

# Federalism, Liberty, and Equality in *United States v. Windsor*

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In *United States v. Windsor*,<sup>1</sup> the Supreme Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage as exclusively between a man and a woman for purposes of federal law.<sup>2</sup> On the same day, the Court decided *Hollingsworth v. Perry*,<sup>3</sup> which involved California's Proposition 8—a state provision, added by voter initiative to the California constitution, likewise prohibiting the recognition of same-sex marriage. One question in these marriage cases was whether these two provisions should stand or fall together based on equal protection principles applicable to all levels of government in our system, or whether it made any difference that DOMA was a *federal* law. As it happened, *Perry* went away on standing grounds.<sup>4</sup> But Justice Anthony Kennedy's majority opinion in *Windsor* left little doubt that federalism principles were

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

<sup>2</sup> Pub. L. 104-199, 110 Stat. 2419 (Sep. 21, 1996) (codified at 1 U.S.C. § 7).

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

<sup>4</sup> See *id.* at 2659. The standing holding in *Perry* raises an important federalism question of its own concerning the extent to which state law may create interests sufficient to support standing in the federal courts. One of us has ventured some preliminary thoughts about that issue elsewhere. See Ernest A. Young, In Praise of Judge Fletcher—and of General Standing Principles, *Ala. L. Rev.* (forthcoming Fall 2013).

crucial to the result. DOMA was unconstitutional not simply because it treated gay and straight couples unequally but because it intruded on the states' sovereign authority to define marriage for themselves.

The extent to which federalism should affect these cases was controversial before the Court's decision,<sup>5</sup> and the extent to which it actually *did* matter to the decision remains controversial in its wake.<sup>6</sup> Chief Justice John Roberts's dissent (written in damage-control mode) argued that federalism was crucial to the majority's decision, leaving the Court free to go the other way should a *state* prohibition on same-sex marriage come before it.<sup>7</sup> Justice Antonin Scalia's dissent (written in outrage mode) dismissed Justice Kennedy's invocation of federalism as mere window-dressing, designed to make the majority's embrace of same-sex marriage more palatable to a skeptical public.<sup>8</sup> Only time will tell who was right, of course. But we think that controversy over whether equal protection or federalism is the "best" or "truest" ground for invalidating DOMA misses the fundamental ways these two broad constitutional principles are pervasively intertwined.

Most constitutional lawyers acknowledge (although it often slips their minds) that the Constitution's structural features—federalism and separation of powers—along with its rights and equality provisions secure the liberty of the people.<sup>9</sup> Less well understood is that rights and structure intersect at the doctrinal level as well. The

<sup>5</sup> Compare George F. Will, *DOMA Is an Abuse of Federalism*, Wash. Post, Mar. 20, 2013, available at [http://articles.washingtonpost.com/2013-03-20/opinions/37870263\\_1\\_doma-defense-of-marriage-act-general-police-power](http://articles.washingtonpost.com/2013-03-20/opinions/37870263_1_doma-defense-of-marriage-act-general-police-power), with Linda Greenhouse, *Trojan Horse*, N.Y. Times Opinionator Blog, Apr. 3, 2013, <http://opinionator.blogs.nytimes.com/2013/04/03/Trojan-horse>.

<sup>6</sup> E.g., Michael McConnell, *Debating the Court's Gay Marriage Decisions*, The New Republic, Jun. 26, 2013, available at <http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate> ("Justice Kennedy has sought to find a formula that enables him to invalidate the denial of same-sex marriage at the national level without doing so in every state. Federalism would have provided such a path, but he did not take it."); Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in Windsor*, Balkinization, Jun. 26, 2013, <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> (writing off *Windsor's* federalism arguments as "some blather about traditional state sovereignty and marriage").

<sup>7</sup> 133 S. Ct. at 2696–97 (Roberts, C.J., dissenting).

<sup>8</sup> *Id.* at 2705 (Scalia, J., dissenting).

<sup>9</sup> See, e.g., *Bond v. United States*, 131 S. Ct. 2355 (2011).

Court's opinion in *Windsor* beautifully illustrates that intersection. Federalism principles played a critical role in defining the contours of the equality right at stake, limiting which governmental interests could weigh against that right, and influencing the level of deference that the Court owed to how Congress had weighed those rights and interests. Rather than choosing between federalism and rights-based approaches to the case, *Windsor* demonstrated how federalism can become an integral part of the rights calculus.

It is already fashionable for *Windsor's* admirers and detractors to dismiss Justice Kennedy's opinion as "muddled" or "incoherent."<sup>10</sup> This essay takes the radical view that the opinion's reasoning is not only coherent but brilliant—the best explanation yet of how federalism and equality doctrine intersect.<sup>11</sup> Part I describes the controversy over same-sex marriage and the litigation challenging DOMA. Part II discusses the doctrinal interconnection between federalism and equality in Justice Kennedy's opinion. These doctrinal links are not the only, nor even the most important, connections between constitutional structure and equality. But we think that *Windsor* dealt a blow not only to barriers to same-sex marriage but also to the doctrinal silos that have long constrained our constitutional thinking.

## I. DOMA and the Debate over Same-Sex Marriage

Federalism has structured our national conversation about same-sex marriage. Beginning in the 1990s, some states put the issue on the national agenda by experimenting with same-sex marriage. Congress enacted DOMA in 1996 to contain those experiments, both by

<sup>10</sup> See, e.g., Levinson, *supra* note 6 (noting "the intellectual awkwardness of [Kennedy's] opinion" and comparing it to "a camel (i.e., a horse designed by a committee)"); Andrew Sullivan, The Method in Kennedy's Muddle, *The Dish*, Jun. 27, 2013, <http://dish.andrewsullivan.com/2013/06/27/the-method-in-kennedys-muddle/>; McConnell, *supra* note 6 ("[T]he DOMA decision is a logical mish-mash, portending more litigation and more instability."); Tara Helfman, A Ruling Without Reason, *Commentary*, Jun. 26, 2013, <http://www.commentarymagazine.com/2013/06/26/a-ruling-without-reason> ("In a 26-page opinion brimming with constitutional catch phrases but containing no coherent rationale, the Court delivered an outcome that many find politically favorable but that no serious reader could possibly find legally sound.").

<sup>11</sup> Although we like to think Justice Kennedy might have built on our brief, see *Federalism Scholars, supra* note \*, his opinion contains much that we only wish we'd thought of first.

ensuring that federal law and unwilling states need not recognize same-sex marriages and by raising the costs for states that might try same-sex marriage in the future. We strongly suspect that not only the states' traditional primacy over marriage but also the Court's revival of constitutional limits on Congress's enumerated powers during the same period<sup>12</sup> contributed to Congress's decision not to go further and simply ban same-sex marriage across the board. One of federalism's primary functions is to create institutional space for fundamental disagreements about visions of the good life.<sup>13</sup>

Similarly, when DOMA and state same-sex-marriage bans were challenged in court, the federal courts' own federalist-style organization allowed different federal courts of appeals to experiment with different visions of how federalism and equality interact. Given how the same-sex marriage issue percolated up to the Supreme Court, *Windsor's* strong reliance on federalism should have surprised no one.

#### A. *The Stunning Evolution of Public Opinion and American Law*

Congress passed (with President Bill Clinton's approval) DOMA in 1996<sup>14</sup> when the possibility that states might permit same-sex marriage was only dawning on most Americans. Three years earlier the Hawaii Supreme Court had all but held that same-sex couples had a right to marry;<sup>15</sup> many expected that Hawaii's courts ultimately would recognize that right (they did). Most Americans first reacted skeptically: in 1996 27 percent of Americans supported same-sex marriage, while 68 percent opposed it.<sup>16</sup> Their laws reflected that: by 2000 about 40 states (including Hawaii) banned same-sex marriage by statute or constitutional amendment.<sup>17</sup>

<sup>12</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>13</sup> See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L. J.* 75, 136–40 (2001).

<sup>14</sup> Pub. L. No. 104-199, 110 Stat. 2419.

<sup>15</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>16</sup> *Marriage*, Gallup.com, <http://www.gallup.com/poll/117328/marriage.aspx> (last visited July 29, 2013). All statistics about same-sex-marriage opinions in this essay can be found here.

<sup>17</sup> *Same Sex Marriage Laws*, Nat'l Conf. of State Legislatures, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx#2> (last visited July 29, 2013).

Other states, however, began experimenting with same-sex marriage. From 2003 through 2009, the supreme courts of Massachusetts, Iowa, California, and Connecticut held, under their state constitutions, that same-sex couples had a right to marry.<sup>18</sup> Starting in 2009, several state legislatures permitted same-sex marriage; and in 2012 voters began approving same-sex marriage in referenda.<sup>19</sup>

As of this writing, 13 states and the District of Columbia permit same-sex marriage, and similar legislation pends elsewhere. Twelve states and the District of Columbia permit civil unions or domestic partnerships that confer some or all rights that married couples enjoy.<sup>20</sup> About 35 states have adopted statutes or constitutional amendments prohibiting same-sex marriage.<sup>21</sup> Fifty-four percent of Americans favor a right to same-sex marriage; 43 percent oppose it.

### *B. Same-Sex Marriage in the Federal District and Circuit Courts*

*Perry* and *Windsor* emerged from that ongoing evolution in public opinion and American law.

*Windsor* was one of two cases in which a lower federal court struck down DOMA's Section 3 on Fifth Amendment equal protection grounds. Edith Windsor and Thea Spyer, partners since 1963, married in Ontario, Canada, in 2007 and returned home to New York City.<sup>22</sup> New York state law recognized their marriage,<sup>23</sup> but when Spyer died two years later, DOMA prohibited Windsor from claiming the marital exemption to the federal estate tax. Windsor paid \$363,053 in estate taxes, then requested and eventually sued for a refund.<sup>24</sup> Nancy Gill

<sup>18</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>19</sup> See Research Guides: Same-Sex Marriage Laws, The Ohio State University Moritz College of Law, <http://moritzlaw.osu.edu/library/samesexmarriagelaws.php> (last visited July 29, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Same Sex Marriage Laws, *supra* note 17. These categories are not exclusive. Many states that permit same-sex marriage also allow civil unions or domestic partnerships, and some states that prohibit same-sex marriage nonetheless allow same-sex civil unions or domestic partnerships. See *id.*

<sup>22</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

<sup>23</sup> At the time, most New York courts recognized out-of-state same-sex marriages; the state's legislature legalized same-sex marriage in 2011. *Windsor*, 133 S. Ct. at 2689.

<sup>24</sup> *Windsor*, 833 F. Supp. 2d at 397.

and other plaintiffs brought the second case in Massachusetts when they were denied federal benefits (in Gill's case, the right to add her same-sex spouse to her federal health insurance) because of DOMA.<sup>25</sup> The Commonwealth of Massachusetts filed a companion suit, *Massachusetts v. Department of Health & Human Services (DHHS)*, claiming that DOMA violated the Tenth Amendment and the Spending Clause.<sup>26</sup>

Unlike *DHHS* and *Windsor*, the *Perry* plaintiffs were not married under state law but argued that, under the Fourteenth Amendment's Equal Protection Clause, they were entitled to marry their same-sex partners. The California Supreme Court had held in 2008 that limiting marriage to opposite-sex couples violated the state's equal protection clause,<sup>27</sup> but voters overruled that decision through a ballot initiative, Proposition 8, amending the California constitution to permit only opposite-sex marriage.<sup>28</sup> Between the California court's decision and Proposition 8's effective date, the state issued marriage licenses to over 18,000 same-sex couples.<sup>29</sup> Two same-sex couples who sought but were denied marriage licenses after Proposition 8 became effective sued the state to challenge the new law.

In all three cases, at different points during litigation, executive officials refused to defend the constitutionality of DOMA and Proposition 8. The Obama administration concluded that gays and lesbians are a suspect class, laws burdening them are subject to intermediate scrutiny, and DOMA failed that standard. California's attorney general conceded that Proposition 8 was unconstitutional; the other state defendants simply refused to defend it. Others intervened, however, to defend the enactments. The U.S. House of Representatives' Bipartisan Legal Advisory Group (BLAG) voted to defend DOMA and intervened in *DHHS* and *Windsor*. Proposition 8's proponents, led by then-state-senator Dennis Hollingsworth, similarly intervened in *Perry*.

*DHHS*, *Windsor*, and *Perry* presented a spectrum of constitutional arguments. Most fundamentally, the Supreme Court's prior decisions

<sup>25</sup> Gill v. Office of Personnel Mgmt., 699 F. Supp. 2d 374, 379–83 (D. Mass. 2010).

<sup>26</sup> 698 F. Supp. 2d 234 (D. Mass. 2010). These cases were consolidated on appeal. *Massachusetts v. Dep't of Health & Human Services (DHHS)*, 682 F.3d 1 (1st Cir. 2012).

<sup>27</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>28</sup> *Perry v. Brown*, 671 F.3d 1052, 167–68 (9th Cir. 2012).

<sup>29</sup> *Id.* at 1067–68.

addressing laws aimed at gay relationships, *Romer v. Evans*<sup>30</sup> and *Lawrence v. Texas*,<sup>31</sup> (probably deliberately) obscured the constitutional framework for analyzing such laws. What level of scrutiny applied, even what provision of the Constitution governed (equal protection or substantive due process) remained unsettled.<sup>32</sup>

*Windsor* and *DHHS* raised the additional question of how to treat *federal* laws addressing same-sex relationships. The Court had never addressed a statute burdening those relationships under the Fifth Amendment. And in *DHHS* litigants objected that the federal government had no business defining marriage at all.

But the biggest question was whether the Supreme Court was ready to flatly strike down gay-marriage bans. *DHHS* and *Windsor* left room for courts to rule on uniquely federal grounds and leave undisturbed state laws and amendments banning gay marriage. *Perry*, which directly challenged a state constitutional amendment approved by California voters under the U.S. Constitution, left less room for middle ground—though the Obama administration and the U.S. Court of Appeals for the Ninth Circuit tried to find it.<sup>33</sup>

BLAG offered a number of justifications for DOMA that, it said, at least met rational basis's generous standard: DOMA preserved each sovereign's (including the federal government's) ability to define marriage for itself; it ensured national uniformity of benefits; it preserved past legislative judgments and protected the public fisc; Congress wanted to proceed with caution before recognizing a new marriage form; and the federal government wanted to support traditional families and encourage parents to rear their biological offspring.<sup>34</sup> The

<sup>30</sup> 517 U.S. 620 (1996).

<sup>31</sup> 539 U.S. 558 (2003).

<sup>32</sup> Whatever the virtues of this approach as a matter of judicial statesmanship, it infuriated a generation of law students, who could not tell what to put in their outlines.

<sup>33</sup> The Obama administration proposed an "eight state solution" under which same-sex marriage bans would be unconstitutional only in states that permitted civil unions or domestic partnerships with the same rights, but not the same title, as married couples. Brief of the United States as Amicus Curiae in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). This position laid an egg at the Supreme Court. See, e.g., Erin Fuchs, *The Supreme Court Was Highly Skeptical of Obama's Weird Gay Marriage Argument*, *Business Insider*, Mar. 28, 2013. The Ninth Circuit's solution is discussed below.

<sup>34</sup> Merits Brief of Bipartisan Legal Advisory Group at 28–49, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

House report accompanying DOMA asserted that the statute defended and nurtured traditional, heterosexual marriage; defended traditional morality; and preserved the public fisc.<sup>35</sup>

After the respective district courts invalidated DOMA and Proposition 8, the U.S. Courts of Appeals for the First, Second, and Ninth Circuits affirmed, each on different grounds.

The First Circuit applied “a closer than usual review”<sup>36</sup> (dubbed by BLAG’s counsel “rational basis plus”<sup>37</sup>) for two reasons. First, the court identified an open secret in Supreme Court jurisprudence: when statutes disadvantage unpopular minorities, the Court sometimes has professed to apply rational-basis review while conducting a more searching inquiry than it would for, say, a tax law. Second, the Supreme Court has shown less deference to legislative judgment when statutes undermine federalism and state sovereignty, such as in *United States v. Lopez*.<sup>38</sup> DOMA raised both concerns—it uniquely burdened same-sex couples and intruded in an area of traditional state authority. Thus, the First Circuit applied somewhat more searching scrutiny to BLAG’s proffered justifications and found them inadequate. The court rejected the Tenth Amendment and Spending Clause arguments, however.

The Second Circuit took a more traditional path. The court held that intermediate scrutiny applies to denials of same-sex marriage because gays and lesbians are a discrete minority and have historically suffered persecution. The court then analyzed the rationales offered to justify DOMA and ruled that they did not survive intermediate scrutiny. But it agreed with the First Circuit that the states’ primary authority over marriage was “a reason to look upon Section 3 of DOMA with a cold eye.”<sup>39</sup>

Finally, the Ninth Circuit held that Proposition 8 violated the Fourteenth Amendment because it withdrew a right to marry that state law had conferred on gay couples.<sup>40</sup> Once the California Su-

<sup>35</sup> *Massachusetts v. Dep’t of Health & Human Servs. (DHHS)*, 682 F.3d 1, 14 (1st Cir. 2012). The report also said DOMA respected state sovereignty, obviously referring to Section 2 rather than Section 3. *Id.*

<sup>36</sup> DHHS, 682 F.3d at 8.

<sup>37</sup> *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012).

<sup>38</sup> DHHS, 682 F.3d at 10–13.

<sup>39</sup> *Windsor*, 699 F.3d at 181–86.

<sup>40</sup> *Perry v. Brown*, 671 F.3d 1052, 1076–92 (9th Cir. 2012).



preme Court ruled that the state constitution required allowing gay marriage, California voters could not rescind that right without a legitimate reason. These different approaches by the First, Second, and Ninth Circuits left the Court with a variety of models for viewing the relationship between state power and equality.

C. *DOMA in the Supreme Court*

In the fall of 2012, the U.S. Supreme Court granted certiorari in *Hollingsworth v. Perry* and *United States v. Windsor*.<sup>41</sup> The Court heard both cases back to back in March and decided both on June 26, 2013. *Perry* had presented the cleanest, up-or-down constitutional challenge to same-sex-marriage bans. The Supreme Court dodged, dismissing the case on standing grounds.<sup>42</sup> But the Court held that *Windsor* was justiciable and struck down DOMA's Section 3 on narrower, but still significant, grounds. Justice Kennedy wrote the majority opinion; Chief Justice Roberts and Justices Scalia, Clarence Thomas, and Samuel Alito dissented.

Like his opinions in *Romer* and *Lawrence*, Justice Kennedy's *Windsor* opinion left much of the legal framework he was applying implicit. But a framework is there, and the First Circuit's decision in *Gill* provides a useful reference point.

As the First Circuit did, the *Windsor* majority identified two related concerns: (1) states had chosen to recognize these marriages as they did opposite-sex marriages, and (2) the federal government, through DOMA, singled out some state-created marriages for disapproval. The majority also, like the First Circuit, essentially applied rational-basis-plus scrutiny. The Court conspicuously failed to adopt (or even mention) intermediate scrutiny. But it did not apply deferential rational-basis scrutiny either. It held, citing *Romer*, that DOMA's "[d]iscriminations of an unusual character' especially require careful consideration."<sup>43</sup>

<sup>41</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2012); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). The Court held the petition in *DHHS* but ultimately denied certiorari, 133 S. Ct. 2887 (2013), presumably because Justice Kagan was recused. See Lyle Denniston, Kagan, DOMA, and Recusal, SCOTUSblog, Nov. 2, 2012, <http://www.scotusblog.com/?p=154714>.

<sup>42</sup> *Hollingsworth v. Perry*, 133 S. Ct. 786 (2013).

<sup>43</sup> *Windsor*, 133 S. Ct. at 2691–93.

The majority began with federalism. Traditionally, states have virtually exclusively governed family law, subject to constitutional limits. Though the federal government has power to decide who gets federal benefits, sometimes differently than state law would, the government has never before treated married couples within the same state differently. It has accepted state marital determinations and then decided who gets federal benefits.<sup>44</sup>

Though the majority declined to rule that DOMA exceeded the federal government's powers, the states' decision to include same-sex couples in state-created marriages was nonetheless critical. That judgment is a "far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages."<sup>45</sup> DOMA, however, rejects "the usual tradition of recognizing and accepting state definitions of marriage" and "deprive[s] same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."<sup>46</sup>

Thus, once states decided to classify same-sex couples as married, the federal government decided to "use[] this state-defined class for the opposite purpose—to impose restrictions and disabilities."<sup>47</sup> The Court described those disabilities in philosophical and practical terms. DOMA's "avowed purpose and practical effect," as BLAG openly admitted, was "to impose a disadvantage, a separate status, and so a stigma" on state-recognized same-sex marriages.<sup>48</sup> As a result, "DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law," which "diminish[es] the stability and predictability of basic personal relations" and "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."<sup>49</sup>

The majority also cataloged ways that DOMA, practically speaking, treated same-sex marriages as second class. Same-sex couples were deprived of federal benefits and protections in healthcare,

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2692.

<sup>46</sup> *Id.* at 2693.

<sup>47</sup> *Id.* at 2692.

<sup>48</sup> *Id.* at 2693.

<sup>49</sup> *Id.* at 2694.

bankruptcy, and taxation. Ethics rules and special protection did not apply to federal officials' same-sex spouses. Parenting was more expensive for same-sex couples. Altogether, "DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life."<sup>50</sup>

Put simply, "[w]hat the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect."<sup>51</sup> "By doing so [DOMA] violates basic due process and equal protection principles applicable to the Federal Government."<sup>52</sup>

## II. The Doctrinal Intersections of Federalism and Rights

After discussing the states' preeminent role in defining marriage, the *Windsor* majority wrote that "[d]espite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."<sup>53</sup> Early commentators have read that line as conceding that the case wasn't really about federalism—that the Court's extended account of federalism was, as Justice Scalia put it, merely a "rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government."<sup>54</sup> This interpretation gives short shrift to Justice Kennedy's statement immediately following that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."<sup>55</sup> The remainder of our essay explores what he possibly could have meant.

### A. *The Enumerated Powers Argument That Wasn't*

The "principles of federalism" that Justice Kennedy decided the case "quite apart from" were traditional arguments about limits on the federal government's enumerated powers.<sup>56</sup> It is not surprising

<sup>50</sup> *Id.* at 2695.

<sup>51</sup> *Id.* at 2692.

<sup>52</sup> *Id.* at 2693.

<sup>53</sup> *Id.* at 2692.

<sup>54</sup> *Id.* at 2705 (Scalia, J., dissenting); see, e.g., Helfman, *supra* note 10.

<sup>55</sup> 133 S. Ct. at 2692.

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

that the Court did not analyze the case from that perspective, given that no court of appeals had relied on such an argument and the Court had granted certiorari only on the plaintiffs' equal protection challenge. The Court did have an enumerated-powers argument before it, however, in the amicus brief filed by several federalism scholars.<sup>57</sup> Although the Court did not rely on that ground, developing that argument can make a useful foil for the federalism argument that the Court *did* adopt.

Of course, no specific enumerated federal power to define marriage exists. Nor does DOMA fit under the Commerce Clause: although weddings are often highly commercial (ask anyone who's paid for one), marriage itself is generally not a commercial activity.<sup>58</sup> One can imagine federal marriage legislation under Section 5 of the Fourteenth Amendment. But the Section 5 argument is asymmetrical; it is very hard to say that it is unconstitutional for a state to *recognize* same-sex marriage, so there is no constitutional violation for DOMA to prevent or remedy by withdrawing recognition.<sup>59</sup>

The best arguments thus would have to maintain that defining marriage to exclude same-sex couples is "necessary and proper" to Congress's exercise of its other enumerated powers to regulate commerce or spend federal money. That position is intuitively powerful, especially given the Court's precedents recognizing broad federal power and adopting a deferential standard of review for necessary and proper cases.<sup>60</sup> They don't, in other words, call it the "Sweeping Clause" for nothing.<sup>61</sup> But the Court has suggested in recent years that the Necessary and Proper Clause is no longer a blank check allowing Congress to evade the limits on its specifically enumerated powers. In *National Federation of Independent Business v. Sebelius*,<sup>62</sup> five justices rejected a Necessary and Proper Clause argument for upholding the

<sup>57</sup> Federalism Scholars, *supra* note \*, at 11–25.

<sup>58</sup> But see RussianBrides.com, <http://www.russianbrides.com/mail-order-brides.htm> (demonstrating that particularly when it comes to sex, there's a commercial version of almost everything).

<sup>59</sup> Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>60</sup> E.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>61</sup> See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 *Duke L. J.* 267, 270 n.10 (1993).

<sup>62</sup> See 132 S. Ct. 2566, 2591–93 (2012) (plurality opinion of Roberts, C.J.); *id.* at 2644–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

individual health insurance mandate, and some of the Court's other recent Necessary and Proper Clause opinions have cautioned against reading the clause too broadly.<sup>63</sup>

The Court's underdeveloped case law appears to impose three distinct requirements for valid legislation under the Necessary and Proper Clause. First, such legislation must be "incidental" to the exercise of an enumerated power.<sup>64</sup> Congress may employ unenumerated *means* so long as they are necessary and proper to the accomplishment of an enumerated *end*.<sup>65</sup> But it does not allow pursuing unenumerated *ends* or using unenumerated *means* for their own sake.<sup>66</sup> As Chief Justice John Marshall warned in *McCulloch v. Maryland*, "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land."<sup>67</sup> Distinguishing incidental and primary purposes will often be hard. But sometimes Congress is not particularly subtle. It seems safe to say that a law entitled "The Defense of Marriage Act" regulates marriage *for its own sake*—not as an incidental way to make some other federal regulatory scheme more effective. And Paul Clement's brief defending DOMA was candid enough to argue in precisely those terms.<sup>68</sup>

Second, also traceable to *McCulloch*, the unenumerated means must be "plainly adapted" to Congress's enumerated end.<sup>69</sup> That means

<sup>63</sup> E.g., *United States v. Comstock*, 130 S. Ct. 1949 (2010); *id.* at 1970 (Alito, J., concurring in the judgment) ("[T]he term 'necessary' . . . requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress. . . . And it is an obligation of this Court to enforce compliance with that limitation.") (citing *McCulloch*, 17 U.S. (4 Wheat.) at 415). See generally Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2009-2010 *Cato Sup. Ct. Rev.* 239 (2010).

<sup>64</sup> See *NFIB*, 132 S. Ct. at 2591 (stating that the Necessary and Proper Clause "vests Congress with authority to enact provisions 'incidental to the [enumerated] power, and conducive to its beneficial exercise'" (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 418).

<sup>65</sup> See generally *Comstock*, 130 S. Ct. at 1956; David Engdahl, *The Spending Power*, 44 *Duke L. J.* 1, 18-24 (1994).

<sup>66</sup> See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 411 (stressing that creating a corporation is "never used for its own sake, but for the purpose of effecting something else").

<sup>67</sup> *Id.* at 423.

<sup>68</sup> See *supra* note 34 and accompanying text.

<sup>69</sup> See 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted

the means and ends must fit, and the Court's analysis is traditionally deferential.<sup>70</sup> But although *McCulloch* is often credited as originating the rational-basis standard, Justice Kennedy recently went out of his way to insist that the hyper-deferential post-1937 version of rational-basis review, employed in substantive due process and equal protection cases not involving fundamental rights or suspect classifications, does not apply to the Necessary and Proper Clause.<sup>71</sup> Rather, "[t]he rational basis [required] . . . is a demonstrated link in fact, based on empirical demonstration."<sup>72</sup>

Demonstrating that link for DOMA would be difficult. The act defines marriage to exclude same-sex couples in more than 1,100 different federal statutes. A provision that applies shotgun-style to more than 1,100 federal laws is "plainly adapted" to none. Congress was not trying to improve the tax code or the immigration laws, for example. Although those exercises of Congress's enumerated powers do sometimes require the federal government to determine which state-sanctioned marriages it will recognize for specific federal purposes, DOMA was not enacted for any such purpose.

Finally, unenumerated means must be not only "necessary" to achieving some enumerated end but also "proper."<sup>73</sup> In the Founding era, that meant that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights."<sup>74</sup>

to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

<sup>70</sup> But see *NFIB*, 132 S. Ct. at 2579 (cautioning that "deference in matters of policy cannot, however, become abdication in matters of law").

<sup>71</sup> See *Comstock*, 130 S. Ct. at 1966 ("This Court has not held that the *Lee Optical* test, asking if 'it might be thought that the particular legislative measure was a rational way to correct' an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so.") (Kennedy, J., concurring in the judgment) (citing *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955)). We need not remind the gentle reader that Justice Kennedy might as well have a numeral "5" tattooed on his forehead for these purposes.

<sup>72</sup> *Id.* (attributing this standard to "the Commerce Clause cases").

<sup>73</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 923–24 (1997); see also *Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.").

<sup>74</sup> *Lawson & Granger*, *supra* note 61, at 297.

But that formulation—if it is to be more than tautological—is hard to unpack. In *NFIB*, the chief justice suggested that the individual health insurance mandate was improper because it extended federal power in a way that had no obvious stopping point.<sup>75</sup>

For DOMA, the strongest argument is that Congress had appropriated a power that is reserved exclusively to the states. And Congress's intrusion on that power interfered with the states' own exercise of their powers over marriage. First, it required state officials to disregard state law when administering federal programs. State officials administering veterans' cemeteries, for example, had to exclude veterans' same-sex spouses in spite of state law. Second, DOMA interfered with implementing and enforcing state law itself and imposed substantial costs on the states. For example, it made spousal-support orders between same-sex couples unenforceable in bankruptcy and precluded using garnishment procedures ordinarily available for monies in federal hands (such as income-tax refunds, or federal wages and benefits payments). It prevented state income tax regimes from "piggybacking" on federal forms, rules, and enforcement. And it increased the taxes that states as employers pay when they extend health insurance to same-sex spouses.<sup>76</sup> These effects reflect DOMA's fundamental purpose, which was to discourage states from adopting a definition of marriage that departed from Congress's preferences.<sup>77</sup>

Some have suggested, however, that Congress *always* has the power to define terms in its enactments.<sup>78</sup> Because this essay is primarily

<sup>75</sup> 132 S. Ct. at 2588 (opinion of Roberts, C.J.); accord *id.* at 2646 (joint dissent); see also Jonathan Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, in *The Health Care Case: The Supreme Court's Decision and Its Implications* (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

<sup>76</sup> See Brief of Federalism Scholars, *supra* note \*, at 32–35.

<sup>77</sup> See 133 S. Ct. at 2693 (DOMA's purpose "is to discourage enactment of state same-sex marriage laws . . . . The congressional goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.'" (quoting *Massachusetts*, 682 F.3d at 12–13)). One might analyze many of these burdens as conditions on the federal monies and other benefits that states accept in order to participate in federal programs. From that perspective, however, DOMA probably could not validly apply to any programs that states elected to participate in prior to DOMA's effective date. See, e.g., *NFIB*, 132 S. Ct. at 2603–06 (striking down retroactive conditions on Medicaid participation).

<sup>78</sup> See, e.g., Nicholas Quinn Rosenkranz, *Congress Has Power to Define the Terms of Its Own Statutes*, *Volokh Conspiracy*, Mar. 6, 2013, <http://www.volokh.com>.

about the arguments the Court *did* address in *Windsor*, one of us has analyzed this argument for a broad federal “definition power” in a separate essay.<sup>79</sup> Briefly, there are three basic answers. First, federal definitions for terms like “marriage” are hardly inevitable or essential. Federal law has traditionally taken state law as it found it with respect to marriage and other basics of family law. Under DOMA, federal law *continued* to take state marriage law as it found it—except for refusing to recognize state-sanctioned same-sex marriages. Second, *everything* Congress does must be tied to an enumerated power. When Congress offers definitions for statutory terms, it is using the Necessary and Proper Clause power, and its definitions—like everything else done under that power—still must be incidental, plainly adapted, and proper. Calling Congress’s action a “definition” changes nothing.

The third objection ties the Necessary and Proper Clause arguments to the equal protection analysis, which the rest of this essay focuses on. Even if Congress can define its terms, Congress’s enumerated powers limit the range of *interests* that Congress may assert in support of those definitions when they are challenged under the Constitution’s rights and equality provisions. Congress might define “marriage” so that its statutes are intelligible, but it cannot assert an interest in maintaining the traditional institution of marriage in

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com/2013/03/06/congress-has-power-to-define-the-terms-of-its-own-statutes; Nicholas Quinn Rosenkranz, There Is No Federalism Objection to Section Three of the Defense of Marriage Act, *Volokh Conspiracy*, Mar. 24, 2013, <http://www.volokh.com/2013/03/24/there-is-no-federalism-objection-to-section-three-of-the-defense-of-marriage-act>; see also Ed Whelan, Badly Confused Amicus Brief on Federalism in DOMA Case, *Nat’l Rev. Online*, Mar. 5, 2013, <http://www.nationalreview.com/bench-memos/342256/badly-confused-amicus-brief-federalism-doma-case-ed-whelan> (offering a more ad hominem version of the same argument).

<sup>79</sup>See Ernest A. Young, *DOMA and the Limits of Congress’s Power to Define Its Terms*, *Case Western Res. L. Rev.* (forthcoming Spring 2014). For shorter responses, see Ernie Young, *DOMA and Federalism: What Are the Limits of Congress’s Power to Define Terms in Federal Statutes? A Reply to Whelan and Rosenkranz*, *Volokh Conspiracy*, Mar. 7, 2013, <http://www.volokh.com/2013/03/07/doma-and-federalism-what-are-the-limits-of-congresss-power-to-define-terms-in-federal-statutes-a-reply-to-whelan-and-rosenkranz>; Randy Barnett, *The Chief Justice’s Excellent Hypothetical: Under Our System of Federalism, Can You Be Both Married and Unmarried at the Same Time?*, *Volokh Conspiracy*, Mar. 28, 2013, <http://www.volokh.com/2013/03/28/the-chief-justices-excellent-hypothetical-under-our-system-of-federalism-can-you-be-both-married-and-unmarried-at-the-same-time>; Jonathan H. Adler, *A Final Response to Ed on DOMA*, *Nat’l Rev. Online*, Apr. 1, 2013, <http://www.nationalreview.com/bench-memos/344376/final-response-ed-doma-jonathan-h-adler>.



response to an equal protection challenge. That is because maintaining that institution is not itself within any of Congress's enumerated powers. What Congress cannot do, in other words, is exactly what BLAG did in the *Windsor* litigation: assert that it has the same interest as a state to define who can and cannot be married.

*B. Federalism and Equal Protection*

The Court did not, of course, reach these enumerated powers arguments in *Windsor*. It decided the case on equal protection grounds, prompting not only Justice Scalia but also numerous commentators to discount the holding's federalism element. That reaction, in our view, fundamentally misunderstands the majority opinion. Structural principles like federalism and separation of powers exist to protect individual liberty.<sup>80</sup> We generally think of this protection in a macro sense: federalism, like separation of powers, helps form a system of checks and balances that makes it more difficult for either level of government to act tyrannically and provides institutional outlets for divergent views. But federalism also operates in a *micro* sense, shaping individual-rights doctrine. Justice Kennedy's *Windsor* opinion is, in fact, the best illustration we have of how structural analysis can—and should—inform individual rights.

Edith Windsor's equal protection challenge to DOMA necessarily included several elements. Unlawful discrimination occurs with respect to some right or interest, and the courts had to define that interest with some precision. BLAG offered particular governmental interests to justify DOMA, and the courts had to assess those interests. Finally, the courts had to determine the "fit" between the government's interests and Congress's means, which required deciding how much deference, if any, to show Congress's judgment of that fit. Justice Kennedy's opinion demonstrates that federalism played a key role at each step of this analysis.

*1. Defining the Right*

It seems natural to think of *Windsor* and *Hollingsworth* as cases about whether gay and straight people have equal rights to marry.

<sup>80</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

That is not quite correct. *Hollingsworth*, which challenged California's prohibition of same-sex marriage, did raise that question. In *Windsor*, however, even BLAG did not argue that Edith Windsor and Thea Spyer were not lawfully married. All parties recognized that state law settled that point. The question was whether the federal government, through DOMA, could constitutionally refuse to recognize that marriage. Hence, the solicitor general framed the question presented as: "Whether 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."<sup>81</sup>

The last phrase is critical: Edith Windsor and Thea Spyer were "legally married under the laws of their State." They did not assert that justice or fairness entitled them to marry; they insisted that their state's law had conferred marital status upon them and that Congress could not treat some people with that status differently from others without denying equal protection of the laws. That struck a chord with the *Windsor* majority, which emphasized that "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community."<sup>82</sup>

The Court's focus on the *state's* determination that Windsor and Spyer could marry rather brilliantly dissolved what, in our view, has always been the dilemma at the heart of debates about same-sex marriage. At least since *Loving v. Virginia*, marriage has been recognized as a fundamental right.<sup>83</sup> It is hornbook law that governmental

<sup>81</sup> Petition for a Writ of Certiorari Before Judgment in *United States v. Windsor*, at I, 133 S. Ct. 2675 (2013) (No. 12-307), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Petition.pdf>.

<sup>82</sup> 133 S. Ct. at 2692. See also Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, Volokh Conspiracy, Jun. 26, 2013, at <http://www.volokh.com/2013/06/26/federalism-marries-liberty-in-the-doma-decision> (emphasizing this aspect of *Windsor*).

<sup>83</sup> 388 U.S. 1 (1967) (holding that anti-miscegenation laws violate the Equal Protection Clause).

classifications that burden or unequally allocate a fundamental right are subject to strict (and usually fatal) scrutiny.

But strict scrutiny requires the government to discriminate among *similarly situated* people. Opponents of same-sex marriage contend that marriage just *is*—and has always been—an institution involving one man and one woman; hence, gay and straight couples cannot be similarly situated. Proponents, of course, disagree. It is not easy to resolve that debate without relying on one's moral priors.<sup>84</sup>

The *Windsor* majority, however, focused on the fact that the great state of New York had already resolved—and as a matter for federalism, was *entitled* to resolve—that question through its own democratic processes. State law defined the class of similarly situated persons for purposes of Windsor's equal protection claim.<sup>85</sup> As Justice Kennedy explained:

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.<sup>86</sup>

That approach made Justice Scalia's *sturm und drang* about democratic deliberation singularly inappropriate: the Court did not impose its own view of whether same-sex marriages should be recognized; it accepted New York's.<sup>87</sup>

It is worth remembering that state law provides the predicate for federal constitutional claims all the time. Property interests, for example, are generally a function of state law; hence, claims under the Takings and Due Process Clauses, as well as the Fourth Amendment,

<sup>84</sup> That is not to say that there is no right answer, either as a legal or a moral matter. Our point is simply that the question is a difficult one.

<sup>85</sup> See 133 S. Ct. at 2694 (“DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.”).

<sup>86</sup> *Id.* at 2695–96.

<sup>87</sup> Compare, e.g., *id.* at 2711 (Scalia, J., dissenting) (“We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.”), with Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10-a, 10-b, 13) (2011) (deciding).

often turn on whether the government has invaded an interest defined by state law.<sup>88</sup> Contracts Clause claims likewise require first establishing a valid contract under state law.<sup>89</sup> In all these contexts, federalism provides a positivist alternative to some Platonic notion of “property” or “contract”—or “marriage.” The Constitution gives states authority to define those terms, and federal law takes state law as it finds it.<sup>90</sup>

There are, of course, exceptions. State law definitions may not violate the federal Constitution. Virginia’s power to define marriage did not save its anti-miscegenation law, which violated the Equal Protection Clause by discriminating on the basis of race.<sup>91</sup> State prohibitions on same-sex marriage, such as Proposition 8, might also violate that provision. But that is a harder question than whether *Congress* may refuse to recognize marriages that a state has already sanctioned. Like property and contracts, state law defined and elevated Edith Windsor and Thea Spyer’s marriage.

The close connection between the state’s power to define marriage and the dignity of individuals is not simply theoretical—it is also highly practical and emotional. As the Federalism Scholars’ brief argued, “DOMA creates significant uncertainty with [the] private realm. It forces same-sex couples to live a divided life, married for state purposes but unmarried for federal ones.”<sup>92</sup> Or, as Justice Ruth Bader Ginsburg famously put it at oral argument, DOMA transforms

<sup>88</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (noting “our traditional resort to ‘existing rules or understandings that stem from an independent source such as state law’ to define the range of interests that qualify for protection as ‘property’ under the Fifth and Fourteenth Amendments”) (takings claim) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (due process claim)); *United States v. Jones*, 132 S. Ct. 945, 951 (2012) (holding that warrantless GPS surveillance violates the Fourth Amendment where it would amount to a trespass upon individual property interests).

<sup>89</sup> See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938).

<sup>90</sup> See generally Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler’s *The Federal Courts and the Federal System* 459 (6th ed. 2009) (“Federal law is generally interstitial in its nature. . . . Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.”). We would add, of course, that Congress can only change the state law background by legislation if it acts within its enumerated powers.

<sup>91</sup> See *Loving*, 388 U.S. at 11–12.

<sup>92</sup> Brief of Federalism Scholars, *supra* note \*, at 36.

a “full marriage” into a “skim-milk marriage.”<sup>93</sup> Same-sex married couples—like *all* married couples—justifiably rely on the solidity and permanence of state law’s recognition of their relationships. DOMA’s intrusion on those relationships threatens their well-being and undermines their dignity. As Edith Windsor said after Thea died, “In the midst of my grief, I realized that the federal government was treating us as strangers.”<sup>94</sup>

Invalidating DOMA hardly ensures that state law will recognize all same-sex relationships. But ensuring that people can rely on state law to settle their family relationships without Congress interfering promotes notice, reliance, and political accountability.<sup>95</sup> As Justice Kennedy put it, “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.”<sup>96</sup> Whether or not Edith Windsor and Thea Spyer had a right to have New York recognize their marriage, once it did so they were entitled to rely on that decision.

## 2. *The Government’s Interests*

Federalism also constrained the interests that could justify DOMA by tightening the Court’s standard of review and prompting the Court to reject Congress’s primary interest outright. The Court simply ignored several of the interests that BLAG asserted, including an interest in maintaining a nationally uniform definition of marriage for purposes of federal law and protecting the federal fisc.<sup>97</sup> The most plausible reason for the Court’s silence was that it did not think these interests had much to do with Congress’s *actual* purpose. Rather, the Court said, “The history of DOMA’s enactment and its

<sup>93</sup> Transcript of Oral Argument at 71, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

<sup>94</sup> Amy Davidson, *The Skim Milk in Edith Windsor’s Marriage*, *The New Yorker*, Mar. 28, 2013, <http://www.newyorker.com/online/blogs/comment/2013/03/edith-windsors-victory-doma.html>.

<sup>95</sup> See Brief of Federalism Scholars, *supra* note \*, at 36 (arguing that “DOMA blurs lines of political accountability for this intrusion, particularly when state officials must administer federal rules that do not respect marriage rights under state law”).

<sup>96</sup> 133 S. Ct. at 2692.

<sup>97</sup> See BLAG Brief, *supra* note 34, at 28–49 (discussing these interests).

own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."<sup>98</sup>

Under traditional rational basis review, however, courts generally do not hold the legislature to its actual purpose as long as some possible basis justifies the law.<sup>99</sup> But the Court has not always been so deferential, even in cases purporting to apply rational basis review.<sup>100</sup> In *Romer v. Evans*<sup>101</sup>—also a case about gay rights, also written by Justice Kennedy—the Court applied what some have called “active rational basis” review or “rational basis with bite.”<sup>102</sup> *Romer* diverged from traditional rational basis review in two ways. First, it addressed only the government interests actually asserted by Colorado in defense of its law; it did not, as it traditionally does in rational basis cases, unleash its imagination (or its law clerks) to think up better ones.<sup>103</sup> Second, it somewhat tightened the “fit” required between the government’s interests and means.

Justice Kennedy’s *Windsor* opinion followed the same pattern. It considered only DOMA’s *actual* purpose, which it found to be “to

<sup>98</sup> 133 S. Ct. at 2693.

<sup>99</sup> See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993).

<sup>100</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 458 (1985) (Marshall, J., dissenting) (suggesting that “perhaps the method employed must . . . be called ‘second order’ rational-basis review”); *Massachusetts v. U.S. Dept. of Health & Human Servs.*, 682 F.3d 1, 10–11 (1st Cir. 2012) (Boudin, J.); *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (noting “that the usually deferential ‘rational basis’ test has been applied with greater rigor in some contexts”).

<sup>101</sup> 517 U.S. 620 (1996).

<sup>102</sup> See, e.g., Kevin G. Walsh, Comment, *Throwing Stones: Rational Basis Review Triumphs over Homophobia*, 27 *Seton Hall L. Rev.* 1064 (1997) (noting speculation that *Romer* “contains a tier . . . of ‘active’ rational basis review”); Jeremy B. Smith, Comment, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *Fordham L. Rev.* 2769 (2005).

<sup>103</sup> That would not have been hard to do. Colorado’s Amendment 2 prohibited anyone from raising a discrimination claim based on sexual orientation. That was far too broad for the state’s asserted rationale, which was to “respect . . . other citizens’ freedom of association.” 517 U.S. at 635. But the state *could* have argued that expanding the category of discrimination claims always raises compliance costs and enforcement costs, and that reducing such costs is a legitimate government interest. If the Court had addressed that interest, it would surely have had overtly to embrace a higher level of scrutiny in order to strike down the law.

impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>104</sup> As he noted, “The stated purpose of the law was to promote an ‘interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.’ . . . Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.”<sup>105</sup> The Court also, as we discuss in Section 3 below, required a somewhat closer fit between means and ends than it often does in pure rational-basis cases.

The question, then, is what prompted the Court to tighten its review in *Windsor*? Early commentators have emphasized Justice Kennedy’s comments about the dignity of same-sex couples and their families: “[DOMA’s] differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . . And it humiliates tens of thousands of children now being raised by same-sex couples.”<sup>106</sup> But each time that Kennedy mentioned dignity, he emphasized that this was a “relationship [that] *the State* has sought to dignify.”<sup>107</sup> Each of the burdens that he cited deprived same-sex couples of *state-law* rights and responsibilities.<sup>108</sup> “DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”<sup>109</sup>

It was not just that DOMA was mean, in other words. Its meanness arose because it sought to put asunder a union that New York has already recognized. That was “strong evidence of a law having

<sup>104</sup> 133 S. Ct. at 2693.

<sup>105</sup> *Id.* (quoting H.R. Rep. No. 104-664, at 12–13 (1996)).

<sup>106</sup> 133 S. Ct. at 2694; see also *id.* at 2695 (“DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.”).

<sup>107</sup> *Id.* at 2694 (emphasis added); see also *id.* at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure *those whom the State, by its marriage laws, sought to protect* in personhood and dignity.” (emphasis added)).

<sup>108</sup> The same can be said of the Court’s invocations of “animus” as an illegitimate basis for a law. See *id.* at 2693 (citing *Romer*, 517 U.S. at 633). Justice Kennedy introduced that discussion by stressing that “DOMA seeks to injure the very class New York seeks to protect.” *Id.*

<sup>109</sup> *Id.* at 2695–96.

the purpose and effect of *disapproval* of that class [of same-sex couples married under state law].”<sup>110</sup> Singling out a particular class for disapproval was an important trigger of “active rationality” review in *Romer*.<sup>111</sup> But it was DOMA’s displacement of the state-law norms that raised the fear of class legislation.<sup>112</sup> Writing for the First Circuit in *DHHS*, Judge Michael Boudin reached the same conclusion more directly: “Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection . . . is uniquely reinforced by federalism concerns.”<sup>113</sup>

Federalism thus helps explain why the Court limited its review to DOMA’s *actual* purpose. It equally explains how the Court assessed the legitimacy of that governmental interest. BLAG’s merits brief in *Windsor* opened with the striking—and unprecedented—claim that “the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes.”<sup>114</sup> Although the brief rested this assertion on “[b]edrock principles of federalism,”<sup>115</sup> the relevant section lacked a single citation to precedent or other authority.<sup>116</sup> There was a reason for that omission.

One can put the federalism objection to this interest either of two ways. The milder is to say that this is simply an interest that Congress

<sup>110</sup> *Id.* at 2693 (emphasis added).

<sup>111</sup> See, e.g., 517 U.S. at 623 (citing Justice Harlan’s admonition that “the Constitution ‘neither knows nor tolerates classes among citizens’”) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)); *id.* at 627 (“Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres.”); *id.* at 633 (emphasizing “the principle that government . . . remain[s] open on impartial terms to all who seek its assistance” and observing that “[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal status . . . are rare”); *id.* at 635 (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.”); see generally Jack Balkin, *Windsor and the Constitutional Prohibition against Class Legislation, Balkinization*, Jun. 26, 2013, at <http://balkin.blogspot.com/2013/06/windsor-and-constitutional-prohibition.html>.

<sup>112</sup> See also 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (“The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past.”).

<sup>113</sup> *DHHS*, 682 F.3d at 13.

<sup>114</sup> BLAG Brief, *supra* note 34, at 19.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 30–33.



does not have because it falls outside Congress's enumerated powers.<sup>117</sup> As John Marshall wrote in *McCulloch*, for an "end [to] be legitimate," it must be "within the scope of the constitution."<sup>118</sup> One important and often-forgotten implication of this statement is that while there are "necessary and proper" means to enumerated ends, there are no "necessary and proper"—but unenumerated—federal ends or interests.<sup>119</sup> Otherwise, the Supremacy Clause would cause Congress's purpose to discourage same-sex marriage to preempt state laws recognizing same-sex marriage because they would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>120</sup> No one thinks DOMA had that effect.

Justice Kennedy described BLAG's argument even more starkly, as "candid[ly]" acknowledging a "congressional purpose to influence or interfere with state sovereign choices about who may be married."<sup>121</sup> The objection is not just that the federal government lacked an interest in defining marriage, but that its attempt to do so anyway interfered with the states' choices. If Congress had constitutional power to define marriage, however, then that interference would be fine. In *Gonzales v. Raich*, for example, because the Supreme Court concluded that Congress *did* have power to prohibit marijuana consumption, California's contrary choice was constitutionally irrelevant.<sup>122</sup> But in *Windsor*, Justice Kennedy seems to have viewed Congress's interference as violating the principle he identified in *Comstock*, that "essential attributes of state sovereignty [may not be] compromised by the assertion of federal power under the Necessary and Proper Clause."<sup>123</sup>

<sup>117</sup> See, e.g., *Windsor*, 699 F.3d at 187 (reasoning that "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman").

<sup>118</sup> 17 U.S. (4 Wheat.) at 421.

<sup>119</sup> See, e.g., Engdahl, *supra* note 65, at 18–20.

<sup>120</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & Lib. 63, 66 (2010) (describing obstacle preemption as "an expansive route whereby state law tort claims are ousted not by express statutory text, but rather on account of their implied conflict with the purposes and objectives of the federal regulatory scheme").

<sup>121</sup> 133 S. Ct. at 2693.

<sup>122</sup> 545 U.S. 1, 29–31 (2005).

<sup>123</sup> See *supra* note 73.

That is why BLAG's argument did not count as a legitimate federal interest.

Finally, we consider an additional interest that the government asserted but that the Court ignored. In the same sentence that it insisted Congress has a coequal authority to define marriage for itself, BLAG also said that Congress "has a unique interest in treating citizens across the nation the same."<sup>124</sup> One might question how strong this interest in uniformity really is,<sup>125</sup> but it lacks the bad odor of an effort simply to harm a particular class of citizens. Nonetheless, the Court ignored it—which necessarily entailed a judgment, implicit or not, that it was not a legitimate federal interest in this context. Why not? The Court must have concluded that Congress simply lacks authority to make judgments about who is married; it has no constitutional option other than to take state law as Congress finds it, in all its variegated glory.<sup>126</sup>

### 3. *Deference as to Fit*

The Court decided *Windsor* primarily on the ground that DOMA lacked any legitimate federal interest.<sup>127</sup> But the Court also had something to say about fit, complaining that "DOMA frustrates [New York's] objective through a system-wide enactment with no identified connection to any particular area of federal law."<sup>128</sup> Likewise, the Court dismissed any possibility that DOMA might be a revenue measure:

<sup>124</sup> BLAG Brief, *supra* note 34, at 19.

<sup>125</sup> See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979) (rejecting "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs"); *Amanda Frost, Overvaluing Uniformity*, 94 Va. L. Rev. 1567 (2008).

<sup>126</sup> The Second Circuit explicitly rejected BLAG's uniformity argument on federalism grounds. See 699 F.3d at 186 ("Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.").

<sup>127</sup> See 133 S. Ct. at 2695 ("[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold . . . that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.").

<sup>128</sup> *Id.* at 2694.

The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed on an estate tax refund. 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.<sup>129</sup>

And the Court's catalog of nonsensical results under DOMA—for example, DOMA permitted gifts to the same-sex spouses of senators and other officials that otherwise would be illegal under federal ethics laws<sup>130</sup>—apparently rejected the notion that DOMA was sufficiently related to any legitimate end the government might assert.

Ordinary rational basis review generally permits laws to be significantly over- or underinclusive.<sup>131</sup> DOMA's shortcomings in this regard were extreme: applying to more than 1,100 federal laws at once, it was rationally related to none.<sup>132</sup> Nonetheless, it is hard to avoid the impression that the Court ratcheted up the level of scrutiny. Judge Boudin's opinion for the First Circuit was more explicit, concluding that "[i]f we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress's will, this statute fails that test."<sup>133</sup>

It is critical to remember, however, that "ordinary" rational basis review is not itself part of the Constitution. It is a doctrinal test that the Supreme Court has developed for specific reasons—in particular, to defer to democratically elected legislatures that presumably have superior institutional capability to decide social and economic issues. Those underlying justifications for judicial deference have

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2695.

<sup>131</sup> See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

<sup>132</sup> Cf. *DHHS*, 682 F.3d at 13 (noting that "only one day of hearings was held on DOMA . . . and none of the testimony concerned DOMA's effects on the numerous federal programs at issue").

<sup>133</sup> *Id.* at 15. The First Circuit explicitly "[did] not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality." *Id.* at 16. Its analysis turned instead on its conclusion that "Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern." *Id.*

complex implications, however, in a case like *Windsor*. Not one but *two* legislatures are in play: Congress and New York's. It is hardly obvious why Congress is more worthy of deference than the New York legislature—both institutions, after all, have similar democratic pedigrees and institutional competences.<sup>134</sup>

To the extent that the Court required a somewhat closer-than-usual fit between means and ends in *Windsor*, it may have concluded that Congress was not the appropriate institution entitled to deference when it comes to marriage. Justice Kennedy's repeated reference to the states' primacy in this area suggested that Congress does not enjoy the same strong presumption of constitutionality when it interferes with state law as when legislating on traditional federal subjects within its enumerated powers. We do not suggest that that was the *only* reason for a lesser degree of deference. Like *Romer*, *Windsor* leaves the strong impression that same-sex couples share many of the indicia that make racial and gender classifications suspect, even if the Court seems reluctant to say so outright. Nonetheless, we think that, in this context, respect for federalism played a crucial role in dissuading the Court from deferring to Congress.

## Conclusion

At a time when the Constitution lacked a Bill of Rights, much less an Equal Protection Clause, James Madison invoked both federalism and separation of powers as forming a "double security" protecting "the rights of the people."<sup>135</sup> The Court echoed that language two years ago: "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one'; hence, "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"<sup>136</sup> *Windsor* illustrates this dynamic, perhaps better than any case in recent memory. Edith Windsor prevailed because the state of New York had established her right to marriage equality in state law, and Congress lacked legitimate authority to interfere with that right.

<sup>134</sup> If anything, one can argue that a state legislature is closer to the people. See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1509 (1987).

<sup>135</sup> The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

<sup>136</sup> Bond, 131 S. Ct. at 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999); *New York v. United States*, 505 U.S. 144, 181 (1992)).

This close relationship between federalism, liberty, and equality has often eluded even seasoned observers. Writing in the *New York Times*, Court-watcher Linda Greenhouse attacked the notion of a federalism-based resolution in *Windsor*. “Federalism tends to emerge from under the rocks in times of constitutional ferment,” Greenhouse said, and she asserted that “striking down DOMA on federalism grounds is a truly bad idea, and the campaign for marriage equality would be worse off for it.”<sup>137</sup> To reach that conclusion, however, one would have to believe that if Justice Kennedy had not been distracted by federalism, the Court would have issued a strong rights-based decision mandating same-sex marriage across the board. The argument and decision in *Perry* suggest—somewhat to the surprise of many observers, including us—that such a resolution was simply not in the cards in 2013.

It is true that, as the chief justice argued in dissent, DOMA’s federalism problems could distinguish *Windsor* in subsequent suits challenging state-law same-sex-marriage bans.<sup>138</sup> And “while ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here, . . . that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions.”<sup>139</sup> But we have a hard time seeing how state sovereignty will weigh particularly heavily in favor of state same-sex marriage bans. That value is embodied in the rational-basis test that applies to equal protection challenges not implicating a suspect or quasi-suspect class, and the states will probably be allowed to assert continuity with traditional moral teaching on marriage as a legitimate interest in a way that Congress, in *Windsor*, was not. The odds of striking down traditional state marriage laws under ordinary rational-basis review were never good, however.

<sup>137</sup> Greenhouse, *supra* note 5. Greenhouse also impugned the motives of the conservative and libertarian scholars who filed the federalism brief against DOMA. See *id.* (intoning “[b]eware of conservatives bearing gifts” and comparing our argument to Virginia’s racist defense of its anti-miscegenation laws). We have not seen any post-decision columns from her lamenting DOMA’s demise or explaining how the gay-rights movement is worse off.

<sup>138</sup> 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

<sup>139</sup> *Id.* at 2697.

But federalism does not justify rejecting any of the various forms of heightened scrutiny proposed for discrimination against homosexuals.<sup>140</sup> Our Constitution imposes national checks on state abuses, just as it counts on the states to check national ones. Hence, in myriad cases involving state laws challenged under heightened scrutiny pursuant to principles of equal protection, free speech, or due process, federalism generally has not been a significant impediment. Many of those cases—involving public education,<sup>141</sup> tort liability,<sup>142</sup> and regulation of the medical profession<sup>143</sup>—also implicated well-established, traditional state functions. As Greenhouse pointed out, federalism was not an obstacle to the assault on Virginia’s prohibition of interracial marriage in *Loving v. Virginia*.<sup>144</sup> And rightly so. As the Court has frequently pointed out, the Fourteenth Amendment was always intended and understood as an incursion into and constraint on state sovereignty.<sup>145</sup>

*Windsor* recognized that federalism *additionally* protects liberty and equality when federal action threatens those rights. As Madison insisted, that protection was part of the Constitution’s first-line strategy for ensuring individual freedom. Although we cannot develop the argument here,<sup>146</sup> we believe that the remarkable success of the gay-rights movement owes a great deal to our federal system. As Justice Kennedy recognized in another recent case, “Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”<sup>147</sup> The movement for marriage equality has surely benefited from the opportunity to implement same-sex-marriage in sympathetic states and to demonstrate to a

<sup>140</sup> See, e.g., 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> (arguing for heightened equal protection scrutiny).

<sup>141</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>142</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>143</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>144</sup> See Greenhouse, *supra* note 5.

<sup>145</sup> See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

<sup>146</sup> See Ernest A. Young, Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate, *U. Colo. L. Rev.* (forthcoming Spring 2014).

<sup>147</sup> *Bond*, 131 S. Ct. at 2364.

watching nation that the institution is not so threatening as some moral traditionalists might have feared.<sup>148</sup> Whether or not the Court ever strikes down state-law same-sex-marriage bans under the Equal Protection Clause, *Windsor* removed a significant impediment to that broader liberalization process in DOMA. In so doing, the Court reminded us how our federalism can profoundly enhance liberty.

<sup>148</sup> See generally Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, 570 *Cato Inst. Policy Analysis*, at 10–12 (Apr. 2006), available at <http://www.cato.org/publications/policy-analysis/federal-marriage-amendment-unnecessary-antifederalist-antidemocratic> (articulating how federalism has been beneficial to democratic debate over same-sex marriage).