriers between groups of citizens."[122] Linde's study of the founding generation's understanding of republicanism led him to conclude that it "depended on deliberation by representative institutions not only for rational public policies; it also

omitted).

116. *Id.* (emphasis added).

117. *Id.*

118. *See* David B. Cruz, *Repealing Rights: Proposition 8,* Perry, *and* Crawford *Contextualized*, 37 N.Y.U. REV. L. & SOC. CHANGE 235, 241 (2013) (defending conclusion that "Prop 8 takes the right to marry the person of one's choice away from lesbian, gay, and bisexual persons but not from heterosexually identified persons").

119. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

120. U.S. CONST. art. IV, § 4.

121. Linde, *supra* note 119, at 22.

122. *Id.* at 31.

was the essential safeguard of civil and religious rights."[123]

Capture of state power by religious majorities to impose their standards on dissidents was a particular fear of that generation,[124] and so, Linde argues, a core concern of the Guarantee Clause. Where group passions about morality animate public policy and invite a state's "citizens to choose sides between the righteous and the sinners, between the homosexual minority and the heterosexual majority,"[125] republican government has failed. For

> the design of republican government, embodied in the Constitution eighty years before the Fourteenth Amendment, would not allow such policies to be put to a statewide plebiscite upon initiative petitions that bypass deliberation by elected legislators and governors (and, when amending the state constitution, by the courts). Rather, such deliberations were the only guarantee safeguarding minorities against unmediated swings of majority passions.[126]

Linde was writing in the context of Oregon's proposed Measure 9, which lumped "homosexuality" together with "pedophilia, sadism [and] masochism"; prohibited the State from legislating against sexual orientation discrimination or otherwise "recogniz[ing]" the category "homosexuality"; forbade the government to "promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism"; and directed public schools in particular to "assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided."[127] California's Proposition 8, though less inflammatory in tone, raises very similar structural concerns.

Prop 8 reflects a social "dividing practice,"[128] discriminates with respect to an important societal institution, and selectively overrides the state's equality and fundamental rights guarantees, all without

123. *Id.* at 33.
124. *See id.* at 35.
125. *Id.* at 36.
126. *Id.* at 37.
127. *Id.* at 36 n.71.
128. For a brief discussion of the provenance and significance of "dividing practices," see David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1003 n.30 (2002).

having been tempered by the representative legislative process. Prop 8 seeks to draw a stark line between the people in same-sex couples and those in different-sex couples, and thus largely between lesbigay and heterosexually identified persons, with the latter treated as more valuable or significant.[129] This dividing practice is a prime example of the kind of factionalism Linde was addressing. Prop 8 discriminates with respect to marriage, which is a distinctively important societal institution.[130] This heightens the harm the measure wrought—harms which were never addressed and assessed through legislative deliberation because Prop 8 was proposed via the initiative process. Prop 8 also sought to override the California Supreme Court's determinations that "all adult Californians enjoy a fundamental right to marry the person of their choice" and "that sexual orientation is a suspect classification under the California Constitution, such that government action discriminating on the basis of sexual orientation, including the exclusion of same–sex couples from civil marriage, is likewise subject to strict scrutiny."[131] Prop 8, by "requiring discrimination against a group defined by a suspect classification with respect to a fundamental right, thus violat[ed] the foundational guarantee of equal citizenship in the California

129. Michael Dorf has explained why exclusionary marriage laws such as California's Proposition 8 are reasonably regarded as expressing a second-class status for lesbigay persons. *See generally* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267 (2011).

130. *See*, *e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (recognizing "the understanding that marriage is more than a routine classification for purposes of certain statutory benefits"); *id.* at 2710 (Scalia, J., dissenting) (characterizing marriage as "an institution so central to the lives of so many"); *id.* at 2715 (Alito, J., dissenting) (characterizing "[t]he family" as "an ancient and universal human institution"); *id.* at 2720 (speculating that Congress "viewed marriage as a valuable institution to be fostered and . . . viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment"); *cf. In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) (concluding that "the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family—constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society"); *id.* at 424 ("[P]ast California decisions have described marriage as the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (internal quotation marks omitted)); Goodridge v. Dep't of Health, 798 N.E.2d 941, 954–55 (Mass. 2003) (describing civil marriage as "a social institution of the highest importance" and observing that "[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." (internal quotation marks omitted)).

131. Cruz, *supra* note 38, at 47.

Constitution" as that document is best understood.[132] The rampant, unfiltered factionalism at work in Prop 8 thus selectively stripped away some of the most fundamental guarantees of fairness previously offered by the California Constitution. This, too, shows that Linde's concerns about Oregon's Measure 9 are also raised as strongly by California's Proposition 8.

Consequently, states might never have the option, let alone a constitutionally protected prerogative, to adopt a measure such as Proposition 8 via an initiative process, bypassing the legislature, and, even if permissible, the Constitution should not be thought to place any special value on a state's doing so. My argument is not that measures that violate constitutional equal protection principles should therefore be thought also to violate the Guarantee Clause. Rather, direct democracy is sufficiently constitutionally problematic—at least when it comes to minority-targeting measures like Prop 8, regardless of whether such measures in fact violate equal protection—that it should not be regarded as a weighty criticism if a constitutional doctrine does not zealously protect state power to use an unfettered initiative process to strip minorities of rights. The fact that the *Perry* majority rejected the Prop 8 proponents' and the dissenting Justices' invitations to take Article III standing doctrine down the path of empowering states to place appellate defense of discriminatory initiative measures in the hands of private persons lacking any meaningful accountability[133] or role constraints should carry little weight as an indictment of the majority's reasoning.

"Our Federalism" ought not be understood as prizing a state's ability to treat minorities the way the *Perry* dissenters would have privileged it. The majority's rejection of the dissent's federalism-based arguments shows, at a minimum, that such putative state prerogatives rank low in a hierarchy of constitutional values. Maintaining a federal judiciary with a limited role and insisting that a state's litigation agents truly represent the people of the state clearly trumped the dissenters' more robust view of states' rights. It is of

132. *Id.* at 47–48.

133. Hollingsworth v. Perry, 133 S. Ct. 2652, 2666 (2013) ("[P]etitioners answer to no one. . . . Unlike California's attorney general, they are not elected"); *but see id.* at 2672 (Kennedy, J., dissenting) ("[The initiative] proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure.").

course true that the *Perry* majority's analysis limits the standing of all personally uninjured parties in whom a state might seek to vest defense of any initiative, not just initiatives targeting minorities in ways similar to California's Proposition 8.[134] But this seems a modest price to pay for a federal standing doctrine that would not aggrandize those who would turn state law direct democracy provisions against politically vulnerable minorities.[135]

As a predictive matter, it should be noted that the Supreme Court seems unlikely any time soon to hold that initiatives and referenda are categorically unconstitutional, although some scholars have taken that position.[136] Indeed, in April 2014 in *Schuette v. Coalition to Defend Affirmative Action*,[137] the Court reversed a case from Michigan where the Sixth Circuit Court of Appeals held unconstitutional[138] a state initiative that amended Michigan's constitution to bar affirmative action or any consideration of "on the basis of race, sex, color, ethnicity, or national origin" in public colleges and universities, "public employment, public education, or public contracting."[139] Although *Schuette* presented the Court only with an equal protection challenge to Michigan's law,[140] Justice Kennedy's plurality opinion did more broadly suggest that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."[141] The current Court displays marked hostility to race-based government action even when designed to include historically excluded minorities.[142] And in 1996,

134. *See generally id.* (majority opinion).

135. *See* Linde, *supra* note 119, at 32–38 (explaining that direct democracy initiatives that target minorities subjecting them to the swings of majority passions threaten republicanism).

136. *See, e.g.*, Catherine A. Rogers & David L. Faigman, *"And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1059 (1996) (arguing "that the Guarantee Clause establishes a per se prohibition against state initiatives").

137. 134 S. Ct. 1623 (2014).

138. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466 (6th Cir. 2012), *rev'd* 134 S. Ct. 1623.

139. MICH. CONST. art. I, § 26.

140. *See id.* at 1629 ("The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause ….").

141. *Id.* at 1638.

142. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557 (2009) (invalidating municipal rejection of promotion test that had not been validated for the firefighter positions at issue after test produced

with a less conservative bench of Justices,[143] the Court went out of its way to avoid relying on cases striking down initiative measures that operated to the particular detriment of racial minorities.[144] Given all this, this Court is unlikely to rule broadly that use of the initiative mechanism violates the Guarantee Clause of the U.S. Constitution. That does not necessarily mean that it would hold that the Constitution affirmatively protects or values states' authority to make law by initiative, or that the Court would not invalidate particular anti-lesbigay ballot measures as unconstitutional, perhaps on the ground that they are rooted in animus against lesbigay persons.

D. Future Defense of Prop 8 and Other State Initiatives

It is not apparent that the Supreme Court's ruling in *Perry* will have a major effect on standing determinations in other cases, for it shuts courthouse doors in strikingly limited circumstances. First, because *Perry* was rooted in Article III of the Constitution, it only applies to litigation in federal courts; state courts are free to adopt less restrictive standing rules and allow initiative proponents standing to defend and take appeals in defense of the initiatives they sponsored.[145] Second, if you have an actually, nonideologically injured party seeking to appeal, federal litigation remains open.[146] If

---

significant disparate impact on minorities); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating race-based pupil-assignment schemes designed to avoid extremes of racial isolation in schools in district at issue).

143. *See, e.g.*, Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y TIMES, July 24, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html (concluding that by the end of June 2010, the Roberts Court "became the most conservative one in living memory, based on an analysis of four sets of political science data").

144. *See* Romer v. Evans, 517 U.S. 620 (1996) (affirming on a "different" rationale a state court decision that had invalidated an anti-lesbigay state constitutional amendment "because it infringed the fundamental right of gays and lesbians to participate in the political process," a right the state court had derived in part from *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), cases the *Romer* Court characterized as "involving discriminatory restructuring of governmental decisionmaking"). *Romer* relied on the Equal Protection Clause, rather than federalism, to protect lesbigay people from Colorado's anti-gay state constitutional amendment. *Romer*, 517 U.S. at 623.

145. *Cf.* Garden State Equal. v. Dow, 82 A. 3d 336, 350 (N.J. Super. Ct. Law Div. 2013) ("New Jersey courts are not limited to the case or controversy requirement imposed on the federal courts by way of Article III of the Federal Constitution." (internal citation omitted)).

146. *Cf.* Transcript of Oral Argument in Hollingsworth v. Perry at 31, 133 S. Ct. 2652 (2013) (No. 12-144) (remarks of Roberts, C.J.) *available at* http://www.supremecourt.gov /oral_arguments/argument_transcripts/12-144a.pdf ("I suppose there might be people out there with their own personal standing, someone who performs marriages and would like that to remain open to everyone but would prefer not to perform same-sex marriages, or other people. We seem

the district court and court of appeals had ruled against the *Perry* plaintiffs and held that Prop 8 was constitutional, they would have still been denied marriage licenses and would have had standing to ask the Supreme Court to review that decision. If a member of a same-sex couple married in California while Prop 8 was enjoined contested the validity of the marriage by arguing that Prop 8 was in fact constitutional, say in a dispute over custody or marital property, he or she might be able to litigate the viability of Prop 8 and appeal to the U.S. Supreme Court.[147] Or if a third party were tangibly affected by a same-sex couple's marital rights, that party could likely claim injury and litigate the validity of Prop 8 and the marriage in federal court. Third, if the state official defendants in *Perry* had litigated the case and lost, they would have had federal standing even under *Perry* to appeal to assert the state's interests.[148] Thus, only cases that fail to satisfy all of these alternative conditions would actually be governed by the *Perry* ruling.

At least one anti-LGBT group has tried to *extend* the reach of the Supreme Court's *Perry* decision. The Christian right legal organization Liberty Counsel[149] has argued that *Perry* limits organizations' ability to intervene as defendants. There is, however, as I will address, a distinction between an organization's procedural entitlement to intervene in a federal case that already involves a proper case or controversy, and the requirements for intervenors to satisfy Article III standing doctrine in order to be able to take an appeal, the issue that was before the Supreme Court in *Perry*. Accordingly, *Perry* is unlikely to have an appreciable effect on

---

to be addressing the case as if the only options are the proponents here or the State. I'm not sure there aren't other people out there with individual personalized injury that would satisfy Article III.").

147. Due to the "domestic relations" exception to federal court jurisdiction, in a diversity suit over property dependent on adjudicating the validity of the couple's marriage, for example, the party might not be able to file the suit in federal trial court. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689 (1992) (affirming the existence of, but ultimately finding inapplicable, the domestic relations exception).

148. *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) ("No one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional." (internal quotation marks omitted)).

149. *See About Us*, LIBERTY COUNSEL, http://www.lc.org/index.cfm?pid=14096 (last visited Aug. 22, 2013) (Liberty Counsel website characterizing the organization as a "Christian Ministry" "dedicated to advancing religious freedom, the sanctity of life, and the family since 1989").

organizations' ability to participate in litigation over legislation they supported.

Liberty Counsel represented a group of plaintiffs in *Pickup v. Brown*, a case presenting a constitutional challenge to California's statutory ban on efforts to change the sexual orientation of minors by licensed mental healthcare professionals ("sexual orientation change efforts" or "SOCE").[150] *Pickup* was appealed from the U.S. District Court for the Northern District of California to the Ninth Circuit Court of Appeals.[151] Two days after the Supreme Court's *Perry* decision, Liberty Counsel sent a letter to the Ninth Circuit arguing that *Perry* precluded standing for "intervening parties such as Equality California ['EQCA'] in this case."[152] As Liberty Counsel read *Perry*, "the Supreme Court held that a public interest group did not have Article III standing to defend a law merely because it supported the passage and adoption of such a law. . . . The Court stated that public interest groups must have an actual injury to continue to defend a law that it has supported."[153]

As explained above, the Supreme Court's decision in *Perry* held that the ballot sponsors did not have standing to be litigating Prop 8 *by themselves* in federal court, and so could not appeal Judge Walker's decision where the state governmental defendants refused to do so.[154] *Perry* does not call into question the permissibility of the ballot sponsors' intervening in the federal trial court to help defend Prop 8 in a proper case brought challenging Prop 8. *Perry* was a case primarily about standing to appeal.[155]

Here, however, assuming the *Pickup* plaintiffs challenging California's ban on sexual orientation conversion practices on minors had standing to sue in federal trial court, nothing in the Supreme Court's *Perry* decision states that interested groups cannot intervene to defend the California law. And, assuming one or more parties with

150. Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013).

151. Pickup v. Brown, 12-17681, 2012 WL 6869637 (9th Cir. Dec. 21, 2012).

152. Plaintiff's Citation of Supplemental Authorities, Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013) (No. 12-17681), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2013/06/28/12-17681%20Supplemental%20Authorities.pdf.

153. *Id.*

154. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

155. Liberty Counsel's letter saw the glass half empty, saying the Court of Appeals had "merely accepted the district court's grant of intervention." Plaintiff's Citation of Supplemental Authorities, *supra* note 152.

standing asked the Ninth Circuit to review a federal trial court decision about the ban on appeal,[156] it is not clear why anything in *Perry* would keep the law's backers like EQCA from continuing to participate in the litigation. *Perry* presented a different situation in that there would have been no appellate litigation without the Prop 8 sponsors' filing an appeal.

In one of the two cases appealed to the Ninth Circuit, *Pickup v. Brown*,[157] consolidated on appeal with *Welch v. Brown*,[158] the trial court had ruled that the challengers were unlikely to prevail and denied them a preliminary injunction.[159] To the extent the *Pickup* plaintiffs had standing to appeal that decision to the Ninth Circuit, which they did if they had standing to file their federal court suit in the first place, standing rules should not prevent the law's supporters, such as the pro-LGBT equality nonprofit organization EQCA, from joining the state in defending the law on appeal.[160] In *Welch*, the state was preliminarily enjoined from enforcing the law at least in some circumstances; it therefore has an injury that provides standing to appeal,[161] and since the state defendants chose to appeal,[162] EQCA,

156. The state of California would be recognized by virtually all as having standing to appeal the *Welch* decision which enjoined the state from enforcing its law banning SOCE on minors. If the *Pickup* plaintiffs suffered an injury entitling them to challenge the law in federal court, then that same injury would support their standing to appeal the trial court decision denying them injunctive relief.

157. Pickup v. Brown, No. 12-17681, 2012 WL 6869637 (9th Cir. Dec. 21, 2012).

158. Welch v. Brown, No. 13-15023 (9th Cir. 2012).

159. Pickup v. Brown, No. 2:12-cv-02497-KJM-EFB, 2012 WL 6021465, at *1 (E.D. Cal. Dec. 4, 2012).

160. In the appeal, the Ninth Circuit panel held that it need not decide whether EQCA had standing to defend the state law "because the State of California undoubtedly has standing to defend its statute, and the presence in a suit of even one party with standing suffices to make a claim justiciable." Pickup v. Brown, 740 F.3d 1208, 1224 n.2 (9th Cir. 2013) (internal quotation marks omitted). On the merits, the court rejected the challenges to the law. *Id.* at 1222.

I should note that I assisted Equality California in understanding the potential outcomes in the Supreme Court's marriage cases and the preparation of press releases in conjunction therewith and that I joined the board of its affiliated 501(c)(3) organization Equality California Institute in January 2014.

161. *See*, *e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional." (quoting Maine v. Taylor, 477 U. S. 131, 137 (1986)).

162. My view of the federalism concerns and state choices implicit in *Perry* differs from that claimed to underlie both *Perry* and *Windsor* by Eric Restuccia and Aaron Lindstrom in *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013), http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define
-marriage/ (last visited Aug. 27, 2013). They lay emphasis on the fact that the attorney general of

as the law's nongovernmental backers, again, should be able to continue to participate if it meets the federal standards for intervention. (If it did not, then intervention would be improper, but not because of the Supreme Court's *Perry* decision.) Basically, standing doctrine requires that there must be a case or controversy, a real live dispute between parties with real stakes in the matter, for a case to be in federal court. It is not totally settled, but a majority of federal appeals courts have held that if there is such a dispute, then others can participate in that litigation too without having to establish standing on their own.[163]

The Ninth Circuit Court of Appeals ruled in *Pickup* that the law banning SOCE against minors does not violate the First Amendment.[164] Its opinion does not squarely address the effect of *Perry*, if any, on the ability of a group like EQCA to intervene to defend a law it supports that is germane to its members' interests. The Court of Appeals specifically concluded that it "need not resolve [the] question" of *Perry*'s effect on EQCA's ability to intervene "because the State of California undoubtedly has standing to defend its statute, and 'the presence in a suit of even one party with standing

---

California chose not to defend or appeal the decision invalidating Proposition 8 and, rather wishfully, see the Court as having protected California's governmental choices to litigate or not. *See id.* ("In *Hollingsworth*, the Court rejects the standing of private parties to defend the constitutionality of a state statute where 'state officials have chosen not to.' On their face, as holdings, these decisions respect the principles of federalism, honoring the exclusive authority of the states to define and to defend marriage.") The obvious problem with this states' rights Pollyannaism is that, at least according to the California Supreme Court, the state of California *had chosen* to vest defense of Proposition 8 in its official proponents. Thus, the decisions by the attorney general and governor of California not to defend the measure should not have been the end of the Supreme Court's concern, had the Court's decision in *Perry* really been driven by "state sovereignty." *Id.*

163. *See, e.g.*, Canadian Wheat Board v. United States, 637 F. Supp. 2d 1329, 1338–42 (Ct. Int'l Trade 2009) (addressing circuit split favoring no need for intervenors in a proper case or controversy to establish their own Article III standing and siding with that majority view); Melissa Waver, *Where Standing Closes a Door, May Intervention Open a Window? Article III, Rule 24(A), and Climate Change Solutions*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10945, 10952 & nn.105–07 (2012) (noting circuit split and same majority position).

164. Pickup v. Brown, 728 F.3d 1042, 1048 (2013) (holding "that SB 1172, as a regulation of professional conduct, does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights"), opinion amended and superseded on denial of reh'g en banc, 740 F.3d 1208 (9th Cir. 2013), cert. denied, 134 S.Ct. 2871 (2014). Due to the plaintiffs' failure to adequately address their claim "that SB 1172 violates the religion clauses of the First Amendment," the court "decline[d] to address" it but left it open for "[t]he district court [to] do so in the first instance." 728 F.3d at 1051 n.3.

suffices to make a claim justiciable.'"[165] *Pickup* thus illustrates one more reason that it is unclear that *Perry* will have effects of much significance as far as federal court standing law, upon which *Perry*'s holding was based, is concerned.

III. FEDERALISM CONCERNS IN *UNITED STATES V. WINDSOR*

Unlike in *Hollingsworth v. Perry*, the Supreme Court in *United States v. Windsor*[166] overcame the threshold jurisdictional issues to reach the equal protection merits of the challenge to section 3 of the combatively named Defense of Marriage Act.[167] DOMA section 3, recall, defines marriage as male-female for almost all federal law, regardless of whether a state or another jurisdiction allowed a same-sex couple to marry.[168] On the merits, the Court in *Windsor* held section 3 unconstitutional as applied to same-sex couples validly married in states.[169] Unlike *Perry* in another way, *Windsor* is likely to have significant doctrinal repercussions, as is already becoming apparent.

Section A of this part summarizes the *Windsor* litigation up through the Supreme Court. Although it should be quite clear that the Court's decision invalidating section 3 of DOMA was based on equal protection principles, Section B of this part makes the case for that conclusion in painstaking detail in light of Justice Scalia's contention in dissent that the Court *did not* base its ruling on equal protection. Section C of this part then considers the potential impact of *Windsor* on suits seeking to make not the federal government, as in *Windsor*, but rather a state recognize a same-sex couple's marriage from another state. Finally, Section D takes up the question of the implications of *Windsor* for constitutional suits seeking to compel states themselves to let same-sex couples marry civilly.

A. The Windsor *Litigation*

United States v. Windsor arose after Edie Windsor's partner of

165. *Id.* at 1050 n.2 (quoting Brown v. City of Los Angeles, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008) (per curiam)).

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

167. Defense of Marriage Act of 1996, Pub. L. No. 104-199 § 2(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

168. *See id.* and note 5 and accompanying text *supra*.

169. *See Windsor*, 133 S. Ct. at 2695–96.

forty-four years and wife, Thea Spyer, died.[170] They had been legally married in Canada after four decades together,[171] and the law of their home state of New York recognized their marriage.[172] If the federal government had done likewise, Edie would have qualified for the surviving spouse tax exemption from the federal estate tax; however, because section 3 of DOMA denied federal recognition of their marriage, the government insisted that Edie pay the Treasury $363,053.[173] She challenged this treatment as denying her the equal protection of the laws guaranteed by the Fifth Amendment.[174]

After U.S. Attorney General Eric Holder announced that he and President Barack Obama had concluded that Windsor's contention was correct—that section 3 of DOMA was unconstitutional as applied to validly married same-sex couples—and that the Department of Justice would not defend Edie's lawsuit,[175] the House Bipartisan Legal Advisory Group intervened to defend the law, acting on a three-to-two party-line vote (with the Republicans voting to defend DOMA and the Democrats voting against doing so).[176]

The federal district court in *Windsor* held that section 3 was unconstitutional.[177] The administration declined to provide Windsor her tax refund, even though it believed her legal position correct. Rather, both BLAG and the Justice Department appealed the

170. "Edie Windsor and Thea Spyer shared their lives together as a committed couple for 44 years. They became a couple in 1965, got engaged in 1967, and married in Canada in 2007, after it became legal . . . . Thea died in 2009 . . . ." Windsor v. United States—*Frequently Asked Questions (FAQ)*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/lgbt-rights/windsor-v-united-states-frequently-asked-questions-faq (last visited Sept. 29, 2013).

171. *See id*.

172. *Windsor*, 133 S. Ct. at 2683 (citing United States v. Windsor, 699 F.3d 169, 177–78 (2d Cir. 2012)).

173. *Id.*

174. *Id.* Because the defendant was the federal government, the suit relied on the equal protection component of the Fifth Amendment's Due Process Clause, rather than on the Equal Protection Clause of the Fourteenth Amendment, which applies to state and local government, as discussed below.

175. Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

176. *See* Brief for Court-Appointed Amica Curiae Addressing Jurisdiction at 2-3, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (timing and vote); David Baumann, *The Defense of Marriage Act, U.S. Politics*, ABOUT.COM, http://uspolitics.about.com/od/gaymarriage/a/The-Defense-Of-Marriage-Act.htm (last visited Sept. 29, 2013) (noting party-line vote split). Later a majority of the House of Representatives voted to authorize the continued defense of section 3.

177. *Windsor*, 133 S. Ct. at 2684.

decision, the latter not seeking reversal but affirmance. While the case was pending before the U.S. Court of Appeals for the Second Circuit, the Justice Department filed a petition for a writ of certiorari before judgment in the case, which Windsor agreed the Supreme Court should grant but which BLAG opposed. Before the Court acted on that petition, the court of appeals affirmed the trial court.[178] Strikingly, alone among current court of appeals cases, it held that sexual orientation is a suspect classification requiring strict scrutiny and that DOMA section 3 could not satisfy such scrutiny.[179] The administration then asked the Court to treat its request as a regular certiorari petition (not one requesting unusual review before the lower court ruled).

The Supreme Court granted the administration's petition for certiorari, but the Court also directed the parties to brief whether there was a proper case for it to decide in light of the administration's agreement with Edie Windsor that DOMA section 3 was unconstitutional. After hearing argument, the Court concluded that there was a proper case or controversy before it[180] and that section 3 was indeed unconstitutional.[181] The ruling was five-to-four, with the Court's more liberal justices (Ginsburg, Breyer, Kagan, and Sotomayor) joining Justice Kennedy's majority opinion.[182] Chief Justice Roberts and Justices Scalia and Thomas (in opinions by the Chief Justice and Justice Scalia) concluded that there was not a proper case before the Court, and that even if there were, DOMA section 3 did not violate the Constitution's equality guarantees. Justice Alito thought that BLAG had standing to bring the case, but agreed with the other dissenters that DOMA section 3 was constitutional.[183]

Despite expressing skepticism about the Executive's decision not to defend the constitutionality of section 3 of DOMA,[184] the

178. *Id.*

179. *See* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012).

180. *Windsor*, 133 S. Ct. at 2680.

181. *Id.* at 2693, 2696.

182. *Id.* at 2681.

183. *Id.* at 2696 (Roberts, C.J., dissenting); *id.* at 2697–98 (Scalia, J., joined by Thomas, J., and in Part I by Roberts, C.J., dissenting); *id.* at 2711–12 (Alito, J., joined in parts II and III by Thomas, J.).

184. Justice Kennedy's opinion for the Court characterized the attorney general's letter announcing that the president had determined section 3 to be unconstitutional and refusing to

Windsor majority concluded that "[i]n this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court" despite the government's position on DOMA's unconstitutionality.[185] The Court accepted that the obligation to pay Windsor's tax refund counts as an injury, whether or not the government agrees that it was legally obliged to pay, and that "Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction."[186] To the extent that the posture of the case raised prudential concerns, the Court held them allayed by BLAG's substantive defense of section 3 and the importance of resolving the question of the constitutionality of this federal law,[187] and so the Court concluded that "the prudential . . . requirements" of standing were met.[188]

On the merits, a majority of the Court agreed with the United States and Edie Windsor that section 3 of DOMA was

---

defend its constitutionality as "reflect[ing] the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." *Windsor*, 133 S. Ct. at 2683–84. And in further addressing the standing issue, the Court wrote: "The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma." *Id.* at 2688. This "wait for us" approach to constitutional interpretation has little to commend it in this context, where the president and attorney general had faithfully applied the Court's own precedents addressing the factors bearing on heightened scrutiny and reached a conclusion in accord with the great weight of scholarly analysis. (This is not just my sense of the literature. An earlier survey of constitutional scholarship on marriage rights of same-sex couples published found that sixty-nine "of seventy-two articles, notes, comments, or essays focusing primarily on same-sex marriage . . . . advocated, supported, or were generally sympathetic to same-sex marriage." Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18, 20. *Cf.* Lynn D. Wardle, *Section 3 of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 964 (2010) (concluding that "opposition to DOMA within the legal academy has also been strong and consistent and seems to be increasing").

185. *Windsor*, 133 S. Ct. at 2686.

186. *Id.*

187. *Id.* at 2687–89. Because the Court did not hold that BLAG had independent standing to defend DOMA, *Windsor* need not be seen as blessing an interference with separation of powers (a committee of one House of Congress defending a federal law, rather than the executive branch defending it) of a kind that might seem akin to that in *Perry* (initiative proponents who were not state officials in any branch seeking to defend the initiative in federal court, unsuccessfully given the Court's holding in *Perry*). Nor did the Court in *Windsor* hold that BLAG had a personal interest in DOMA that was injured by the its nonenforcement or a judicial ruling that DOMA is unconstitutional, so again there is no conflict with the Court's holding in *Perry* that the proponents lacked such an injury; *Windsor* simply did not reach BLAG's standing.

188. *Id.* at 2688.

unconstitutional.[189] The Court extensively recounted the primary role of states (rather than the federal government) in regulating "domestic relations" including marriage, an allocation of authority set aside by section 3.[190] Rather than address "whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance,"[191] the Court treated the "unusual character" of the discrimination wrought by DOMA as a reason to give "careful consideration" to the question of its constitutionality.[192] And the Court did so, noting the broad sweep of DOMA's section 3,[193] recounting prejudice expressed in DOMA's legislative history,[194] and detailing some of the wide range of economic and dignitary harms Section 3 inflicted on married same-sex couples.[195]

B. The Doctrinal Basis for Kennedy's Opinion of the Court

As he did in the Supreme Court's two other major decisions widely seen as "gay rights" cases, *Romer v. Evans*[196] and *Lawrence v. Texas*,[197] Justice Anthony Kennedy again wrote for the Court in *United States v. Windsor*. Joined by the Court's four more liberal Justices,[198] Justice Kennedy's majority opinion held that section 3 of the so-called Defense of Marriage Act,[199] which sought to exclude same-sex couples from the definition of "marriage" and "spouse" for all federal laws,[200] was unconstitutional. Contrary to protestations of

189. *Id.* at 2693, 2696.

190. *Id.* at 2689–92.

191. *Id.* at 2692.

192. *Id.*

193. *Id.* at 2694 ("DOMA writes inequality into the entire United States Code . . . . Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.").

194. *Id.* at 2693–94. According to the Court in *Windsor*, the Court of Appeals for the First Circuit was corrected that Congress's "goal" with section 3 "was 'to put a thumb on the scales and influence a state's decision as to how to shape its marriage laws.'" *Id.* at 2693 (quoting Massachusetts v. United States Dept. of Health and Human Servs., 682 F. 3d 1, 12–13 (1st Cir. 2012)).

195. *Id.* at 2694–95.

196. 517 U.S. 620 (1996).

197. 539 U.S. 558 (2003).

198. Specifically, Justices Ginsburg, Breyer, Kagan, and Sotomayor joined Justice Kennedy's opinion.

199. Defense of Marriage Act, 110 Stat. 2419, (codified as amended at 1 U. S. C. § 7 (2013)).

200. Section 3 of DOMA amended the federal Dictionary Act, 1 U.S.C. §7, to restrictively provide that, regardless of state law,

> in determining the meaning of any Act of Congress, or of any ruling, regulation, or

bafflement in Justice Scalia's obstreperous dissent,[201] the *Windsor* majority opinion clearly relied on the Fifth Amendment's guarantee of equal protection of the laws, as explained in the first subsection below.[202] Scalia's slightly better point, however, addressed in the next section, was that the significance of federalism in the Court's opinion was underspecified. Indeed, Justice Scalia disparages the majority's rationale for its possible reliance on "some amorphous federalism component"[203]—a point taken up in the second subsection following.[204]

1. Equal Protection at Its Core

Pace Justice Scalia, it should be beyond dispute that the Court's opinion in *Windsor* was predicated on equal protection principles; after all, the Court expressly stated that DOMA "violates basic . . . equal protection principles applicable to the Federal Government."[205] I nevertheless make the point here, at some length, in an effort to steer lower federal and state courts away from the confusion Scalia is seemingly trying to sow. First, the sole question presented in the U.S. government's petition for certiorari in *Windsor* was "[w]hether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."[206] Since the Supreme Court is only supposed to decide that question or subsidiary questions "fairly included therein,"[207] the Court would have strayed far from its officially approved practice if it did not address that equal protection question.

Second, in turning to the merits of the constitutional challenge,

---

> interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id.

201. *See infra* Part III.B.2.

202. *See infra* Part III.B.1.

203. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

204. *See infra* Part III.B.2.

205. *Windsor*, 133 S. Ct. at 2693 (majority opinion). I discuss this language, and what the ellipsis replaces, at text accompanying note 227 *infra*.

206. Petition for a Writ of Certiorari Before Judgment at i, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

207. Sup. Ct. R. 14.1(a).

after recounting the basic facts of Edie Windsor and Thea Spyer's wedding the Court's opinion "conclude[d] 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."[208] This language of "occupy[ing] *the same* status and dignity" sounds in equal protection, a constitutional protection which the Court's earlier opinion in *Romer v. Evans*[209] suggested is suspicious of "status-based enactment[s]" or "a classification of persons undertaken for its own sake."[210] Although only a minority of states allowed same-sex couples to marry,[211] the Court understood those states to have "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."[212] When the Court's opinion turned to analyzing section 3's constitutionality, the Court observed that "its operation is *directed to a class of persons* that the laws of New York, and of 11 other States, have sought to protect."[213] This discussion about "a class of persons" is likewise language of equal protection, which has long been understood to prohibit "class legislation"[214] and whose constitutional doctrine focuses on the

208. *Windsor*, 133 S. Ct. at 2689.

209. 517 U.S. 620 (1996).

210. *See id.* at 635.

211. See *Windsor*, 133 S. Ct. at 2689 ("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 . . . ."); *Same-Sex Marriage: Developments in the Law*, NOLO, http://www.nolo.com/legal-encyclopedia/same-sex-marriage-developments-the-law.html ("After a long, drawn-out marriage equality battle, California became the 13th state to recognize same-sex marriage.") (last updated Dec. 5, 2013); Kate Zernika & Marc Santora, *As Gays Wed in New Jersey, Christie Ends Court Fight*, N.Y. TIMES, Oct. 21, 2013, http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html ("His decision not to appeal a judge's ruling that allowed the weddings removed the last hurdle to legalized same-sex marriage in New Jersey, making it the 14th state, along with the District of Columbia, to allow gay couples to wed."); Courtney Subramanian, *Hawaii Governor Signs Gay Marriage Bill*, TIME, http://nation.time.com/2013/11/13/hawaii-governor-signs-gay-marriage-bill/ (Nov. 13, 2013) ("The new measure allows gay residents and tourists to wed beginning Dec. 2, adding to the 14 states and District of Columbia where same sex marriage is legal."); Dana Davidsen, *Illinois Becomes 16th State to Allow Same-sex Marriage*, CNN (Nov. 20, 2013), http://politicalticker.blogs.cnn.com/2013/11/20/illinois-becomes-16th-state-to-allow-same-sex-marriage/ ("The measure will go into effect June 14, 2014.").

212. *Windsor*, 133 S. Ct. at 2960 (emphasis added).

213. *Id.* (emphasis added).

214. Cruz, *supra* note 38.

"classification" embodied in challenged government action.[215]

The Court continued its focus on inequality when it observed that "DOMA rejects 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."[216] Viewed this way, DOMA's discrimination was unusual, and the Court had affirmed in *Romer v. Evans*,[217] quoting *Louisville Gas and Electric Co. v. Coleman*,[218] that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision[.]"[219] "[T]he constitutional provision" at issue in *Romer* and *Louisville Gas & Electric Co.* was the Equal Protection Clause of the Fourteenth Amendment,[220] again showing that *Windsor* is an equal protection decision.

Of course, the Equal Protection Clause does not by its terms apply to the federal government; rather, it provides that "[n]o *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws."[221] Where the federal government is concerned, the Fifth Amendment's Due Process Clause is the primary textual home of the Constitution's guarantee of constitutional equality, as the Court's doctrine for decades has recognized.[222] As the Court said in *Brown v. Board of Education*'s companion case *Bolling v. Sharpe*,[223] "discrimination may be so unjustifiable as to be violative of due process."[224] That is, certain unequal treatment deprives people of liberty (or property or even life, one might suppose) without due process of law. This doctrinal

215. *See, e.g.*, Robert C. Farrell, *Affirmative Action and the "Individual" Right to Equal Protection*, 71 U. PITT. L. REV. 241, 245–63 (2009) (addressing "The Supreme Court Precedents on Equality as a Limit on Governmental Classification").

216. *Windsor*, 133 S. Ct. at 2692 (emphasis added).

217. 517 U.S. 620, 633 (1996).

218. 277 U.S. 32, 37–38 (1928).

219. *Romer*, 517 U.S. at 633.

220. *Id.* at 631; *Louisville Gas & Electric Co.*, 227 U.S. at 36.

221. U.S. CONST. amend. XIV (emphasis added).

222. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

223. *Bolling*, 347 U.S. 497.

224. *Id.* at 499 (condemning racial school segregation by the District of Columbia, a federal governmental entity).

guarantee is commonly known as "the equal protection component of the Due Process Clause" of the Fifth Amendment.[225]

That is why the Court's opinion in *Windsor* says that the case requires the Court "to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment."[226] Because the federal government is subjected to equal protection commands through the Due Process Clause of the Fifth Amendment, the *Windsor* opinion's declaration that DOMA "violates basic due process and equal protection principles applicable to the Federal Government"[227] should be unexceptionable. When the Supreme Court criticized DOMA because it "seeks to injure" same-sex couples married under state law, the Court repeated its forty-year-old conclusion that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[228] This invocation of "[t]he Constitution's guarantee of equality" clearly signals that equal protection was doing the work here, as does the Court's focus on "disparate treatment," a core equal protection concern.[229] Moreover, the case that articulated this principle quoted in *Windsor*, *Department of Agriculture v. Moreno*,[230] was one in which the Court held a federal law violated the equal protection component of the Fifth Amendment (as Justice Scalia acknowledges in his *Windsor* dissent).[231]

The Court in *Windsor* explained the deficiencies of section 3 in terms that should leave no room for doubt that the Court held that the law violates equal protection principles. In discussing the breadth of the law, the Court observed that "DOMA writes inequality into the entire United States Code."[232] The Court identified section 3's purpose and effects with inequality: "DOMA's principal effect is to

225. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009); *see, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2706 n.5 (2013) (Scalia, J., dissenting) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973)).

226. *Windsor*, 133 S. Ct. at 2692 (majority opinion).

227. *Id.* at 2693.

228. *Id.* (quoting *Moreno*, 413 U.S. at 534–35).

229. *Id.*

230. 413 U. S. 528 (1973).

231. *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

232. *Id.* at 2694.

identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality. . . ."[233]

When the *Windsor* Court concluded that it must "hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution[,]"[234] the Court was invoking the Constitution's equal protection obligation on the federal government.[235] The very next sentence of the opinion explained unequivocally that "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[236] In support of this contention, the *Windsor* opinion cited *Bolling v. Sharpe*,[237] the first Supreme Court case that expressly held there to be an equal protection component of the Due Process Clause of the Fifth Amendment, and *Adarand Constructors, Inc. v. Peña*, which held that the equal protection standard applicable to the federal government under the Due Process Clause of the Fifth Amendment is coextensive with the equal protection standard applicable to the states through the Equal Protection Clause of the Fourteenth Amendment.[238]

All the preceding might sound like overkill to establish the obvious meaning of Justice Kennedy's opinion for the Court in *Windsor*. What warrants the extended explication is that Justice Scalia purported to be perplexed[239] by the majority's statement that "[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[240] "The only possible interpretation of this statement," Scalia asserted, "is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding."[241] Scalia did not offer

233. *Id.*
234. *Id.* at 2695.
235. *Id.*
236. *Id.*
237. 347 U.S. 497, 499–500 (1954).
238. 515 U.S. 200, 217–218 (1995).
239. *See Windsor*, 133 S. Ct. at 2705–06 (Scalia, J., dissenting).
240. *Id.* at 2695 (majority opinion).
241. *Id.* at 2706 (Scalia, J., dissenting).

any explanation for why he interpreted the Court's sentence in the counterintuitive way that he did, perhaps because there is no legitimate explanation.

The Court forthrightly stated in the first half of its sentence under discussion here that the Fifth Amendment rendered section 3 of DOMA unconstitutional.[242] That first half of the sentence neither expressly asserted nor denied that it is the equal protection component of the Due Process Clause of that amendment which rendered section 3 unconstitutional.[243] But the second half of the contested sentence is entirely consistent with this Article's foregoing equal protection analysis. In saying that the Fourteenth Amendment's Equal Protection Clause makes the Fifth Amendment right against such stigmatizing class legislation more specific, comprehended, and meaningful, the Court is simply echoing what the Supreme Court said in *Bolling v. Sharpe* back in 1954: "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' . . . [b]ut, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[244] As scholars including Akhil Amar have recognized, one function of the later-enacted Equal Protection Clause of the Fourteenth Amendment is to clarify the Fifth Amendment's Due Process Clause.[245] And as for the notion that the Fourteenth Amendment's specification of the equal protection mandate makes the right to due process better understood and protected, recall Chief Justice Marshall's words for the Court in *Marbury v. Madison*: "The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written."[246]

The only potentially real question is not whether equal protection undergirds the Court's holding in *Windsor*, but whether the opinion *also* rests on substantive due process protection of liberty

242. *Id.*

243. *See id.*

244. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

245. *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 772 (1999) ("[F]or the framers and ratifiers of the Fourteenth Amendment, the words of its Equal Protection Clause were not expressing a different idea than the words of the Due Process Clause but were elaborating the same idea: the Equal Protection Clause was in part a clarifying gloss on the due process idea." (emphasis omitted)).

246. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

and perhaps fundamental rights.[247] Justice Scalia's dissent, not without reason, sees indications of "the dread" doctrine of "substantive due process" in the majority opinion.[248] He wrote:

> The majority opinion . . . says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution[]"; that it violates "basic due process" principles; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment."[249]

"And," *Windsor* stated, "though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."[250]

Although there are coherent arguments that *Windsor* only used substantive due process's fundamental right to marry to inform an analysis grounded squarely in equal protection doctrine,[251] marriage equality litigation has already relied on *Windsor* in suits pressing not just equal protection claims but also substantive due process/fundamental rights claims. In Pennsylvania, for example, the ACLU is suing the state, arguing that its refusal to let same-sex couples marry and its refusal to recognize the marriages of same-sex couples validly entered in other states are unconstitutional.[252] The ACLU[253] argues that "Pennsylvania's exclusion of same-sex couples

247. *See, e.g.*, Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 25 (arguing that *Windsor* is an "equal liberty" case that "unif[ies] principles of equal protection and liberty") (2014).

248. United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting).

249. *Id.* at 2706 (citations omitted) (quoting majority opinion at 2695, 2693, and 2692, respectively).

250. *Id.* at 2695 (majority opinion).

251. *See* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 220, 230 (2013) (concluding that *Windsor* "is conceptually, if not doctrinally, a right-to-marry case" but that "Justice Kennedy's opinion ultimately rests on equal protection grounds").

252. *See Whitewood v. Corbett*, AMERICAN CIVIL LIBERTIES UNION (July 11, 2013), https://www.aclu.org/lgbt-rights/whitewood-v-corbett. Although I served as a board-elected general counsel for the national ACLU during some of the period of the preparation of this Article, I did not participate in the *Whitewood* litigation. *See also* Complaint, Paladino v. Corbett, No. 2:13-cv-5641 (E.D. Pa. Sept. 26, 2013) (seeking recognition by Pennsylvania of marriage same-sex couple entered in Massachusetts).

253. Complaint for Declaratory and Injunctive Relief at 5, Whitewood v. Corbett, No. 1-13-

from marriage infringes on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[254] Independently of the discrimination argument under the Equal Protection Clause, the plaintiffs argue that Pennsylvania's denial of marriage to same-sex couples should be held to strict scrutiny "because it burdens the fundamental right to marry."[255] Most of the complaint does not differentiate between the equal protection and due process claims.[256] Thus, the introduction of the complaint argues that "[t]he exclusion from marriage undermines the plaintiff couples' ability to achieve their life goals and dreams, threatens their mutual economic stability, and denies them," here quoting *Windsor*, "'a dignity and status of immense import.'"[257]

More dramatically, at least one complaint as of the initial writing of this Article appears to have already interpreted *Windsor* to mean that the Due Process Clause's substantive protection of "liberty" embraces same-sex couples' freedom to marry.[258] In *Griego v. Oliver*,[259] six couples challenged New Mexico's refusal to allow same-sex couples to marry civilly or to recognize same-sex couples' marriages validly entered in other jurisdictions.[260] In seeking (ultimately unsuccessfully)[261] a writ of mandamus from the New Mexico Supreme Court to shorten the litigation, the *Griego* plaintiffs relied on federal precedent to argue that "[b]arring same-sex couples

---

cv-01861-1 (filed July 9, 2013), *available at* https://www.aclu.org/files/assets/whitewood_v._corbett_--_complaint.pdf.

254. *Id.* ¶ 15, at 5.

255. *Id.*

256. *Id.*

257. *Id.* ¶ 10 (quoting United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

258. Second Amended Complaint for Declaratory and Injunctive Relief, Griego v. Oliver, No. D-202-CV-2013-02757, 2013 WL 4879250, at *1 (D. N.M. Aug. 21, 2013).

259. Griego v. Oliver, No. D-202-CV-2013-02757, 2013 WL 4716361 (D. N.M. Aug. 26, 2013). The New Mexico Supreme Court ultimately affirmed the trial court's conclusion that the marriage non-recognition laws violated the state constitution's equal protection clause. Griego v. Oliver, 316 P.2d 865 (N.M. 2013).

260. I should note that I am close friends with one of the plaintiff couples who sought recognition of an extraterritorially entered marriage.

261. *See* Steve Terrell, *NM High Court Won't Immediately Hear Marriage Equality Cases*, ROUNDHOUSE ROUNDUP: THE BLOG, http://roundhouseroundup.blogspot.com/2013/08/nm-high-court-wont-immediately-hear.html (last visited Aug. 28, 2006) (reporting denial without prejudice of petition for writ of mandamus in *Griego v. Oliver*); Order, Hanna v. Salazar, No. 34,216 (N.M. Aug. 15, 2013), *available at* http://www.scribd.com/doc/160797573/NM-SUPREME-ORDER-DENYING-IMMEDIATE-CONSIDERATION-of-SAME-SEX-MARRIAGE-CASES (last visited Aug. 28, 2013) (denying without prejudice petition for writ of mandamus).

from marriage violates New Mexico's due process guarantee by depriving them of the fundamental right to marry."[262] In arguing that "denying recognition to same-sex couples who legally married in another jurisdiction would . . . violate their right to due process under the New Mexico Constitution," the *Griego* plaintiffs read *Windsor* to have "specifically held that married same-sex couples who are legally married under state law have a protected liberty interest in their marriage under the federal Due Process Clause."[263] The language they quoted from *Windsor*? "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[264]

The Supreme Court undeniably said that. And it is one of the passages to which Justice Scalia pointed in accusing the Court of relying on substantive due process to invalidate section 3 of DOMA.[265] Scalia may have made this interpretive claim in order to further his apparent desire to minimize the import of *Windsor*, expecting that "lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples"[266] and exhorting them to do so.[267] Yet I have already explained why the Court's language is best understood as reflecting reliance on the equal protection component of the Fifth Amendment's Due Process Clause. Ironically, then, in light of the *Griego* plaintiffs' use of *Windsor* to support a substantive liberty-based (as distinguished from equality-based) argument against exclusion of same-sex couples from civil marriage, Scalia's studied obtuseness, which had him denying that the Court's holding rested on equal protection and suggesting that it might rest on substantive due process, may in the lower courts actually undermine his preferred view that the Constitution poses no obstacle to states'

262. Verified Petition for Writ of Mandamus at 20, Griego v. Oliver, No. D-202-CV-2013 -02757, 2013 WL 4879250) (July 2, 2013), *available at* http://www.scribd.com/doc/151566993 /New-Mexico-Supreme-Court-Writ-of-Mandamus (last visited Aug. 28, 2013).

263. *Id.* at 23 (citing United States v. Windsor, 133 S. Ct. 2675, 2695 (2013)).

264. *Id.* at 23 (quoting *Windsor*, 133 S. Ct. at 2680).

265. *See supra* text accompanying footnote 264–265.

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

267. *See id.* (avowing that "an opinion with such scatter-shot rationales as this one . . . can be distinguished in many ways," opining that the majority's opinion "deserves to be" so distinguished, and bluntly concluding that "[s]tate and lower federal courts should take the Court at its word and distinguish away").

excluding same-sex couples from marriage.

2. "Amorphous Federalism" in the Court's Reasoning

Justice Scalia's grousing about the role of federalism in the *Windsor* majority opinion is not as baseless as his denial that the opinion rests on equal protection principles. He questioned why the majority opinion continued to advert to "the usual tradition of recognizing and accepting state definitions of marriage" even after it "formally disclaimed reliance upon principles of federalism."[268] At the end of the day, for Scalia, "[t]he 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). . . ."[269] While there is some merit to his concerns, I do not think the Court's deployment of federalism is as indistinct as Justice Scalia suggests.

One could certainly envision an opinion relying on federalism as a factor of unspecified weight and/or unclear doctrinal significance. The Court could have relied on the fact that DOMA section 3 regulates marriage, part of domestic relations, which is "one of the still paradigmatic cases of matters said to lie properly with the states."[270] That fact could have been said to "weigh against" the constitutionality of the law, without the Court ever attempting to quantify such weight.[271] I myself previously sketched what such an "uncategorical" treatment of federalism objections to DOMA section 3 might look like.[272] The regulation of "domestic relations" could have been just one of a series of unquantified (or "amorphous," in

268. *Id.* at 2705 (quoting majority opinion at 2693).

269. *Id.* at 2707. This concession of the possibility of an equal protection basis for the Court's holding in *Windsor* contradicts Scalia's earlier assertion that "the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding." *Id.* at 2706.

270. David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 817 (2011).

271. *Cf.* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing notion of interest "balancing" because "the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy").

272. *See* Cruz, *supra* note 270, at 814–27 (identifying several factors that collectively might be taken to render DOMA section 3 unconstitutional on federalism grounds).

Scalia's parlance[273]) factors informing a judgment that section 3 was unconstitutional: It was a federal law that operates in the core of the field of domestic relations, an arena historically and to this day still frequently said to be the near-exclusive preserve of state authority.[274] It operated, not in discrete operational settings carefully judged by Congress to require federal displacement of state law definitions of marital status, but across the board in virtually any area in which the federal government acts.[275] It purported to be a definitional statute, but it selectively excluded married couples (of the same-sex) who are in fact married under state laws that the federal government otherwise uses for determining people's marital status, thus casting egalitarian state laws and couples who have taken advantage of them in a false light.[276] But that is not how the Court in *Windsor* treated federalism.

The *Windsor* opinion recounted the process whereby New York and some other 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" because the mixed-sex requirement for civil marriage "came to be seen [there] as an unjust exclusion."[277] Then, the Court in *Windsor* asserted that as the "beginning point" for deciding whether section 3 was unconstitutional it should consider "the design, purpose, and effect of DOMA . . . [a]gainst this background of lawful same-sex marriage in some states."[278] Thus, the Court in its initial brush with federalism in *Windsor* suggested that the legal landscape provides important context against which to assess the structure, intent, and consequences of section 3 of DOMA. This suggestion is completely unexceptional.

"By history and tradition the definition and regulation of marriage," the Court next summarized, "has been treated as being within the authority and realm of the separate States."[279] At the same time, the federal government had over time adopted laws "that bear

273. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).
274. Cruz, *supra* note 270, at 827.
275. *Id.*
276. *Id.* (footnote omitted).
277. *Windsor*, 133 S. Ct. at 2689.
278. *Id.*
279. *Id.* at 2689–90.

on marital rights and privileges" or "affect marriages and family status."[280] Governmental authority over civil marriage thus had been shared between federal and state governments, so the Court was *not* saying that merely touching on domestic relations made section 3 of DOMA unconstitutional. Yet DOMA appeared to the Court different from earlier federal actions where Congress enacted "discrete statutes" or somewhat narrowly "limited federal laws" to further constitutionally permissible federal policies.[281] Thus, section 3's constitutionality cannot be taken for granted but must be analyzed. DOMA's applicability to nearly the entirety of federal law appears against this background as an "intervention" in the usual distribution of marriage regulations.[282]

"In order to assess the validity of that intervention," the Court maintained, "it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition."[283] This pronunciamento seems to be key to Justice Scalia's objections. For after providing what Scalia counts as "seven full pages about the traditional power of States to define domestic relations,"[284] the majority opinion concluded 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."[285] Because Scalia thought that "no one questions the power of the states to define marriage (with the concomitant conferral of dignity and status)," he could not see "the point of devoting seven pages to describing how long and well established that power is[.]"[286]

But whether contested or not, the pedigree and breadth of state authority over marriage, and domestic relations more generally, is

280. *Id.* at 2690.

281. *Id.*; *cf.* Cruz, *supra* note 270, at 822 ("With the enactment of section 3 of DOMA, Congress created a type of federal family law that is very different from the definitional sections of individual statutes, which apply only within the boundaries of those statutes.").

282. *See Windsor*, 133 S. Ct. at 2691.

283. *Id.*

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

285. *Id.* at 2692 (majority opinion).

286. *Id.* at 2705 (Scalia, J., dissenting). He means of course, as does the majority, *see id.* at 2691 (majority opinion) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . .") (citing Loving v. Virginia, 388 U.S. 1 (1967)), that no one disputes that states generally have authority to define civil marriage, even though the Constitution makes certain definitions impermissible. *See, e.g.*, *Loving*, 388 U.S. at 2 (holding restrictions on interracial marriages unconstitutional).

relevant on the majority's terms, terms that are quite comprehensible within conventional equal protection doctrine, without recourse to the kind of "amorphous federalism" that Scalia took the Court to be arguing. In particular, as the Court went on to explain, the deep-rootedness of state (rather than federal) authority over marriage serves an evidentiary function.[287] DOMA section 3 is unusual in that it "rejects 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."[288] And as noted above, the Court said again that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to [equal protection]."[289] Since "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage[,]"[290] the Court should be understood to believe DOMA more likely reflects animus against same-sex couples than would a federal law that adhered to the more usual allocation of governmental authority.[291] In the *Windsor* majority's own words,

> the responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. 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.[292]

This evidentiary inference is plausible, and more plausible than

---

287. *Windsor*, 133 S. Ct. at 2692 (majority opinion).

288. *Id.*

289. *Id.* (internal quotation marks omitted). See quoted text accompanying note 219 *supra*.

290. *Id.*

291. *See id.* at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration." (internal quotation marks omitted)).

292. *Id.* The Court does not state that this deviation is the sole evidence of animus, and it discussed other evidence at *id.* at 2693–95. I do not address that evidence here because I am focusing on the role of federalism in the Court's analysis.

others enshrined in the Supreme Court's constitutional jurisprudence.[293] If a particular tradition allocating authority to the states is both broad and deep, one might expect that the federal government would have powerful reasons before it derogates from it. In order to determine whether the United States has such reasons, courts must give the challenged, unusual law "careful consideration"; otherwise, if the lenient rational basis review typically applied to economic regulations were used, the Court would only assess whether the law has the most tenuous conceivable connection to some merely legitimate governmental purpose. Without looking for more persuasive justifications for the deviation, a reviewing court might not be able to tell whether or not the deviant policy is grounded in animus or instead justified by public-regarding purposes. This, at any rate, is the "smoking out" rationale of strict scrutiny, which holds that strict scrutiny is necessary for courts to determine whether particular governmental uses of race are "compelling."[294]

Of course, racial classifications receive strict scrutiny under current equal protection doctrine, and the Court has not specified the level of scrutiny applicable to sexual orientation discrimination.[295] As Justice Scalia noted in his *Windsor* dissent, the majority "opinion

293. Consider, for example, the Court's argument in *Printz v. United States*, 521 U.S. 898 (1996). There, in the course of holding that Congress lacked the ability to use its Article I powers to "commandeer" state or local law enforcement officials to enforce federal programs, Justice Scalia's majority opinion argued that "if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist." *Id.* at 905. In reality, as Justice Stevens's dissent explained, "[t]he Court's evaluation of the historical evidence . . . fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution." *Id.* at 952–53 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). "Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise 'highly attractive' . . . power. Congress' discretion, contrary to the majority's suggestion, indicates not that the power does not exist, but rather that the interests of the States are more than sufficiently protected by their participation in the National Government." *Id.* at 953 n.12.

294. *See, e.g.*, Adarand Constructors, Inc v. Peña, 515 U.S. 200, 226 (1995).

295. Were discrimination against same-sex couples recognized as a form of sex discrimination, *see, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, *Defending the Sex Discrimination Argument for Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER (2007), which it is, extant doctrine would call for heightened or intermediate scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996).

does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."[296] So, it may be that, if DOMA's deviation from the historical exercises of governmental authority over marriage is relevant for the animus- or purpose-based reason just sketched, *Windsor* may in the future be best understood as employing a form of heightened scrutiny.[297] That is, by using an unspecified form of scrutiny to "smoke out" the anti-lesbigay animus behind DOMA, *Windsor* may seem (as Scalia charged) to apply something more akin to heightened scrutiny than rational basis review, and so may come to stand for the proposition that equal protection demands heightened scrutiny when the government discriminates on the basis of sexual orientation.

C. Windsor *and Interstate Recognition of Marriages*

Among the marriage-related issues that *Windsor* does not expressly address is whether it is constitutional for a state to refuse to recognize a same-sex couple's marriage from another state or country. This is distinct from the issue of whether a state must itself allow same-sex couples to marry, which the next section addresses. It is a question that, like virtually all litigated constitutional issues,[298] will ultimately not be answered solely by logic; rather, the meaning of *Windsor* for questions of interstate recognition will unfold with experience and time. But not necessarily a lot of time and experience. On July 11, 2013, fifteen days after the Supreme Court decided the

296. *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

297. *Accord id.* ("But the Court certainly does not *apply* anything that resembles that deferential framework [i.e., rational basis review]."). This observation might be compared to Justice Scalia's criticism of Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). There, she concluded that Texas's law criminalizing oral and anal sex, when engaged in by two people of the same sex, failed "a more searching form of rational basis review . . . under the Equal Protection Clause." *Id.* at 580 (O'Connor, J., concurring in the judgment). Justice Scalia criticized Justice O'Connor's standard as unprecedented and underspecified, *id.* at 601 (Scalia, J., dissenting), and suggested it must mean at a minimum that if a law did "exhibit a desire to harm a politically unpopular group, it would be unconstitutional even if it had a rational basis." *Id.* (internal quotation marks omitted). That would be more stringent judicial review than that ordinarily understood to be mandated under the rational basis standard.

298. *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

marriage cases, Ohio residents James Obergefell and John Arthur flew to Maryland to be married, since Ohio law neither allows nor recognizes marriages of same-sex couples.[299] After returning to Ohio, they filed suit against Ohio's governor and other defendants on July 19.[300] Arthur was terminally ill,[301] and the suit sought to ensure that the state would recognize their Maryland marriage so that when it came time to issue a death certificate, it would list Arthur's marital status as "married" and record Obergefell as his surviving spouse.[302] The ACLU filed similar suits seeking to use equal protection to compel interstate recognition of valid marriages of same-sex couples, as well as an affirmative right to marry in the state, in New Mexico[303] and Pennsylvania.[304] On Obergfell and Arthur's request for a temporary restraining order, the judge relied on *Windsor* to conclude that they showed a strong likelihood that they would prove that failure to recognize their marriage for purposes of the death certificate would violate equal protection.[305] (Although Arthur died after receiving preliminary injunctive relief,[306] an amended complaint added a funeral director bringing claims on behalf of same-sex couples, and the district court rejected the government's attempt to have the case dismissed after Arthur's death.[307])

Unlike the federal government, state governments historically

299. Obergefell v. Kasich, No. 1:13-CV-501, 2013 WL 3814262, at *3 (S.D. Ohio July 22, 2013).

300. Verified Complaint for Temporary Restraining Order and Declaratory and Injunctive Relief, Obergefell v. Kasich, No. 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 19, 2013), *available at* http://www.scribd.com/doc/155109542/1-13-cv-00501-1.

301. *See id.* at 2 (characterizing Arthur as a "hospice patient" "suffer[ing] from debilitating ALS disease"); *id.* at 6 (noting that "John is likely to die soon").

302. *Id.* at 6.

303. Complaint, Griego v. Oliver, No. D-202-CV-201302757 (D. N.M. Mar. 21, 2013), *available at* https://www.aclu.org/lgbt-rights/griego-v-oliver; *see also* Second Amended Complaint, Griego v. Oliver, No. D-202-CV-201302757 (D. N.M. Aug. 21, 2013).

304. Complaint, Whitewood v. Corbett, No.13-1861-JE, (M.D. Pa. July 9, 2013); *see also ACLU Seeks Freedom to Marry for Pennsylvania Couples*, ACLU (July 9, 2013), https://www.aclu.org/lgbt-rights/aclu-seeks-freedom-marry-pennsylvania-couples. *Cf.* Complaint, Palladino v. Corbett, No. 2:13-cv-5641-MAM (E.D. Pa. Sept. 26, 2013), *available at* http://www.clearinghouse.net/chDocs/public/PB-PA-0013-0001.pdf (same-sex couple's interstate recognition suit filed by private counsel).

305. Obergefell v. Kasich, No. 1:13-CV-501, 2013 WL 3814262, at *4–5, *7 (S.D. Ohio July 22, 2013).

306. Julie Zimmerman, *John Arthur, Who Challenged Same-Sex Marriage Ban, Has Died*, CINCINATTI.COM (Oct. 22, 2013), http://news.cincinnati.com/article/20131022/NEWS0104/310220031/.

307. Obergefell v. Wymyslo, 2013 WL 5934007 (S.D. Ohio Nov. 1, 2013).

regulated marriage and decided, subject to constitutional restrictions, which marriages from other jurisdictions to recognize.[308] Therefore, the Ohio court could have distinguished *Windsor* on that basis. Instead, the judge concluded that Ohio's action was in its own way unprecedented, much as the federal marriage exclusion in DOMA was unprecedented.[309] Historically, Ohio treated as valid any marriages that were valid where entered, even if Ohio would not itself let such a couple marry.[310] Thus, Ohio will recognize a different-sex marriage of a minor[311] or of first cousins.[312] Apparently the only couples whose validly entered marriages it will categorically not recognize are same-sex couples.[313] As with DOMA in *Windsor*, the court here said that the only purpose such discriminatory government action served was to impose inequality and make gay people unequal under law, an impermissible purpose, and it was therefore probably unconstitutional.[314]

This reasoning will not be persuasive to everyone. In his *Windsor* dissent, Chief Justice Roberts saw nothing suspicious in Congress's generally accepting the validity of marriages approved by states—even where states adopted different eligibility criteria—but carving out an exception to this recognition where the sex of the parties to a marriage was not to Congress's liking:

> [N]one of those prior state-by-state variations [accepted by Congress] had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." That the Federal Government treated this *fundamental* question differently than it treated variations over consanguinity or minimum

308. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2691 (2013); *Obergefell*, 2013 WL 3814262, at *5.

309. *See Obergefell*, 2013 WL 3814262, at *4–*6.

310. *Id.* at *5–*6.

311. *Id.* at *5.

312. *Id.*

313. *See, e.g.*, *id.* at *4–*5; State Defendants' Response in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, *Obergefell*, 2013 WL 3814262 (No. 1:13-CV-501), *available at* http://www.buzzfeed.com/chrisgeidner/ohio-officials-ordered-to-recognize-gay-couples-marriage (not identifying any class of marriages validly entered in other jurisdictions categorically denied recognition in Ohio other than those of same-sex couples).

314. *Obergefell*, 2013 WL 3814262, at *6, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/Judge-Black-ruling-on-marriage-7-22.pdf.

age is hardly surprising . . . .[315]

Likewise, the *National Review* published commentary on the *Obergefell* ruling in which Ed Whelan jumped from *Windsor*'s recognition that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"[316] to a supposed corollary "that a state, in determining which out-of-state marriages to recognize, has broad authority to regard some components of marriage as essential and others as incidental[,]"[317] and then to the conclusion that "[t]here is . . . no inconsistency between Ohio's general practice of regarding age of consent and degrees of consanguinity as (within certain bounds) incidental and its view that the male-female component of marriage is essential."[318] And absent any treatment of same-sex couples he would recognize as inconsistent with Ohio's treatment of other couples, Whelan presumably saw nothing suspicious about the state's specifically targeted denial of recognition of same-sex couples' marriages.

Even some supporters of marriage equality have been critical of the district court's reasoning in *Obergefell*. Steve Sanders suggested that "[t]he opinion relied on a reading of [*Windsor*] that was probably too simplistic" and criticized the judge for reasoning from "a few soundbites from *Windsor* (taken out of the federalism context Justice Kennedy was careful to provide)."[319] Yet, unless one buys into an argument like Whelan's that marriages of same-sex couples somehow differ "essential[ly]" from marriages of different-sex couples (regardless of procreative capacity or lack thereof),[320] *Obergefell*'s reasoning about the unprecedentedness of Ohio's rule of nonrecognition for same-sex couples' marriages from states that

315. United States v. Windsor, 133 S.Ct. 2675, 2696 (2013) (Roberts, J., dissenting).

316. *Id.* at 2691 (majority opinion) (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

317. Ed Whelan, *Federal-Court Ruling Against Ohio's Marriage Laws*, NAT'L REV. ONLINE, http://www.nationalreview.com/bench-memos/354422/federal-court-ruling-against-ohios-marriage-laws-ed-whelan (last visited Oct. 8, 2013).

318. *Id.*

319. Steve Sanders, *A New Front for Marriage Equality: Recognizing Same-Sex Marriages from Other States*, ACSBLOG (July 31, 2013), http://www.acslaw.org/acsblog/a-new-front-for-marriage-equality-recognizing-same-sex- marriages-from-other-states.

320. *Cf.* NeJaime, *supra* note 251, at 223, 244 (arguing that *Windsor* conceptualizes marriage in way that renders same-sex couples and different-sex couples "similarly situated").

allow them is strong. It parallels *Windsor*'s reasoning about the unprecedentedness of DOMA's rule of nonrecognition for same-sex couples' marriages from states that allow them, though of course in a different legal context.

Sanders's bigger concern seems to be *Obergefell*'s reliance on equal protection doctrine as opposed to substantive due process.[321] Sanders appeared not to like the use of equal protection here to yield a requirement that Ohio recognize a Maryland marriage of a same-sex couple, because the same analysis would likely also yield a requirement that Ohio itself allow same-sex couples to marry civilly.[322] And, following incrementalist instincts, Sanders apparently would prefer courts in the position of this one to rely on doctrines that would be limited to interstate marriage recognition, not full-blown equal freedom to marry, until such time as the Supreme Court itself blesses the right to marry for same-sex couples.[323]

Yet, even if Sanders were correct that it would be "a much deeper injury to your liberty, privacy and autonomy to have an existing marriage effectively taken away from you by a state that refuses to recognize it" than it is "to be denied the right to marry the person you choose,"[324] that would not mean that it is not *also* a constitutional violation for a state to refuse to let two loving people marry because they are of the same sex. So, it is not clear that litigation seeking recognition of a same-sex couple's marriage

321. Sanders, *supra* note 319 ("But the biggest problem, I think, is Judge Black's use of equal protection as the basis for the decision."); *id.* ("I would locate constitutional protection for an existing marriage in substantive and procedural due process, not equal protection.").

322. *Id.* ("If Judge Black is correct . . . , then it is hard to see why it isn't just as much of a problem for Ohio to refuse to license same-sex marriages on equal terms with heterosexual unions.").

323. *Id.* ("[U]ntil the Supreme Court resolves the question of gay marriage for the whole country, there are compelling reasons to distinguish between a right to get married and a separate right to remain married.").

324. *Id.* I am far from convinced that State B's refusal to recognize a marriage from State A effectively takes away a couple's marriage. State A still recognizes it, as do marriage equality states, as does the federal government and presumably the other jurisdictions in the world that have embraced marriage equality (all of which also calls into question Sanders's assessment of comparative badness). Granted, State B would not be treating the couple as married, which would have untoward consequences for the couple. Yet it is not self-evident that State A can with an administrative act such as marrying someone confer upon a couple a right to particular legal treatment by State B in the wide range of circumstances to which civil marriage may be legally married. For an examination of such concerns in the different context of state decisions about what sex a person is, see generally David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51 (2011).

celebrated in another state ought to eschew constitutional doctrines that could yield a right to marry. Indeed, even Sanders's full law journal article on the subject concludes that at least if one accepts his due process liberty interest in having one's marriage recognized (which recognition he takes as necessary for one to "remain married"), "a state that gives recognition to heterosexual marriages but denies it to same-sex marriages ends up with an equal protection problem."[325] That is what *Obergefell* concludes, and it is an eminently reasonable conclusion, consistent with, if not dictated by, *Windsor*.

D. Windsor *and State Marriage Bans*

Yet another marriage-related issue not expressly resolved by *Windsor*, and perhaps the biggest,[326] is whether it is constitutional for a state to refuse to let same-sex couples civilly marry in the first instance. *Windsor* was about whether the federal government must recognize marriages of same-sex couples that states had chosen to allow. Indeed, the majority opinion in *Windsor* stated that "[t]his opinion and its holding are confined to those lawful marriages."[327] Chief Justice Roberts's dissent correctly parsed the reference to "those lawful marriages" to mean that the Court's conclusion was confined to the unconstitutionality of DOMA's discrimination against same-sex couples validly married by some state (or, presumably, in a foreign jurisdiction).[328] In his view, "[t]he Court [in

325. Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1477 (2012).

326. *But see* John Culhane, *The Most Ingenious Attack on Gay Marriage Bans*, DENVER POST (Oct. 2, 2013), http://www.denverpost.com/opinion/ci_24225439/most-ingenious-attack-gay-marriage-bans (arguing that while a ruling requiring interstate recognition of a same-sex couple's marriage differs from a ruling requiring states to let same-sex couples marry, "that will soon become a distinction without a difference" because same-sex couples will be able to get married in hospitable states and then have their marriage recognized in their domicile state). Culhane's op-ed, necessarily limited in length, does not address whether a ruling requiring interstate recognition would apply to what conflict of laws doctrine has termed "evasive" marriages, where domiciliaries leave a state to marry in another specifically to avoid the restrictions on marriage in the state of domicile.

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

328. *Id.* (Roberts, J., dissenting). *Cf.* Respect for Marriage Act, H.R. 2523, 113th Cong. (2013), *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.2523: ("For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered

Windsor] does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."[329]

In contrast, Justice Scalia dismissed the *Windsor* majority's express limitation as a "bald, unreasoned disclaimer."[330] In his view, it was "easy . . . indeed . . . inevitable" that a majority on the Supreme Court would in the future conclude that not only was DOMA section 3 "motivated by [a] bare desire to harm" same-sex couples, but so too were "state laws denying same-sex couples marital status."[331] Scalia entertainingly, and perhaps helpfully from the perspective of supporters of marriage equality, provided redlining to show the modest changes to the majority opinion (in some cases, nonchange) that would demonstrate the applicability of its reasoning to the question whether state refusal to let same-sex couples marry civilly violates the Equal Protection Clause.[332] While Scalia thought that state and lower federal courts *could* distinguish *Windsor* when confronted with such constitutional claims,[333] he was confident that the Supreme Court *would not* distinguish it, but rather would extend it: "As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe [to drop]."[334]

If the other shoe drops in the future, as Justice Scalia put it,[335]

---

into and the marriage could have been entered into in a State."); S. 1236, 112th Cong. (2012).

329. *Windsor*, 133 S. Ct. at 2696 (Roberts, J., dissenting) (quoting majority opinion at 2692).

330. *Id.* at 2709 (Scalia, J., dissenting) (internal quotation marks omitted). Chief Justice Roberts specifically rejected this characterization, maintaining that "the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt." *Id.* at 2697 (Roberts, C.J., dissenting).

331. *Id.* at 2709 (Scalia, J., dissenting) (some internal quotation marks omitted).

332. *Id.* at 2709–10.

333. *Id.* at 2709.

334. *Id.* at 2710.

335. The district court in *Obergefell* believed that "'the state-law shoe' has now dropped," Obergefell v. Kasich, No. 1:13-CV-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013) (quoting Windsor, 133 S. Ct. at 2705 (Scalia, J., dissenting)), because of the case before it concerning whether the Equal Protection Clause constitutionally compelled Ohio to recognize a same-sex couple's marriage entered in Maryland. Because *Obergefell* does not in terms require Ohio to abandon the mixed-sex requirement for marriage licenses it issues, Justice Scalia might only consider it part of a shoe (laces, perhaps?), but the district court's invocation of Scalia's dissenting trope might suggest that all of these variants of marital exclusion or non-recognition—DOMA, interstate marriage non-recognition, and state laws limiting marriage to different-sex couples—implicate fundamentally similar equal protection problems. I thank Doug NeJaime for this observation.

then perhaps the "federalism noises"[336] in the Court's opinion in *Windsor* ultimately will appear not to have done much constitutional work.[337] This might be defended as an acceptable form of temporizing,[338] a way for the Supreme Court to buy time before rendering a constitutional decision condemning the exclusion of same-sex couples from civil marriage, time during which, if recent history is a guide,[339] it appears likely that an even larger majority of the people of the country will come to support marriage equality. This is unlike the Supreme Court's making up what was and has been generally regarded as a lawless rationale for avoiding reaching the constitutionality of interracial marriage bans twelve years before *Loving v. Virginia*.[340] Here, in contrast, the Court in *Windsor* provided a rationale, persuasive to the majority Justices and to me, for why section 3 of DOMA was unconstitutional. If in a future case the Supreme Court relies on equal protection, but without any "amorphous federalism" concerns, to strike down state laws excluding same-sex couples from marriage, that need not mean that the *Windsor* opinion was disingenuous. It could simply demonstrate

336. *Id.* at 2709 ("Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways.").

337. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 7, 149–55 (1980) (arguing that immutability, as distinguished from judgments about relevance or invidiousness, ultimately does not do much work in equal protection doctrine).

338. *Cf.* Cruz, *supra* note 118, at 242–43 (suggesting permissibility of potential Supreme Court temporizing regarding whether repealing same-sex couples' existing right to marry under California law was necessary for an equal protection violation because "a refusal to prejudge cases that might arise in state with different legal histories may well be an understandable impulse toward judicial restraint").

339. *Gallup Gay Marriage Poll Finds Majority of U.S. Citizens Would Support Nationwide Marriage Equality Law*, HUFFINGTON POST (July 31, 2013), http://www.huffingtonpost.com/2013/07/31/gallup-gay-marriage-poll-_n_3682884.html.

340. Naim v. Naim, 350 U.S. 985 (1956), dismissed for lack of a federal question a mandatory appeal from a state court judgment upholding Virginia's antimiscegenation law after the state court was unresponsive to an earlier Supreme Court decision, Naim v. Naim, 350 U.S. 891 (1955), that called for greater explanation of the state court's ruling. For description and critique of *Naim*, see David B. Cruz, Naim v. Naim, *in* ENCYCLOPEDIA OF CIVIL LIBERTIES (Paul Finkelman ed., 2006), *available at* http://american-civil-liberties.com/cases/4184-naim-v-naim-875-e-2nd-749-va-1955-350-us-891-1955-350-us-985-1956.html; Richard Delgado, *The Worst Supreme Court Case Ever?:* Naim v. Naim, 12 NEV. L.J. 525 (2012); Marc Spindelman, *Reorienting* Bowers v. Hardwick, 79 N.C. L. REV. 359, 446–53 (2001); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 11–12 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (characterizing Supreme Court's action in *Naim* as based "on procedural grounds that . . . are wholly without basis in the law").

that the unconstitutionality of DOMA and other marriage laws discriminating against same-sex couples was overdetermined.[341]

IV. CONCLUSION

In neither *Hollingsworth v. Perry* nor *United States v. Windsor* did the Supreme Court make any doctrinal splashes. *Perry* did extend Article III standing doctrine to hold that private parties who were not agents of the state and suffered no nonideological injury of their own lacked standing to take appeals in federal court to defend state laws they support, even if they were responsible for qualifying the initiative that made the law. The Court's precedent arguably did not squarely dictate an answer to the question whether or not initiative sponsors could, without more, be authorized by state law to defend their measures and thereby enjoy federal court standing.[342] Therefore, some extension of doctrine was necessary whatever way the Court was going to rule. But *Perry*'s holding will have limited impact. *Windsor* did hold a federal statute unconstitutional because it denied lawfully married same-sex couples equal protection, but it did not resolve the question of what tier of equal protection scrutiny applies to sexual orientation discrimination, a basic doctrinal question that the Court has left open since its first opinion addressing lesbigay people's equal protection rights almost two decades earlier in *Romer v. Evans*.[343] Nor did *Windsor* reach the question whether the fundamental constitutional right to marry extends to same-sex couples. For these reasons, it could appear to be a modest case.

Yet, we should bear in mind Justice Souter's admonition that "[n]ot every epochal case has come in epochal trappings."[344] The Supreme Court's decisions in the marriage cases of its October 2012 term paved the way for the restoration of same-sex couple's freedom

341. *Accord* Larry Tribe, *DOMA, Prop 8, and Justice Scalia's Intemperate Dissent*, SCOTUSBLOG (June 26, 2013), http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/ (concluding that, given *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court's decision in *Windsor* "if anything, . . . was over-determined, given the added federalism spin that propelled it").

342. *But see* Erwin Chemerinsky, *Prop 8 Deserved a Defense*, L.A. TIMES, June 28, 2013, http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628 (opining that *Perry* standing holding "was clearly right as a matter of constitutional law").

343. 517 U.S. 620 (1996).

344. United States v. Lopez, 514 U.S. 549, 615 (1995) (Souter, J., dissenting).

to marry in the nation's most populous state, California, home to almost one in eight people in the United States. *Windsor* also certainly contributed to the swelling wave of marriage equality litigation across the land, something unfolding at a pace almost too fast to keep up with: at least eighty-five lawsuits have been filed in thirty-two states and Puerto Rico.[345] Though looking increasingly likely, the advent of nationwide marriage equality *might* not be as inevitable as Justice Scalia's suggestion that "it is just a matter of listening and waiting"[346] for "the second, state-law shoe to be dropped later, maybe next Term."[347] But with the *Windsor* and *Perry* decisions, in conjunction with the growing support among the populace for same-sex couples' right to marry,[348] the Supreme Court has immeasurably helped this particular fight for "Equal Justice Under Law."

345. *See, e.g.*, *Pending Marriage Equality Cases*, Lambda Legal, http://www.lambdalegal.org/pending-marriage-equality-cases (last updated Aug. 1, 2014) ("In summary, there currently are 85 pending lawsuits … involving how the marriage laws of 32 states and Puerto Rico apply to same-sex couples. (The states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.) All states that do not currently allow same-sex couples to marry currently have pending lawsuits challenging that ban, or the refusal of the state to recognize marriages same-sex couples entered outside the jurisdiction, or both."); *id.* ("Marriage equality now exists in the District of Columbia and the following 19 states: CA, CT, DE, HI, IA, IL, MA, MD, ME, MN, NH, NJ, NM, NY, OR, PA, RI, VT and WA.").

346. United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

347. *Id.* at 2705.

348. *See, e.g.*, *Gallup Gay Marriage Poll Finds Majority of U.S. Citizens Would Support Nationwide Marriage Equality Law*, HUFFINGTON POST (July 31, 2013), http://www.huffingtonpost.com/2013/07/31/gallup-gay-marriage-poll-_n_3682884.html (describing several nationwide polls showing majority support for same-sex couples' equal freedom to marry).