

# Reading the Opinions—and the Tea Leaves—in *United States v. Windsor*

By Elizabeth B. Wydra\*

The Supreme Court issued a groundbreaking ruling on the final day of its 2012–2013 term, when, in *United States v. Windsor*, a five-justice majority struck down Section 3 of the Defense of Marriage Act—which excluded legally married same-sex couples from more than 1,000 federal benefits—as a violation of the Fifth Amendment.<sup>1</sup> The DOMA decision was issued exactly 10 years to the day after the Court recognized a constitutional right of privacy in the intimate relations of gay men and lesbians in *Lawrence v. Texas*,<sup>2</sup> a ruling repeatedly cited by the *Windsor* majority in upholding the constitutional rights of married same-sex couples to equal dignity and treatment.

The Court also issued a ruling in *Hollingsworth v. Perry*, dismissing the case for lack of jurisdiction after finding that the proponents of Proposition 8, which changed California’s constitution to define marriage as between a man and a woman, did not have standing to defend it on appeal.<sup>3</sup> *Perry* was a victory for advocates of marriage equality in that the Court’s dismissal allowed to stand the district court’s order striking down Prop 8 as unconstitutional under the Fourteenth Amendment, but neither the majority nor the dissent weighed in on the ultimate question of whether the Constitution bars states from excluding same-sex couples from the institution of marriage. Accordingly, the opinions in *Windsor* provide the most fertile hunting ground for clues as to the future of marriage equality in

\* Chief counsel, Constitutional Accountability Center; counsel of record for briefs submitted on behalf of CAC and the Cato Institute in *Hollingsworth v. Perry* and *United States v. Windsor*.

<sup>1</sup> 133 S. Ct. 2675 (2013).

<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> 133 S. Ct. 2652 (2013).

the high court. This article will focus on reading the opinions—and the tea leaves—of the *Windsor* case.<sup>4</sup>

## I. Case Background

Most Supreme Court cases do not have at their core a cinematic, “almost mesmerizingly romantic” love story.<sup>5</sup> But the journey that ended with Edith Windsor declaring herself “joyous” at having won everything she “asked and hoped for”<sup>6</sup> in her challenge to the DOMA provision that defined marriage for purposes of federal law as “only a legal union between one man and one woman as husband and wife”<sup>7</sup> is a moving tale of love, loss, and history-making.

Edith “Edie” Windsor and her late spouse, Dr. Thea Spyer, fell in love in the early 1960s.<sup>8</sup> In pre-Stonewall New York City, after a failed marriage to a man, Ms. Windsor in desperation called an old friend and said, “If you know where the lesbians go please take me.”<sup>9</sup> That night, in a Greenwich Village restaurant, Edie met Thea, and the two danced all night until Edie got a hole in her stocking.<sup>10</sup> In 1967, they moved in together and became engaged. Spyer, a clinical psychologist, proposed to Windsor with a diamond brooch instead of a ring, to avoid questions from Windsor’s colleagues at IBM about the identity of her “fiancé.” Despite having attained the highest technical

<sup>4</sup> There were, of course, also substantial and interesting questions regarding standing and jurisdiction in both *Windsor* and *Perry*, but these issues will not be addressed by this article.

<sup>5</sup> Amy Davidson, Will the Supreme Court Recognize Edith Windsor?, *New Yorker*, Mar. 21, 2013, <http://www.newyorker.com/online/blogs/closetread/2013/03/edith-windsor-doma-supreme-court-ginsburg-scalia.html>. In fact, a film has been made about the couple’s story. *Edie and Thea: A Very Long Engagement* (2009), trailer available at <http://www.youtube.com/watch?v=IL83YI4-9Vc>.

<sup>6</sup> Matthew Perlman, et al., Edith Windsor, Center of Supreme Court’s DOMA Ruling, Wins “Everything We Asked and Hoped for,” *N.Y. Daily News*, Jun. 26, 2013, available at <http://www.nydailynews.com/new-york/edith-windsor-wins-hoped-article-1.1383602>.

<sup>7</sup> Defense of Marriage Act, 110 Stat. 2419, Section 3 (1996) (amending the Dictionary Act, 1 U.S.C. § 7).

<sup>8</sup> Brief on the Merits for Respondent Edith Schlain Windsor at 1, *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307) (“Windsor Brief”).

<sup>9</sup> Adam Gabbatt, Edith Windsor and Thea Spyer: “A Love Affair That Just Kept On and On and On,” *Guardian*, Jun. 26, 2013, available at <http://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma>.

<sup>10</sup> *Id.*

rank as a computer programmer at IBM, Windsor did not feel able to disclose her full identity at work.<sup>11</sup>

Spyer was diagnosed with multiple sclerosis in 1977, eventually suffering paralysis, and Windsor quit her job to care for Spyer.<sup>12</sup> With Spyer's health continuing to decline, the couple flew to Canada in May 2007 to get married.<sup>13</sup> (In 1993, the couple had registered as domestic partners when New York City law changed to recognize civil unions.<sup>14</sup>) Just as the first night they met, Windsor and Spyer danced together at their wedding, with Windsor on the arm of her wife's wheelchair.<sup>15</sup> Windsor has said that people asked her about the couple's decision to get married, "What could be different? You've lived together for over 40 years—what could be different about marriage? . . . And it turned out that marriage could be different."<sup>16</sup>

Both in their late 70s, Windsor and Spyer spent their last two years together as a married couple. In February 2009, Spyer died, leaving her estate to her spouse.<sup>17</sup> Because of DOMA, however, Windsor was not recognized as Spyer's spouse under federal law and thus could not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse."<sup>18</sup> Windsor thus paid \$363,053 in estate taxes and filed a refund suit in the U.S. District Court for the Southern District of New York—the federal trial court in Manhattan—alleging that DOMA violated the Constitution's guarantee of equal treatment under the law. Windsor prevailed in the district court as well as in the U.S. Court of Appeals for the Second Circuit.<sup>19</sup>

<sup>11</sup> *Id.* Windsor Brief at 2–3.

<sup>12</sup> Richard Wolf, *Gay Marriage Case: A Long Time Coming for Edie Windsor*, USA Today, Dec. 8, 2012, available at <http://www.usatoday.com/story/news/nation/2012/12/07/edie-windsor-gay-marriage-supreme-court/1737387>.

<sup>13</sup> Windsor, 133 S. Ct. at 2683.

<sup>14</sup> *Id.*

<sup>15</sup> Wolf, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> Windsor, 133 S. Ct. at 2683.

<sup>18</sup> 26 U.S.C. § 2056(a) (1997).

<sup>19</sup> Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y. 2012), *aff'd* 699 F.3d 169 (2d Cir. 2012).

## II. The Statute

In 1996, Congress enacted the Defense of Marriage Act, with two operative sections: Section 2, which purports to authorize states to refuse to recognize lawful same-sex marriages performed in other states,<sup>20</sup> and Section 3, which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>21</sup>

Section 3, challenged in the *Windsor* case, did not prohibit states from recognizing same-sex couples' marriages, but it did control more than 1,000 federal laws that relate to marital or spousal status,<sup>22</sup> including "laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits."<sup>23</sup> Couples like *Windsor* and *Spyer* found themselves in marriages that were recognized by the state in which they lived, but rejected by the federal government. Because of DOMA's Section 3, legally married same-sex couples could not file joint federal tax returns. They were denied some privileges of intellectual property. Federal employees could not share health insurance and other medical benefits with a same-sex spouse, and gay and lesbian couples were denied the protections of the Family and Medical Leave Act. Section 3 even denied a surviving gay or lesbian spouse notification of his or her military spouse's death in the line of duty, and prevented married same-sex couples from being buried together in veterans' cemeteries.<sup>24</sup> As the *Windsor* Court explained, "by its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound."<sup>25</sup>

<sup>20</sup> 28 U.S.C. § 1738C (1996).

<sup>21</sup> 1 U.S.C. § 7 (1996).

<sup>22</sup> *Windsor*, 133 S.Ct. at 2688.

<sup>23</sup> *Windsor*, 133 S. Ct. at 2688, 2694.

<sup>24</sup> *Windsor* Brief, at 6–7; see also *Windsor*, 133 S. Ct. at 2694.

<sup>25</sup> *Windsor*, 133 S. Ct. at 2694.

In passing DOMA, the report from the House of Representatives concluded that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . The effort to redefine marriage to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.”<sup>26</sup> The House Report explained that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>27</sup>

### **III. The Opinions**

#### *A. The Majority Opinion*

The majority opinion in *Windsor*, authored by Justice Anthony Kennedy and joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, does not mince words: “DOMA writes inequality into the entire United States Code.”<sup>28</sup> The “principal effect” of the statute “is to identify a subset of state-sanctioned marriages and make them unequal. . . . DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”<sup>29</sup> According to the *Windsor* majority, DOMA’s intent to interfere “with the equal dignity of same-sex marriages” was “its essence.”<sup>30</sup> Because the “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,” the statute was struck down as violating “basic due process and equal protection principles applicable to the Federal Government.”<sup>31</sup>

In analyzing the majority opinion and its conclusion, it helps to ask several key questions. First, and most important, does the conclusion square with the Constitution’s text and history? What does it portend for advocates both for and against recognition of same-sex

<sup>26</sup> H.R. Rep. No. 104-664, at 12–13 (1996).

<sup>27</sup> *Id.* at 16; see *Windsor*, 133 S. Ct. at 2693.

<sup>28</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2693 (citation omitted).

<sup>31</sup> *Id.*

couples' marital status in the states? Does the majority opinion recognize that gay men and lesbians have a constitutional right to marry the person of their own choosing?

### 1. *The Windsor Ruling and the Constitution's Text and History*

Although Justice Antonin Scalia accused the majority of employing “legalistic argle-bargle” in his dissent,<sup>32</sup> the majority's conclusion is supported by constitutional text and history.<sup>33</sup> The Due Process Clause of the Fifth Amendment (which was the operative constitutional provision in *Windsor* because DOMA is a federal enactment) and the Equal Protection Clause of the Fourteenth Amendment (which was passed in the wake of the Civil War to protect against state and local government action) guarantee to all persons the equal protection of the laws. While, of course, the text of the Fifth Amendment “is not as explicit a guarantee of equal treatment as the Fourteenth Amendment,” the Court has repeatedly held that “the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.”<sup>34</sup> Indeed, the *Windsor* majority explicitly braided together the Fifth Amendment guarantee of liberty with the Fourteenth Amendment's express protection of equality, noting that “[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way [DOMA] 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.”<sup>35</sup>

The text of the Equal Protection Clause of the Fourteenth Amendment is sweeping and universal: “No State shall . . . deny to *any person*

<sup>32</sup> *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

<sup>33</sup> See Brief of the Cato Institute and Constitutional Accountability Center as Amici Curiae in Support of Respondents, *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307) (“Cato-CAC Brief in *Windsor*”).

<sup>34</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213, 231–32 (1995); see also *Lyng v. Castillo*, 477 U.S. 635, 636 n.2 (1986) (“The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.”) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1976) (“This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”).

<sup>35</sup> *Windsor*, 133 S. Ct. at 2695.

within its jurisdiction the equal protection of the laws.”<sup>36</sup> While the amendment was written and ratified in the aftermath of the Civil War and the end of slavery, and “in some initial drafts [it] was written to prohibit discrimination against ‘persons because of race, color or previous condition of servitude,’ the Amendment submitted for consideration and later ratified contained more comprehensive terms.”<sup>37</sup> It protects *all* persons. It secures the same rights and same protection under the law for all men and women, of any race, whether young or old, citizen or alien, gay or straight.<sup>38</sup> No person, under the Fourteenth Amendment’s text, may be consigned to the status of a pariah, “a stranger to [the State’s] laws.”<sup>39</sup> The Fourteenth Amendment’s sweeping guarantee of equal legal protection means, first and foremost, equality under the law and equality of rights for all persons. Under the plain text, this sweeping guarantee applies to gay men and lesbians, as the *Windsor* majority assumes.

The original meaning of the Equal Protection Clause confirms what the text makes clear: that equality of rights and equality under the law apply broadly to any and all persons within the United States. History shows that the original meaning of the Equal Protection Clause secures to all persons “‘the protection of equal laws,’”<sup>40</sup> prohibiting arbitrary and invidious discrimination and securing equal rights for all classes and groups of persons. The Fourteenth Amendment’s framers’ own explanations of the Equal Protection Clause during congressional debates, press coverage of the proposal

<sup>36</sup> U.S. Const. amend. XIV, § 1 (emphasis added).

<sup>37</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring).

<sup>38</sup> See *Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) (“These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality.”); *Civil Rights Cases*, 109 U.S. 3, 31 (1883) (“The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.”). See generally Brief of the Cato Institute and Constitutional Accountability Center as Amici Curiae in Support of Respondents at 4–10, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“Cato-CAC Brief in Perry”).

<sup>39</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>40</sup> *Id.* at 634 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

and ratification process, and the Supreme Court's earliest decisions interpreting the clause all affirm this basic understanding.<sup>41</sup>

Introducing the amendment in the Senate, Jacob Howard explained that the Equal Protection Clause “establishes equality before the law, and . . . gives to the humblest, the poorest, and most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”<sup>42</sup> The guarantee of equal protection, he went on, “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.”<sup>43</sup> Senator Howard's reading of the Fourteenth Amendment—never once controverted during the debates and widely reported “in major newspapers across the country”<sup>44</sup>—demonstrated that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation,”<sup>45</sup> ensuring “the law's neutrality where the rights of persons are at stake.”<sup>46</sup> Emphasizing this point in an article published shortly after Congress sent the Fourteenth Amendment to the states for ratification, the *Cincinnati Commercial* explained that the Fourteenth Amendment wrote into the Constitution “the great Democratic principle of equality before the law,” invalidating all “legislation hostile to any class.”<sup>47</sup> “With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens.”<sup>48</sup> Press coverage emphasized that the amendment “put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic,”<sup>49</sup> placing all “throughout the land upon the same footing of equality before the law, in order to prevent unequal

<sup>41</sup> See Cato-CAC Brief in Perry, at 10–14.

<sup>42</sup> Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

<sup>43</sup> *Id.* at 2961 (Sen. Poland) (noting that the Equal Protection Clause aimed to “uproot and destroy . . . partial State legislation”).

<sup>44</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3074 (2010) (Thomas, J., concurring).

<sup>45</sup> *Plyler v. Doe*, 457 U.S. 202, 213 (1982).

<sup>46</sup> *Romer*, 517 U.S. at 623.

<sup>47</sup> *Cincinnati Commercial*, Jun. 21, 1866, at 4.

<sup>48</sup> *Id.*

<sup>49</sup> *Chicago Tribune*, Aug. 2, 1866, at 2.



legislation.”<sup>50</sup> The original meaning of equality, as it was written into the Constitution, was neutrality under the law for all persons—it was broad and inclusive, and there is no reason to exclude gay men and lesbians from this promise of equality.

The *Windsor* majority opinion is in line with the constitutional text and history of the Fourteenth Amendment, which provides the rubric or analog under which the Supreme Court has applied an equal protection component of the Fifth Amendment. Echoing Justice Kennedy’s opinion in *Romer*, which invalidated a “status-based enactment” that denied equal rights to gay men and lesbians, “not to further a proper legislative end but to make them unequal to everyone else,”<sup>51</sup> the *Windsor* majority struck down DOMA Section 3 because the “avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma”<sup>52</sup> on married same-sex couples. Noting that DOMA placed “same-sex couples in an unstable position of being in a second-tier marriage,” the majority concludes that this “differentiation demeans the couple, whose moral and sexual choices the Constitution protects, [citing *Lawrence*], and whose relationship the State has sought to dignify,” and “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>53</sup>

## 2. *The Windsor Ruling and the Future of State Marriage Laws*

The majority’s conclusion that Section 3 of DOMA violates constitutional guarantees of equal protection and due process, coupled with an apparent compassion for the real and dignitary harm discriminatory marriage laws visit upon gay and lesbian couples and their families, is encouraging to many advocates of marriage equality. But Justice Kennedy’s opinion gives hope to advocates on both sides of the issue.

For those who wish to maintain state laws excluding gay and lesbian couples from the institution of marriage, the threads of federalism running through the majority opinion might be cause for optimism. Justice Kennedy repeatedly refers to the democratic workings

<sup>50</sup> Cincinnati Commercial, Aug. 20, 1866, at 2.

<sup>51</sup> *Romer*, 517 U.S. at 635.

<sup>52</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>53</sup> *Id.* at 2694.

of state law in recognizing marriage equality. Describing the history of marriage law in New York, he specifically highlights the “state-wide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage.”<sup>54</sup> The majority opinion gestures to the inherent dignity of gay and lesbian couples’ relationships, noting that “[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring’”<sup>55</sup>—but the opinion appears to rely on New York’s decision “to give further protection and dignity to that bond,”<sup>56</sup> rather than any inherent right of the couple to have their bond recognized. The majority characterizes New York’s marriage-equality law as a reflection of “the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality,”<sup>57</sup> which could be at odds with an argument that same-sex couples have a right, not subject to the whims of a democratic majority, to have their bond recognized by state marriage laws.

But a close reading of the majority opinion suggests that it is not really about federalism (regardless of what Chief Justice John Roberts and Justice Samuel Alito say in their dissents, discussed below). First, the majority rejects the argument that the federal government has no power whatsoever to “make determinations that bear on marital rights and privileges.”<sup>58</sup> The Court cites several examples of “congressional statutes which affect marriages and family status” when relevant to other federal policies and goals, noting that “when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt.”<sup>59</sup> Congress may constitutionally intrude, in at least some contexts, on the state’s traditional regulation of marriage.

Second, to the extent DOMA’s intrusion into the state realm of marriage regulation is relevant to the majority’s analysis, it is to

<sup>54</sup> *Id.* at 2689.

<sup>55</sup> *Id.* at 2692 (quoting *Lawrence*, 539 U.S. 557, 567).

<sup>56</sup> *Id.* at 2692.

<sup>57</sup> *Id.* at 2692–93.

<sup>58</sup> *Id.* at 2690.

<sup>59</sup> *Id.*

demonstrate “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage.”<sup>60</sup> As Justice Kennedy previously wrote in *Romer*, “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>61</sup> Making it clear that the ruling is not about federalism, the *Windsor* majority states that “it is unnecessary to decide whether [DOMA’s] federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”<sup>62</sup>

Perhaps most important for advocates of marriage equality, the majority’s opinion recognizes that the “States’ interest in defining and regulating the marital relation” is “subject to constitutional guarantees.”<sup>63</sup> Citing *Loving v. Virginia*, the case that struck down bans on interracial marriage as unconstitutional, Justice Kennedy affirms that “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”<sup>64</sup>

Moreover, the point that “marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term”<sup>65</sup> is not likely to be the end of the inquiry for the justices in the *Windsor* majority. Inequality rooted in “tradition” is as much a blot on the Constitution’s guarantee of equal protection as novel forms of discrimination. As Justice Kennedy wrote in *Lawrence*, “the fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>66</sup> The infamous *Plessy v. Ferguson* upheld the constitutionality of segregation based on “the

<sup>60</sup> *Id.* at 2693.

<sup>61</sup> *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)); see also *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (observing that sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s actions) (quoting Judge Kavanaugh’s dissent, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (2008)).

<sup>62</sup> *Windsor*, 133 S. Ct. at 2692

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>65</sup> *Id.* at 2689.

<sup>66</sup> *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

established usages, customs, and traditions of the people,"<sup>67</sup> whereas *Lawrence* explained that "neither history nor tradition"<sup>68</sup> could save an otherwise unconstitutional law.

If pressed, Justice Kennedy would likely have a difficult time justifying state authority to discriminate against gay and lesbian couples when it comes to marriage. As the *Windsor* majority opinion notes, states do enjoy traditional authority to regulate marriage, but this authority must be used in compliance with the Constitution. Indeed, the Constitution consciously modifies traditional or usual governmental regulatory authority to ensure that it is not used for impermissible ends. It was commonly understood at the time the Fourteenth Amendment was ratified that the Equal Protection Clause "was intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people."<sup>69</sup> The Court's precedents, the most relevant of which were authored by Justice Kennedy, firmly establish that the Equal Protection Clause requires "neutrality where the rights of persons are at stake," forbidding states from "singling out a certain class of citizens for disfavored legal status or general hardships."<sup>70</sup> Under precedents such as *Romer*, settled equal protection principles apply with full force to legislation and state constitutional amendments that discriminate based on sex and sexual orientation. No matter how committed to federalism Justice Kennedy (and any other members of the Court) may be, under the Equal Protection Clause, states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society,"<sup>71</sup> just "to make them unequal to everyone else."<sup>72</sup>

### 3. *The Windsor Ruling and a Right to Marriage Equality*

All of this begs the question to which everyone reading *Windsor* is searching for an answer: do gay men and lesbians have a constitutional right to marry the person of their own choosing? The *Windsor* ruling does not decide this question, as the majority makes sure to

<sup>67</sup> 163 U.S. 537, 550–51 (1896).

<sup>68</sup> 539 U.S. at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

<sup>69</sup> Cong. Globe, 42nd Cong., 2nd Sess. 847 (1872) (Sen. Morton).

<sup>70</sup> *Romer*, 517 U.S. at 623, 633.

<sup>71</sup> *Id.* at 631.

<sup>72</sup> *Id.* at 635.

disclaim.<sup>73</sup> But the opinion, the Constitution's text and history, and other precedents suggest an answer.

Justice Kennedy's previous gay rights rulings have recognized that, for same-sex and heterosexual couples alike, the "State cannot demean their existence or control their destiny."<sup>74</sup> In *Lawrence*, the Court affirmed that "our laws and traditions afford constitutional protection to personal decisions relating to marriage" because of "the respect the Constitution demands for the autonomy of the person in making these choices."<sup>75</sup> "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."<sup>76</sup>

The Constitution protects a right for gay and lesbian couples to marry against state infringement, as evidenced by the text and original meaning of the Fourteenth Amendment, which would be the operative constitutional provision in any challenge to state marriage laws. The framers of the Fourteenth Amendment recognized the right to marry as a basic civil right of all persons, "one of the vital personal rights essential to the orderly pursuit of happiness."<sup>77</sup> These rights were intended to apply equally to all persons.<sup>78</sup> The equality of rights secured by the Fourteenth Amendment's Equal Protection Clause thus includes the equal right to marry the person of one's choice, "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."<sup>79</sup>

The amendment's framers recognized the right to marry the person of one's choosing as a crucial component of freedom and liberty—a right that had long been denied under the institution of slavery. Slaves did not have the right to marry, and slaves in loving relationships outside the protection of the law were time and again separated when one slave was sold to a distant buyer.<sup>80</sup> As Sena-

<sup>73</sup> *Windsor*, 133 S. Ct. at 2696.

<sup>74</sup> *Lawrence*, 539 U.S. at 578.

<sup>75</sup> *Id.* at 574.

<sup>76</sup> *Id.*

<sup>77</sup> *Loving*, 388 U.S. at 12 (discussing how the Fourteenth Amendment's Due Process Clause protects substantive, fundamental rights such as marriage).

<sup>78</sup> See generally Cato-CAC Brief in *Perry*.

<sup>79</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

<sup>80</sup> See Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750–1925*, at 318 (1976) ("[O]ne in six (or seven) slave marriages were ended by force or sale").

tor Jacob Howard explained, a slave “had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.”<sup>81</sup>

Indeed, few rights were more precious to the newly freed slaves than the right to marry. With the abolition of slavery, “ex-slaves themselves pressed for ceremonies and legal registrations that at once celebrated the new security of black family life and brought their most intimate ties into conformity with the standards of freedom.”<sup>82</sup> “[M]ass wedding ceremonies involving as many as seventy couples at a time became a common sight in the postwar South.”<sup>83</sup> The right to marry “by the authority and protection of Law,” confirmed that the newly freed slaves, finally, were “beginning to be regarded and treated as human beings.”<sup>84</sup>

Justice Kennedy’s opinions on the rights of gay men and lesbians appear to understand that, just as the rights to marry and create a family were basic elements of liberty that had been wrongly withheld from African Americans, discriminating against someone because of whom he or she loves, desires, and wishes to form a family with, denies gay men and lesbians “their dignity as free persons.”<sup>85</sup> Although Kennedy’s *Windsor* opinion provides a disclaimer at the end that the “opinion and its holding are confined to those lawful marriages”<sup>86</sup> already recognized by the states—and not, presumably, to same-sex couples who would like to marry but are prevented from doing so by discriminatory state laws—the language preceding that caveat, along with the Constitution’s text and history, and other Supreme Court precedent suggest that the Court might be amenable to recognizing that gay and lesbian couples have a constitutional right to marry.

<sup>81</sup> Cong. Globe, 39th Cong., 1st Sess. 504 (1866).

<sup>82</sup> II Freedom: A Documentary History of Emancipation, 1861–1867, at 660 (I. Berlin et al. eds. 1982).

<sup>83</sup> Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 240 (1979).

<sup>84</sup> II Freedom, *supra* note 82, at 604.

<sup>85</sup> *Lawrence*, 539 U.S. at 567.

<sup>86</sup> *Windsor*, 133 S. Ct. at 2696.

*B. The Dissenting Opinions*

Despite the majority's disclaimer about the reach of its ruling, the implications of the *Windsor* opinion are hotly contested by the dissenting justices. Each of the three dissents takes the majority opinion to mean something quite different.

Chief Justice Roberts, perhaps unsurprisingly given his penchant for judicial minimalism, attempts to portray Justice Kennedy's opinion as very narrow, with no implication whatsoever for "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."<sup>87</sup> The chief justice sees the majority's defense of constitutional equal protection and due process rights as nothing more than a federalism ruling, declaring "it is undeniable that [the majority's] judgment is based on federalism."<sup>88</sup> Although he tries to spin the majority's ruling as accepting that state definitions can constitutionally vary from state to state,<sup>89</sup> the opinion's language is in fact much more ambiguous, as discussed above.

Rather than pretending that the majority had accepted a federalism argument, Justice Alito penned a separate dissent to make the argument himself that the Constitution does not enshrine marriage equality, but rather "leaves the choice to the people, acting through their elected representatives."<sup>90</sup> According to Justice Alito, there is no constitutional right to marry a person of the same sex.<sup>91</sup> And the equal protection framework "is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage."<sup>92</sup> (Of course, the Court applied the Equal Protection and Due Process Clauses to the claim for marriage rights in *Loving v. Virginia*—against a defense that Virginia's law prohibiting couples of different races from marrying was "traditional" and had roots back to the colonial period—but Alito does not cite that precedent even once in his dissent.) In the end, even as he remains skeptical that

<sup>87</sup> *Id.* at 2696 (2013) (Roberts, C.J., dissenting) (quoting majority op. at 2692).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2697.

<sup>90</sup> *Id.* at 2711 (2013) (Alito, J., dissenting). See also *id.* at 2720 ("I hope that the Court will ultimately permit the people of each State to decide this question for themselves.").

<sup>91</sup> *Id.* at 2716.

<sup>92</sup> *Id.*

federalism is in fact at the core of the majority opinion, Justice Alito is willing to go along with Chief Justice Roberts's gloss on the majority's ruling, declaring that "[t]o the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree."<sup>93</sup>

Justice Scalia, however, won't be "fool[ed] . . . into thinking that this is a federalism opinion."<sup>94</sup> Cutting right to the chase, he argues that the majority discusses the states' traditional power to regulate marriage because it "needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term)."<sup>95</sup>

Justice Scalia doesn't view the majority's opinion as a true equal protection ruling either, since the majority does not settle upon a tier of scrutiny for review—that is, "whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."<sup>96</sup> But he should not be terribly surprised that the majority opinion does not rehearse the standard tiers-of-scrutiny inquiry: Justice Kennedy, particularly in his *Romer* opinion, has followed a line of reasoning in equal protection jurisprudence, associated with Justice John Paul Stevens, that emphasizes the clause's text and its broad protection rather than formalistic tiers of scrutiny.<sup>97</sup> As Justice Stevens explained: "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."<sup>98</sup> Although *Romer* technically applied rational basis review, the *Romer* Court did not find that it needed to apply any form of heightened

<sup>93</sup> *Id.* at 2720.

<sup>94</sup> *Id.* at 2705 (Scalia, J., dissenting).

<sup>95</sup> *Id.* at 2705.

<sup>96</sup> *Id.* at 2706.

<sup>97</sup> See David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment*, at 40, available at <http://theconstitution.org/think-tank/narrative/perfecting-declaration-text-and-history-equal-protection-clause-fourteenth>.

<sup>98</sup> *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).



scrutiny because Colorado's law discriminating against gay men and lesbians violated the most basic precepts of equal protection.<sup>99</sup>

Unable to place the *Windsor* majority's opinion into a doctrinal box, Justice Scalia concludes that "[t]he sum of all the Court's nonspecific hand-waving is that [DOMA] is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a 'bare desire to harm' couples in same-sex marriages."<sup>100</sup> As he has asserted previously—and vigorously—in his *Lawrence* dissent,<sup>101</sup> Justice Scalia believes that the Constitution allows "the government to enforce traditional moral and sexual norms."<sup>102</sup> So the fact that DOMA reflected moral disapproval of gay and lesbian relationships is of no consequence to Justice Scalia. Even so, he finds "there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation," for example, avoidance of choice-of-law issues.<sup>103</sup>

What Justice Scalia really thinks is going on in the majority's opinion is the laying of a foundation for a ruling striking down state denials of marital status to same-sex couples:

It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it.<sup>104</sup>

He claims that the majority's view of state marriage laws that discriminate against gay and lesbian couples is "beyond mistaking."<sup>105</sup> To demonstrate, Justice Scalia's dissent takes several passages from the majority opinion about DOMA's unconstitutional effect and pur-

<sup>99</sup> See Gans, *supra* note 97, at 37–39.

<sup>100</sup> *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (quoting the majority op., at 2693).

<sup>101</sup> *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

<sup>102</sup> *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2709.

<sup>105</sup> *Id.*

pose with respect to state-sanctioned marriages of same-sex couples and substitutes “state law” for DOMA, and “constitutionally protected sexual relationships, see *Lawrence*,” for state-sanctioned marriages.<sup>106</sup> He believes it is just a matter of “waiting for the other shoe” to drop.<sup>107</sup>

#### IV. What Comes Next?

Justice Scalia did not have to wait very long to hear “the other shoe” drop. On July 22, 2013, less than a month after the Supreme Court’s ruling, a federal district court in Ohio relied on *Windsor* to conclude that the state of Ohio violates the Equal Protection Clause by refusing to recognize the marriages of same-sex couples lawfully solemnized in other states.<sup>108</sup> Explaining that Ohio has traditionally recognized valid out-of-state marriages even if Ohio law does not authorize such marriages—for example, marriages between first cousins or minors—Judge Timothy Black held that Ohio violated the Equal Protection Clause by refusing to recognize the same-sex plaintiffs’ lawful Maryland marriage.<sup>109</sup> Judge Black acknowledged that “the holding in *Windsor* is ostensibly limited to a finding that the federal government cannot refuse to recognize state laws authorizing same sex marriage,” but said that, “just as Justice Scalia predicted in his animated dissent, by virtue of the present lawsuit, ‘the state-law shoe’ has now dropped in Ohio.”<sup>110</sup>

The Ohio ruling, whether it holds up on appeal or not, is interesting because it gives a clue as to how courts will interpret *Windsor*. Rather than viewing it as a ruling about federalism, the Ohio court explained that “[i]n *Windsor*, the Supreme Court applied the principle of equal protection.”<sup>111</sup> Applying this same principle, the court determined that Ohio unconstitutionally created “two tiers of couples” by discriminating against same-sex married couples, and

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2710.

<sup>108</sup> *Obergefell v. Kasich*, Case No. 1:13-cv-501 (S.D. Ohio, July 22, 2013) (Order Granting Plaintiffs’ Motion for a Temporary Restraining Order).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 6.

concluded that “[t]his lack of equal protection of law is fatal.”<sup>112</sup> The district court explained that the “purpose served by [Ohio’s law] treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor* and *Romer*: ‘to impose inequality’ and to make gay citizens unequal under the law.”<sup>113</sup>

Although the Ohio ruling is slightly narrower than the ultimate question of whether states may prohibit same-sex couples from marrying under their own laws—the Ohio case, like *Windsor*, is about a government treating same-sex couples’ lawful marriages differently from the way it treats opposite-sex couples’ lawful marriages—lawsuits pressing the more fundamental claim are moving forward in at least 10 states,<sup>114</sup> and it is likely this issue will find its way back before the Supreme Court.

But some Americans—on both sides of the issue—would rather see the marriage-equality debate settled through democratic processes, not the courts. As Justice Scalia recounts in his *Windsor* dissent, the political process has handed wins and losses to both sides of the fight.<sup>115</sup> He argues that “[f]ew public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. . . . There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy.”<sup>116</sup> Justice Scalia’s preferred method of resolution is to “let the People decide.”<sup>117</sup>

Some marriage-equality supporters appear to agree to a certain extent, at least urging caution as lawsuits proceed.<sup>118</sup> There is concern that a new wave of lawsuits could lead to a backlash<sup>119</sup> and, as more states pass laws recognizing same-sex unions, some

<sup>112</sup> *Id.* at 8.

<sup>113</sup> *Id.* at 11.

<sup>114</sup> See, e.g., *Harris v. McDonnell*, Case No. 5:13-cv-00077-MFU (W.D. Va.) (filed Aug. 1, 2013), available at <http://www.aclu.org/files/assets/complaintwithfilinginfo.pdf>.

<sup>115</sup> *Windsor*, 133 S. Ct. at 2710–11 (Scalia, J., dissenting).

<sup>116</sup> *Id.* at 2710.

<sup>117</sup> *Id.* at 2711.

<sup>118</sup> Lila Shapiro, *Marriage Equality Lawsuits After DOMA Arise in South, Midwest, As Gay Right Groups Urge Caution*, *Huffington Post*, Jul. 31, 2013, [http://www.huffingtonpost.com/2013/07/31/marriage-lawsuits-doma\\_n\\_3679005.html](http://www.huffingtonpost.com/2013/07/31/marriage-lawsuits-doma_n_3679005.html).

<sup>119</sup> *Id.*

marriage-equality supporters have essentially said, “don’t mess with progress.”<sup>120</sup> Regardless of whether it is sound political strategy to focus on legislatively establishing marriage equality in as many states as possible before heading back to the Supreme Court, however, the fact is that the Constitution simply does not “let the People decide” when it comes to fundamental rights and liberties.

While the Constitution creates a vibrant system of federalism, with states free to experiment with diverse policies that best fit their communities’ needs and preferences, it also places certain rights and freedoms beyond the reach of state experimentation. This restriction is why Justice Scalia’s paean to the American “system of government that permits us to rule *ourselves*”<sup>121</sup> falls flat in this context. “We the People” have decided that we will not put our most cherished rights and liberties up to a vote. Indeed, many provisions of the Bill of Rights—such as the guarantees of freedom of speech and religion, and the prohibition against warrantless searches—were specifically intended to protect the politically unpopular. The Constitution stands for the proposition that some rights aren’t left to the whims of a democratic majority. Equality before the law is one of those rights.

That said, by the time the Supreme Court turns again to the constitutionality of discriminatory marriage laws, the legal landscape could be substantially changed. Sexual intimacy between same-sex partners was deemed a crime in about a dozen states only 10 years ago, whereas today 13 states and the District of Columbia recognize the right of same-sex couples to marry. It is likely that, as Lambda Legal, one of the most prominent legal advocates for gay rights, has suggested, the “path to victory” for marriage equality “will be achieved by a combination of lawsuits, legislation, ballot measures and engagement with others.”<sup>122</sup> But if the country’s history with racially discriminatory marriage laws is any guide, the Supreme Court will eventually need to step in to ensure the Constitution’s promise of equality for all.

<sup>120</sup> Emily Bazelon, “Backlash Whiplash,” *Slate*, May 14, 2013, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/justice\\_ginsburg\\_and\\_roe\\_v\\_wade\\_caution\\_for\\_gay\\_marriage.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_ginsburg_and_roe_v_wade_caution_for_gay_marriage.html).

<sup>121</sup> *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting) (emphasis in original).

<sup>122</sup> Jon W. Davidson, *Marriage Equality for All: Getting from Here to There*, *Lambda Legal Blog*, Jul. 11, 2013, <http://www.lambdalegal.org/blog/marriage-equality-for-all-getting-from-here-to-there>.

In 1967, 16 states still had laws on the books that prohibited couples of different races from marrying. In the previous 15 years, 14 states had repealed similar laws prohibiting interracial marriage, reflecting progress achieved through the democratic process. But the Supreme Court did not sit back and wait to see if the remaining holdout states would follow suit when a couple, Mildred and Richard Loving, asked the court to strike down Virginia's ban on interracial marriage. Instead, the Court in *Loving* applied the Constitution's guarantees of equality and liberty to strike down Virginia's discriminatory marriage law as unconstitutional.<sup>123</sup> The Court's opinion noted that marriage is something traditionally left to the states. It observed that there was a long history of limiting marriage to persons of the same race—Virginia's law had roots in the colonial period. It acknowledged that the drafters of the Fourteenth Amendment may not have specifically or expressly intended it to strike down laws prohibiting couples of different races from marrying. It also noted that some states had recently established more equitable marriage laws of their own accord. And yet the Supreme Court still struck down Virginia's discriminatory marriage law because it was unconstitutional. The same will likely happen eventually with respect to state marriage laws that discriminate against gay and lesbian couples. Such a ruling will, like *Loving*, be consistent with, and indeed is required by, the Constitution's text and history.

At a certain point, a community's "evolving understanding of the meaning of equality,"<sup>124</sup> as the *Windsor* majority puts it, will need to be squared with the meaning of equality and liberty promised by the Constitution. When a state has failed to get itself in line with constitutional requirements, it is entirely appropriate for the courts to step in. While our national charter is, in part, focused on empowering the People in a republican government, it is also dedicated to protecting the rights of often unpopular minorities "against even responsive, representative, majority government."<sup>125</sup> Justice Scalia chides the *Windsor* majority in his dissent for not issuing "[a] reminder that disagreement over something so fundamental as marriage can still be

<sup>123</sup> See *Loving*, 388 U.S. at 12.

<sup>124</sup> *Windsor*, 133 S. Ct. at 2698.

<sup>125</sup> Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 215 (1998).

politically legitimate.”<sup>126</sup> But the Constitution tells us in no uncertain terms that equality is not to be apportioned based on popularity or political convenience. And, as the Ohio district court highlighted in striking down that state’s law discriminating against same-sex couples’ valid out-of-state marriages, “the public interest is promoted by the robust enforcement of constitutional rights”<sup>127</sup>—perhaps even when some of us initially don’t like it.

When the right case comes before the Supreme Court, it should not shy away from applying the Constitution’s guarantee of equality under the law to guarantee gay men and lesbians the same marriage rights as everyone else.

<sup>126</sup> Windsor, 133 S. Ct. at 2711 (Scalia, J., dissenting).

<sup>127</sup> Obergefell, *supra* note 108, slip op. at 14 (quotation omitted) (quoting Am. Freedom Def. Initiative v. Suburban 15 Mobility for Reg. Transp., 698 F.3d 885, 896 (6th Cir. 2012)).