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Helen J. Knowles
Skidmore College

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Taking Justice Kennedy Seriously: Why *Windsor* Was Decided “quite apart from principles of federalism”

Helen J. Knowles*

On June 26, 2013, the United States Supreme Court announced its decision in *United States v. Windsor*,¹ striking down section 3 of the Defense of Marriage Act (“DOMA”).² In this Article, I refute the argument that Justice Kennedy’s opinion for the Court in that case is primarily animated by principles of federalism. Drawing on the arguments that I made in *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*,³ I argue

* Visiting Assistant Professor of Government, Skidmore College; B.A., Liverpool Hope University College; Ph.D., Boston University. Email: hknowles@skidmore.edu. This Article is a revised version of a paper presented at the Annual Conference of the American Politics Group of the Political Studies Association (UK), St. Anne’s College and the Rothermere American Institute, University of Oxford, January 5-7, 2014. I would like to thank the conference panel chair, Alex Waddan, and the members of the panel audience – especially Ursula Hackett – for their feedback and comments. I am exceptionally grateful to Lauren Maher (Whitman College ‘13; Gonzaga University School of Law, Class of 2016) for her outstanding research assistance, without which this Article could not have been completed. I am also very grateful to her and three more of my former students, Christian Castaing (Grinnell College, Class of 2014), Andrew Soler (Cornell Law School, Class of 2014), and Julianne Toia (Grinnell College, Class of 2015), for their feedback on an earlier draft of this Article. Last but not least, I would like to thank my colleague Ron Seyb at Skidmore College for his helpful reading suggestions, and the following students for their detailed feedback on an earlier draft: Addison W. Bennett (‘16), Cara M. Cancelmo (‘16), Richard Landry (‘16), Thomas R. Patino (‘16), Alicia C. Pierce (‘15), Kelly Polhemus (‘15), Elena L. Veatch (‘16), and Roger G. Wieand (‘14).

1. 133 S. Ct. 2675, 2692 (2013).

2. 1 U.S.C. § 7 (2012).

3. See generally HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE*

that in *Windsor*, Justice Kennedy made a commitment to equal liberty, just as he did in the landmark cases *Romer v. Evans*⁴ and *Lawrence v. Texas*.⁵ That commitment wholeheartedly embraces the spirit of egalitarianism and social justice underlying President Lyndon Johnson’s 1964 “Great Society Address.”⁶ Although President Johnson’s “abundance and liberty for all” imperative was meant to address the racial and wealth inequities of his time, the speech’s progressive themes were grounded in broad moral principles that apply with just as much force to the inequities facing the lesbian, gay, bisexual, and transgender (“LGBT”) community today.⁷ Justice Kennedy’s articulation of those themes in *Windsor* gets lost, however, if scholarly analysis of his majority opinion focuses not on equal liberty, but on federalism.

I. INTRODUCTION

Fifty years ago, on Friday, May 22, 1964, President Lyndon Baines Johnson delivered a commencement address to the graduating class of the University of Michigan.⁸ Looking out at the sea of people crowded into Michigan Stadium on that hot and humid early-summer morning,⁹ the President spoke for approximately twenty minutes¹⁰ about “[t]he challenge of the next half century”—namely, “to advance the quality of our American civilization.”¹¹ Reflecting upon this speech, which became known

ANTHONY M. KENNEDY ON LIBERTY (2009).

4. 517 U.S. 620 (1996).

5. 539 U.S. 558 (2003).

6. See *Windsor*, 133 S. Ct. at 2692; see also generally Lyndon B. Johnson, 36th President, U.S., Remarks at the University of Michigan (May 22, 1964) [hereinafter President Johnson’s Remarks at the University of Michigan], available at AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=26262> (last visited Oct. 24, 2014).

7. See President Johnson’s Remarks at the University of Michigan, *supra* note 6.

8. *Id.* Originally scheduled for Saturday, May 23, the University of Michigan’s commencement was moved to Friday, May 22 because of the President’s schedule. See ROBERT M. WARNER, THE ANATOMY OF A SPEECH: LYNDON JOHNSON’S GREAT SOCIETY ADDRESS 4 (1978), available at <http://bentley.umich.edu/exhibits/lbj1964/lbjspeech.pdf>.

9. WARNER, *supra* note 8, at 1. Estimates of the audience’s size range from 70,000–85,000. *Id.*

10. *Id.* If one includes the frequent applause that punctuated his words. See *id.* at 4.

11. President Johnson’s Remarks at the University of Michigan, *supra*

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as the “Great Society Address,” Robert M. Warner, the Director of the Michigan Historical Collections at the University’s Bentley Historical Library, wrote in 1978 that “[m]uch of what [the speech] contained has meaning for today.”¹² What did he mean by that? Was it true then? And, does it still have “meaning for today” in 2014 as we recognize the fiftieth anniversary of the speech?

In this Article, I offer some answers to these questions. It is not my intention to engage in an extended exposition on the speech itself, or indeed on the legacy of the Great Society. Rather, my suggested brief answers engage this Article in a discussion of the U.S. Supreme Court’s 2013 decision in *United States v. Windsor*.¹³ In that case, the Court struck down section 3 of DOMA, holding that it violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution.¹⁴ Section 3 of DOMA stated that, “[i]n 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.”¹⁵ Writing for the majority, Justice Kennedy argued that section 3 was inconsistent with the Constitution’s commitment to guaranteeing equal liberty.¹⁶ This is very similar to the reasoning that Kennedy employed in the majority opinions in *Romer v. Evans*¹⁷ and *Lawrence v. Texas*,¹⁸ two other landmark gay rights rulings. I argue that this commitment in *Windsor* wholeheartedly embraces the spirit of egalitarianism and social justice at the heart of the legacy of the 1964 Great Society speech. In making this argument, I offer a very different picture of Kennedy’s opinion for the Court in *Windsor* than that which has been painted by many scholars who contend it was “based on federalism.”¹⁹

note 6.

12. WARNER, *supra* note 8, at 4; *see also* Richard M. Doolen, *Introduction*, in WARNER, *supra* note 8.

13. 133 S. Ct. 2675 (2013).

14. *Id.* at 2696; *see also* U.S. CONST. amend. V; 1 U.S.C. § 7 (2012).

15. 1 U.S.C. § 7.

16. *Windsor*, 133 S. Ct. at 2682-96.

17. 517 U.S. 620, 623-36 (1996).

18. 539 U.S. 558, 562-79 (2003).

19. *See, e.g.*, Rachel Weiner, *Will the DOMA decision kill gay marriage*

The argument that Kennedy's *Windsor* opinion is "deeply rooted in federalism"²⁰ and contains considerable "federalism-laden analysis"²¹ is consistent with the dissenting observation made by Chief Justice Roberts, who wrote that the Court's "judgment is based on federalism."²² It is, however, Justice Scalia's dissenting assessment of the federalism references with which this Article agrees.²³ Scalia is right that federalism is not the dominant theme of the opinion. It is "sprinkled with elements of federalism" (amongst other things),²⁴ but the opinion's "treatment" of the vertical separation of powers is "ultimately inconclusive and nondispositive";²⁵ it is "relevant, but only by the

bans?, WASH. POST (June 26, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/26/will-the-doma-decision-kill-gay-marriage-bans/>. One commentator went so far as to describe the opinion as "a liberal result wrapped in conservative values," an opinion that "reads like a paean to conservative values, invoking totems such as states' rights, federalism, and freedom from the yoke of federal oversight, couched in language a tea partier would cherish." James Oliphant, *Supreme Court Rulings on Gay Marriage: A Liberal Result Wrapped in Conservative Values*, NAT'L J. (June 26, 2013), <http://www.nationaljournal.com/domesticpolicy/supreme-court-rulings-on-gay-marriage-a-liberal-result-wrapped-in-conservative-values-20130626>.

Many of the commentaries that I critique in this Article were written quickly, in the heat of the moments following the announcement of the decision in *Windsor*. This serves, in part, to absolve some authors of their misleading interpretations of the opinions in that case. After all, closer inspection inevitably brings to light aspects that were missed and/or overlooked in the rush to meet deadlines (institutionally-imposed or self-imposed). However, the fact remains that much of what was written was constructed upon interpretive foundations laid much earlier, either in academic literature, amicus briefs, or commentaries that followed the granting of certiorari and/or the oral arguments in this case. Consequently, it would be wrong to avoid engaging in critical analysis of them because of their rapid response nature.

20. Trevor Burrus, *Next Steps for Marriage Equality*, HUFFINGTON POST (June 28, 2013, 11:47 AM), http://www.huffingtonpost.com/trevor-burrus/next-steps-for-marriage-equality_b_3516545.html.

21. Randy Barnett, *Federalism marries liberty in the DOMA decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/>.

22. *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Roberts, C.J., dissenting).

23. *See id.* at 2697–2711 (Scalia, J., dissenting).

24. Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 219 (2013).

25. Helen Alvare, *Taking sides on the meaning of marriage*, SCOTUSBLOG (June 26, 2013, 5:40 PM), <http://www.scotusblog.com/2013/06/taking-sides-on-the-meaning-of-marriage/>.

back door.”²⁶ To be sure, Justice Kennedy does discuss the fact that federal intrusions into definitions of marriage are unusual.²⁷ However, as Deborah Hellman observes, “discussion [is] not made in support of a federalism rationale.”²⁸ Instead, at the heart of the opinion is a guarantee of equal liberty that is very similar to the guarantee that was made to gay and lesbian Americans in *Romer* and *Lawrence*.²⁹

In this Article, the focus of my critique is a pair of commentaries that offer particularly interesting, substantive arguments in support of the “based on federalism”³⁰ theory. First, I examine Professor Randy Barnett’s contention that Justice Kennedy “used the interference with the traditional province of states to regulate marriage to justify *heightened scrutiny under the Fifth Amendment’s Due Process Clause*.”³¹ Second, I analyze Professor Rick Hills’s claim that *Windsor* “recogni[z]es that state law can define, at least in part, the scope of federal constitutional rights by (for instance) defining what constitutes an arbitrary classification under the Fifth Amendment’s Due Process clause.”³² This, Hill contends, makes “the feds . . . more constrained by national constitutional rights than are the states.”³³

Some say that Kennedy’s opinion in *Windsor* is grounded in preserving principles of federalism—a subject about which he frequently waxes lyrical, labeling it the “unique contribution of the

26. Ilya Somin, *The DOMA Decision and Federalism*, VOLOKH CONSPIRACY (June 26, 2013, 11:29 AM), <http://www.volokh.com/2013/06/26/the-doma-decision-and-federalism/>.

27. See *Windsor*, 133 S. Ct. at 2681.

28. Deborah Hellman, *Scalia is right: Justice Kennedy’s opinion in Windsor doesn’t rest on federalism*, BALKINIZATION (June 27, 2013, 5:29 PM), <http://balkin.blogspot.com/2013/06/normal-0-false-false-false-en-us-x-none.html>.

29. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). It should be noted that I focus upon the merits of *Windsor* in this Article, and I do not discuss the jurisdictional component of the decision.

30. Weiner, *supra* note 19.

31. Barnett, *supra* note 21 (emphasis added).

32. Rick Hills, *Windsor and the states’ power to define federal constitutional rights: Does Kennedy revive Justice Harlan’s Theory of Rights?*, PRAWFSBLAWG (June 26, 2013, 11:51 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/windsor-and-the-states-power-to-define-federal-constitutional-rights.html>. A similar argument is made in the following article, Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, CATO SUP. CT. REV., 2012–2013, at 117, 117–18.

33. Hills, *supra* note 32.

Framers to political science and political theory.”³⁴ Indeed, as we will see, much of the “dignity” rhetoric in the opinion is suggestive of federalism because it is state oriented—rather than individual oriented (interestingly, this is a point lost on most of the commentators who argued that the opinion emphasizes federalism).³⁵ Ultimately, however, I demonstrate that the *Windsor* majority’s primary commitment is to the constitutional guarantee of equal liberty. This guarantee is neither as obviously stated nor as passionately expressed as it was in *Romer* and *Lawrence*; the opinion is devoid of the “gauzy platitudes” with which Kennedy’s opinions are so often “studded.”³⁶ Nevertheless, that guarantee of equal liberty is at the heart of the opinion and portends, in the not-too-distant future, an America in which state bans on gay marriage cannot coexist with the U.S. Constitution.

Does *Windsor* open the next chapter in the liberal legacy of the Great Society? This Article provides an affirmative answer to that question. However, it does so by first considering some of the complexities of the Great Society legacy—including the difference between policies and principles. Additionally, the Article recognizes that while “[t]he central principles of Lyndon Johnson’s program . . . were those of amelioration and opportunity,”³⁷ those principles were not, in 1964, expected to extend to the country’s LGBT community.

II. THE “GREAT SOCIETY” AND THE LGBT COMMUNITY: FROM POLICY EXCLUSION TO PRINCIPLED INCLUSION?

In 2014, as the nation recognized the fiftieth anniversary of President Johnson’s speech, the legacy of the Great Society

34. *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

35. The exception is Neomi Rao, *The Trouble With Dignity And Rights Of Recognition*, 99 VA. L. REV. ONLINE 29 (2013).

36. ADAM LIPTAK, *TO HAVE AND UPHOLD 54* (Kindle ed. 2013). See also Jeffrey Toobin, *Adieu, DOMA!*, NEW YORKER (July 8, 2013), http://www.newyorker.com/talk/comment/2013/07/08/130708taco_talk_toobin.

Jeffrey Toobin is no fan of Justice Kennedy’s judicial writing style, which he describes as “windy and verbose at times.” *Id.* Nonetheless, Toobin was positively ebullient in his praise for the Justice’s *Windsor* opinion, describing it as being “bracingly plainspoken” and “[t]o a degree rare in the dusty archives of the Supreme Court . . . a pleasure, even a thrill, to read.” *Id.*

37. JOHN A. ANDREW III, *LYNDON JOHNSON AND THE GREAT SOCIETY* 95 (1998).

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remains unclear. Indeed, as Ursula Hackett masterfully demonstrates, the very term “Great Society” is susceptible to multitudinous understandings and definitions – hence her argument that we should really be talking about “Great Societies.”³⁸ To be sure, major civil rights advancements were made as a result of the Great Society agenda, but many of the President’s ambitious goals remain elusive, having encountered massive resistance almost as soon as they were announced. Within fifteen months of addressing the Michigan graduates Johnson signed landmark legislation into law, including the 1964 Civil Rights Act and the 1965 Voting Rights Act.³⁹ However, many of the challenges which the President asked the country to confront went unmet. In part this was inevitable. They fell victim to the President’s personal, grandiose expectations. Johnson defended the Great Society using “analysis presented in a manner that often failed to distinguish between expectations and established realities.”⁴⁰ The President’s “gigantic aspirations” were too big not to fail, because they were “clearly unattainable within one Presidency, or one generation.”⁴¹ They were, therefore, destined to rise or fall on the (mis)fortune and (dis)favor of subsequent executive administrations and congressional majorities. And then there was, as Doris Kearns Goodwin points out, the mire and malaise of the “[i]f it hadn’t been for Vietnam”

38. Ursula Hackett, *The Six Great Societies* 11–13 (January 5–7, 2014) (unpublished manuscript) (presented at the 40th Anniversary Conference of the American Politics Group of the Political Studies Association (UK), St. Anne’s College and the Rothermere American Institute, University of Oxford) (on file with author). What follows in this Article is merely a very brief overview of the “Great Society.” It is not my intention, in this Article, to revisit in detail the legacy of the Great Society. For excellent scholarly treatments of different aspects of the Great Society agenda—both during and after the Johnson presidency, see generally, for example: JOSEPH A. CALIFANO, JR., *THE TRIUMPH & TRAGEDY OF LYNDON JOHNSON* (Texas A & M Univ. Press 2000) (1991); ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES: 1961-1973* (1998); DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM* (1991).

39. For a good overview of the Great Society’s policy accomplishments, see Joseph A. Califano, Jr., *What Was Really Great About The Great Society*, WASH. MONTHLY ONLINE, Oct. 1999, at 13, available at <http://www.washingtonmonthly.com/features/1999/9910.califano.html>.

40. GOODWIN, *supra* note 38, at 219.

41. *Id.* at 211.

factor.⁴²

One way to evaluate the legacy of the Great Society speech is to draw a distinction between policy and principle. For, while objectives such as confronting poverty “were widely accepted,” it was often the case (as is so true of many facets of American governance) that “specific proposals to reach them sparked debate,” thereby generating delay and, ultimately, defeat.⁴³ In closing the second of his two-volume biographical treatment of Lyndon Johnson, Robert Dallek reminds us of the historiographical value inherent in drawing this policy-principle distinction:

Debates about the sort of social engineering Johnson sponsored will not disappear. Nevertheless, there is at least one side of Johnson’s reformism that the great majority of Americans have embraced and seem unlikely to abandon for the foreseeable future. There is a striking analogy here between Johnson and FDR. Roosevelt’s New Deal never brought full recovery from the Depression. But it put in place a series of measures that humanized the American industrial system

Similarly, many of the laws spawned by Lyndon Johnson’s war on poverty and Great Society have either fallen into disrepute or command little support from most Americans. But the spirit and some of the substance behind Johnson’s reform programs maintain a hold on the public imagination that endures. . . . Johnson’s poverty war and reach for a Great Society may seem somewhat outdated or inadequate to current challenges, but the humanizing force behind them abides and gives both men historical standing as visionaries who helped advance the national well-being and fulfill the promise of American life.⁴⁴

42. *Id.* at 251 (internal quotation marks omitted); *see also id.* ch. 9.

43. ANDREW, *supra* note 37, at 197. I fondly recall that Norman Zucker, my Congress course professor during my junior exchange year at the University of Rhode Island, began the semester by emphasizing that “delay and defeat” should be at the intellectual center of our learning about the legislative process in the United States.

44. DALLEK, *supra* note 38, at 624–25.

Admittedly, in the intervening years, both the underlying principles of the Great Society speech and the policies it spawned came under attack from Republicans and often went undefended by Democrats. For example, Newt Gingrich rode his 1990s Republican Congressional revolution into town on the back of a horse emblazoned with the message that the blame for the nation's woes could be placed squarely upon the shoulders of Democrats who refused "to recognize that Lyndon Johnson's Great Society has failed."⁴⁵ This strategy was, in part, possible (although ultimately unsuccessful) because for several decades 'liberal' Democrats enjoyed a decidedly uneasy relationship with the legislative policy accomplishments *and* the broader principles of the Great Society. They frequently "[ran] from the legacy of the Great Society and the 1960s, seeking to rebut charges that [they were] too effete, too closely tied to racial and ethnic minorities and too out of touch with the mainstream of American life."⁴⁶

As Philip A. Klinkner and Thomas Schaller persuasively argue, however, those very same legislative accomplishments and underlying Great Society principles helped facilitate the creation of a voting base which helped elect Barack Obama in 2008.⁴⁷ "Somewhere," they write, "Lyndon Johnson is smiling," for it was the outcome of that presidential election that suggested the "Democrats have erected a majority coalition based on the votes of non-whites and the college-educated"—what Klinkner and Schaller term "the Latent Great Society Majority."⁴⁸

On January 21, 2013, President Obama gave the second Inaugural Address of his presidency.⁴⁹ He invoked the words and spirit of the Declaration of Independence, just as President Johnson had done nearly a half century earlier in Ann Arbor.⁵⁰

45. LINDA KILLIAN, *THE FRESHMEN: WHAT HAPPENED TO THE REPUBLICAN REVOLUTION?* 239 (1999) (quoting Newt Gingrich, 58th Speaker of the U.S. House of Representatives).

46. Philip A. Klinkner & Thomas Schaller, *LBJ's Revenge: The 2008 Election and the Rise of the Great Society Coalition*, FORUM, Oct. 2008, at 1, 15.

47. *See generally id.*

48. *Id.* at 5, 15.

49. Barack H. Obama, 44th President, U.S., Inaugural Address (January 21, 2013) [hereinafter President Obama's Second Inaugural Address], available at WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> (last visited Oct. 24, 2014).

50. *See id.*; President Johnson's Remarks at the University of Michigan,

This time, however, the tone struck by the President was far more inclusive and less utopian. The country, he observed, “continue[s] a never-ending journey to bridge the meaning of those words with the realities of our time. For history tells us that while these truths may be self-evident [“that all men are created equal,”]⁵¹ they’ve never been self-executing.”⁵² To be sure, Americans could and should strive to achieve the “abundance and liberty for all” advocated by Johnson in 1964.⁵³ But that “journey,” Obama emphasized, “is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well.”⁵⁴ The President of the United States of America had just used the first speech of his second term in office to endorse gay marriage.

Literature which identifies a positive and principled relationship between the Great Society’s “abundance and liberty for all” imperative and the rights and liberties of gay and lesbian Americans is conspicuous by its absence, and for good reason. President Johnson’s “vision . . . embraced an array of legislative initiatives to improve Americans’ ‘quality of life,’” but racial and wealth inequities were the primary targets.⁵⁵ At least one piece of Great Society legislation, however, specifically discriminated against members of the homosexual community. The 1965 Immigration and Nationality Act was one of that year’s “Big Four” legislative accomplishments.⁵⁶ It has been hailed by commentators as “right[ing] a long-rankling ethnic affront”⁵⁷ and “signal[ing] the beginning of the era of liberalization”⁵⁸ of the nation’s immigration policy. In the view of President Johnson, it

supra note 6.

51. THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

52. President Obama’s Second Inaugural Address, *supra* note 49.

53. President Johnson’s Remarks at the University of Michigan, *supra* note 6.

54. President Obama’s Second Inaugural Address, *supra* note 49.

55. ANDREW, *supra* note 37, at 163.

56. Pub. L. No. 89-236, 79 Stat. 911 (1965). Together with educational aid reform, Medicare and Medicaid, and the Voting Rights Act. See JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 569 (1996).

57. IRWIN UNGER, THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON 128 (1996).

58. NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA 32 (1996).

“repair[ed] ‘a very deep and painful flaw in the fabric of American justice’” by abolishing the racially discriminatory provisions of the National Origins Act of 1924, which made ethnic origin the principal basis for immigration inclusion and exclusion.⁵⁹ However, the 1965 Act also restated the homosexual exclusion provisions of previous laws, most notably the 1952 McCarran-Walter Act.⁶⁰ As Eithne Luibheid explains, homosexuals were not actually identified in that law:

Instead, homosexual exclusion became rolled into the provision that barred entry by psychopathic personalities. A Senate report explained: ‘The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change in nomenclature is not to be constructed in any way as modifying the intent to exclude all aliens who are sexual deviants.’⁶¹

Therefore, the 1965 law arguably was more discriminatory because it explicitly identified “sexual deviation” (homosexuality) as one of the grounds for denying admission into the United States.⁶² This state of affairs would not change until Congress

59. DALLEK, *supra* note 38, at 228 (quoting President Johnson’s Remarks at the University of Michigan, *supra* note 6). As David Reimers notes, however, the 1965 Act also deliberately imposed a system of *de facto* racial discrimination, regardless of the inclusivity note that was struck by its Great Society champions. DAVID M. REIMERS, *STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA* 70–73 (2d ed. 1992). Almost three quarters of the immigration places were set aside for family reunification purposes. *See id.* This purposely and disproportionately benefited immigrants from southern and eastern Europe because the racially exclusionary provisions of previous laws resulted in a very small number of colored families seeking to reunify. *See id.* Although, as Hugh Davis Graham observes, over the course of the next forty years the vast majority of immigrants entering the U.S. under the provisions of the 1965 law came from Asia and Latin America. *See* Hugh Davis Graham, *The Great Society’s Civil Rights Legacy: Continuity 1, Discontinuity 3*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 365, 368-69 (Sidney M. Milkis & Jerome M. Mileur eds., 2002).

60. Immigration and Nationality Act § 18.

61. EITHNE LUIBHEID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 78 (2002) (quoting S. REP. NO. 1137, at 9 (1952)).

62. Immigration and Nationality Act § 18; *see also* LUIBHEID, *supra* note 61, at 78.

repealed the “sexual deviation” provision in 1990.⁶³

For gays and lesbians, the legislative vision of American society that emerged from the 1964 speech was one of exclusion. “[P]reserving the liberty of our citizens” so that they could “pursue the happiness”⁶⁴ of which the Declaration of Independence spoke could only be achieved by reinforcing traditional notions of morality. Homosexuals were viewed as dangerous deviants who posed a threat to the liberty enjoyed by ‘normal’ and ‘healthy’ Americans.⁶⁵ President Johnson spoke of “three places where we begin to build the Great Society – in our cities, in our countryside, and in our classrooms.”⁶⁶ As the history of the oppression of homosexuals in the United States clearly indicates, in 1964 these were places where the average American believed that any great society was a straight society.⁶⁷

Over the next three decades, the majority of the LGBT community’s pleas for judicial intervention fell on deaf ears, especially at the nation’s highest court.⁶⁸ The well-documented, and immensely significant expansion of civil rights and liberties by the Warren Court⁶⁹ (and, to a lesser extent, the Burger Court)⁷⁰ did not extend to those individuals experiencing discrimination based upon their sexual orientation.⁷¹ As Marc Stein convincingly demonstrates in *Sexual Injustice*, even the

63. See LUIBHEID, *supra* note 61, at 96–99.

64. President Johnson’s Remarks at the University of Michigan, *supra* note 6.

65. See JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 316-18 (Univ. of Chi. Press, 3d ed. 2012) (1988).

66. President Johnson’s Remarks at the University of Michigan, *supra* note 6.

67. For a very good overview of the social, political, and legal obstacles faced by the LGBT community in the 1960s and 1970s (including, of course, the seminal 1969 Stonewall riots), and the birth of and struggles faced by the Gay Liberation Front, see D’EMILIO & FREEDMAN, *supra* note 65, at 318–25.

68. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

69. For a good overview, see generally Henry J. Abraham, *Justices and Justice: Reflections on the Warren Court’s Legacy*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM*, *supra* note 59, at 351.

70. See generally *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* (Vincent Blasi ed., 1983).

71. See, e.g., *Bowers*, 478 U.S. at 190–91.

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Court's decisions in *Griswold v. Connecticut*,⁷² *Loving v. Virginia*,⁷³ *Eisenstadt v. Baird*,⁷⁴ and *Roe v. Wade*⁷⁵ should be viewed as maintaining a body of "heteronormative doctrine."⁷⁶

Decided in 1967, *Boutilier v. INS*⁷⁷ was not the U.S. Supreme Court's first gay rights decision, but like its predecessors and the cases mentioned above, its narrative was decidedly conservative and heteronormative.⁷⁸ As Stein demonstrates, however, *Boutilier* deserves the greater amount of attention because in it "the Court produced substantive majority and minority opinions," and the case "was decided in the middle of the period in which the Court was announcing liberalizing decisions on birth control, obscenity, interracial marriage, and abortion."⁷⁹

When Clive Michael Boutilier, a Canadian citizen, first crossed the border into the United States in 1955, he entered under the terms of the 1952 McCarran-Walter Act, which, as noted above, excluded homosexuals, labeling them "persons of constitutional psychopathic inferiority."⁸⁰ In 1964, in an affidavit that was part of his application for U.S. citizenship, he admitted that he had previously been arrested and charged (although, his case was ultimately dismissed) with engaging in sodomy with another man.⁸¹ This admission resulted in the initiation of deportation proceedings under the terms of the 1952 Act.⁸² As Stein details, Justice Clark's opinion for the Court upholding the decision of the INS to deport Boutilier repeatedly mischaracterized the facts of the case.⁸³ And while that opinion clearly stated otherwise, Boutilier had "[a]t most . . . affirmed that he was 'a homosexual' in 1957," two years after he first entered

72. 381 U.S. 479 (1965).

73. 388 U.S. 1 (1967).

74. 405 U.S. 438 (1972).

75. 410 U.S. 113 (1973).

76. MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* 3 (2010).

77. 387 U.S. 118 (1967).

78. See STEIN, *supra* note 76, at 58.

79. *Id.*

80. *Boutilier*, 387 U.S. at 119 (quoting 8 U.S.C. § 136(a) (1946)) (internal quotation marks omitted).

81. *Id.* at 119.

82. *Id.* at 118; see also STEIN, *supra* note 76, at 61–66.

83. STEIN, *supra* note 76, at 67.

the U.S.⁸⁴ Neither Clark in his majority opinion, nor Justices Brennan and Douglas in their dissents, penned any language that exhibited any substantive understanding of the issues that in any way departed from the dominant heteronormative narrative.⁸⁵ That narrative and the judicial legacy of *Boutilier* persisted for (at least) another generation, as evidenced by the U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick*.⁸⁶

As Emily Bazelon aptly observes, "Michael Hardwick may have the worst timing of anyone ever to come before the Supreme Court,"⁸⁷ because his (unsuccessful) constitutional challenge to a Georgia criminal sodomy law came before the justices against the backdrop of the AIDS crisis, a crisis that "revealed how tenuous the progress of gay liberation had been."⁸⁸ Writing for the five-justice majority, Justice Byron White produced an insensitive and tradition-oriented opinion that read the concepts of liberty and equality at a very narrow level of generality.⁸⁹ In his view, the case did not involve broad, sweeping questions of individual, personal privacy and autonomy.⁹⁰ Quite the opposite. In White's words, the question in the case was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."⁹¹ White rejected, out of hand, any claim that such a right could be found in the Constitution's text.⁹² It was not "deeply rooted in this Nation's history and tradition."⁹³ And it could not be considered "implicit in the concept of ordered liberty."⁹⁴ Therefore, Hardwick's claim failed all of the standard

84. *Id.* at 72.

85. *Id.* at 57–93. For Stein's discussion of the dissenting opinions in *Boutilier*, see *id.* at 82–91.

86. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

87. Emily Bazelon, *Why Advancing Gay Rights is All About Good Timing*, SLATE (October 19, 2012, 5:56 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html.

88. D'EMILIO AND FREEDMAN, *supra* note 65, at 354; *see also id.* 354–61.

89. *See Bowers*, 478 U.S. at 190.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

94. *Id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

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tests used by the Court in individual liberty cases. Any argument to the contrary was, “at best, facetious.”⁹⁵

The week after the justices met in conference to decide *Bowers*, Justice Lewis F. Powell changed his position, thereby casting the crucial fifth vote to uphold the Georgia law.⁹⁶ Powell agonized over the case. Ultimately, the staid, conservative Virginian was unable to comprehend the nature of homosexual attraction and, consequently, the importance and meaning of Hardwick’s rights claim.⁹⁷ Famously, four years later, Powell publicly confessed that he considered himself to have voted (or switched to voting) the wrong way in *Bowers*: “I think I probably made a mistake in that one,” he said.⁹⁸ By contrast, Justice Kennedy (President’s Reagan’s third choice to replace the retiring Powell)⁹⁹ viewed *Bowers* as misguided from the day it was decided (as he would later get the chance to say in the pages of the U.S. Reports in his majority opinion in *Lawrence*).¹⁰⁰ As he explained to a gathering of Canadian jurists at Stanford University in July 1986:

[M]any argue that a just society grants a right to engage in homosexual conduct. If that view is accepted, the *Bowers* decision in effect says the State of Georgia has the right to make a wrong decision—wrong in the sense that it violates some people’s views of rights in a just society.¹⁰¹

Upon the announcement of Kennedy’s Supreme Court nomination many gay rights advocates looked past that speech. They saw little reason to be optimistic about pressing their rights claims before President’s Reagan’s third choice to replace the

95. *Id.* at 194.

96. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 523–24 (1994).

97. See *id.* at 521–22.

98. *Id.* at 530 (quoting Lewis F. Powell Jr., Assoc. Justice, U.S. Supreme Court, Lecture at New York University Law School (Oct. 18, 1990)).

99. See KNOWLES, *supra* note 3, at 6.

100. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

101. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Stanford Lectures at the Canadian Institute for Advanced Legal Studies: Unenumerated Rights and the Dictates of Judicial Restraint (July 24, 1986 to Aug. 1, 1986). For my more detailed discussion of this, see KNOWLES, *supra* note 3, at 115–16, and more generally ch. 3.

retiring Powell. For example, at the time of Kennedy's confirmation hearings, law professor Arthur S. Leonard commented in the *New York Native* that, "Kennedy seems rather obtuse on important gay issues, and indeed must be counted a likely vote against us on most matters likely to come before the Supreme Court."¹⁰² Kennedy's "appointment should come as no cause for joy among gay people," Leonard concluded.¹⁰³ For "it seems unlikely that gays alone can block his confirmation, and equally unlikely that Ronald Reagan would appoint anyone who would have voted differently in [*Bowers*]."¹⁰⁴ A copy of the article accompanied the testimony of Jeffrey Levi, Executive Director of the National Gay & Lesbian Task Force, before the Senate Judiciary Committee. Levi "look[ed] to Judge Kennedy's record in hope of finding indication that his definition of American society and the Constitution is more inclusive" than that of the *Bowers* majority.¹⁰⁵ "Unfortunately," he concluded, "little hope can be found."¹⁰⁶ Levi and Leonard both focused upon the small number of gay rights-related opinions Kennedy had penned since 1975, during his time on the Ninth Circuit Court of Appeals.¹⁰⁷ As I explained in my book, a close reading of those opinions, together with Kennedy's pre-Supreme Court nomination speeches (especially his post-*Bowers* Stanford speech), does not support Levi and Leonard's conclusions.¹⁰⁸ Those materials make it clear that Kennedy's transformation into "a jurist who treats gay rights claims seriously"¹⁰⁹ did not suddenly take place one day in 1996

102. Arthur S. Leonard, *Kennedy and the Gays, Again*, N.Y. NATIVE, Dec. 7, 1987, at 430, 430, available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-KENNEDY/pdf/GPO-CHRG-KENNEDY-2-3-4-8.pdf>.

103. *Id.* at 431.

104. *Id.*; see also *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. 558.

105. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 426 (1987) [hereinafter *Kennedy Hearing*] (statement of Jeffrey Levi, Executive Director, National Gay & Lesbian Task Force).

106. *Id.*

107. See generally *id.*; Leonard, *supra* note 102.

108. KNOWLES, *supra* note 3, at 93–98.

109. Artemus Ward, *The Gay Rights Jurisprudence of Anthony Kennedy: An Institutional Analysis* 6 (Apr. 15, 2004) (unpublished manuscript) (presented at the Annual Meeting of the Midwest Political Science Association, Chicago, Ill.), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/8/3/4/6/p83460_index.html?phpsessid=a5dae1

when, ten years after *Bowers*, he announced the Court's decision in *Romer*.

In that case, the Court struck down a state constitutional amendment that singled out discrimination based upon sexual orientation as something from which people could not seek governmental protection.¹¹⁰ "It is not within our constitutional tradition to enact laws of this sort," wrote Justice Kennedy.¹¹¹ "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection," he continued, "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."¹¹² Seven years later, the justices went much further, issuing the landmark ruling in *Lawrence v. Texas*, holding unconstitutional a state law criminalizing homosexual sodomy (and, consequently, overturning *Bowers*).¹¹³ And then, exactly ten years later, came the decision in *Windsor*¹¹⁴—liberal progress indeed, and progress arguably entirely consistent with the principles embodied in the concept of the Great Society.

III. "[T]HE MEDIATING IDEA OF ARBITRARINESS"¹¹⁵ – OR, THE
FEDERALISM ROAD NOT TAKEN IN *WINDSOR*

In the months following the decision in *Romer*, Jeffrey Rosen interviewed Pete Wilson, former Governor of California and U.S. Senator, for a *New Yorker* profile of Justice Kennedy.¹¹⁶ One of the ways in which Wilson described the jurisprudence of his good friend was as follows: "I think it strikes him as terribly unfair that anyone's individual potential should be in any way limited by their being classed as a member of a group, and treated in

b8705e4e50460854ae9b9b5af4. In this paper, Professor Ward similarly argues that Kennedy's Ninth Circuit opinions were less hostile towards gay rights claims than the analyses of Levi and Leonard led them to conclude. See generally *id.*; see also KNOWLES, *supra* note 3, at 95–98.

110. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

111. *Id.* at 633.

112. *Id.*

113. 539 U.S. 558, 562 (2003).

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

115. William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 47, 66 (Michael J. Meyer & William A. Parent eds., 1992).

116. See Jeffery Rosen, *The Agonizer*, *NEW YORKER*, Nov. 11, 1996, at 82, available at <http://www.newyorker.com/magazine/1996/11/11/the-agonizer>.

accordance with their group membership, rather than what they deserve to receive as individuals.”¹¹⁷

It is difficult to find a more astute summation of Justice Kennedy’s concept of equality. That is why I chose to open chapter three of my book, *The Tie Goes to Freedom*, with this quotation.¹¹⁸ Wilson’s words perfectly describe the central animating principle of the main opinions analyzed in that chapter—Kennedy’s writings for the Court in *Romer* and *Lawrence*.¹¹⁹ Wilson’s words also can explain the Court’s opinion for the five-justice majority in *Windsor*.

Responding to *Windsor*, Michael Dorf, a former clerk for Associate Justice Kennedy, quipped that, “[i]f Bill Clinton was ‘the first Black president,’ Anthony Kennedy has now firmly secured his place in history as ‘the first gay Justice.’”¹²⁰ To some extent, this reflects the fact that in *Romer*, *Lawrence*, and *Windsor* Justice Kennedy was the key member of the Court—the ideological centrist whose vote was essential for the lawyers to secure in these cases. However, as I explained in my book, and discuss below, Kennedy’s *vote* was never in doubt.¹²¹ Therefore, Dorf’s assertion is better understood as being attributable to the fact that Kennedy wrote the majority *opinion* in each of these cases.

Ten years ago, Professor Dorf observed that Kennedy’s authorship of *Romer* gave an air of predictability to Justice Stevens’s decision to assign Kennedy the task of writing the majority opinion in *Lawrence*.¹²² “The writing was, if not on the wall, at least in the vicinity of the wall,” remarked Dorf.¹²³ There is every reason to believe that Stevens was aware of the extent to which his colleague felt passionately about extending liberty and

117. *Id.* at 86 (quoting Peter Wilson, 36th Governor, California).

118. KNOWLES, *supra* note 3, at 89.

119. *Id.* at 89–125.

120. Michael C. Dorf, *First Takes on DOMA and Prop 8 Rulings*, DORF ON LAW (June 26, 2013, 10:58 AM), <http://www.dorfonlaw.org/2013/06/first-takes-on-doma-and-prop-8-rulings.html>.

121. KNOWLES, *supra* note 3, at 91.

122. *See generally* Richard Brust, *The Man In The Middle*, A.B.A. J., Oct. 2003, at 24. Stevens was acting in his capacity as the Senior Associate Justice in the majority.

123. *Id.* at 24 (quoting Michael Dorf, Professor, Cornell University Law School).

equality to all, regardless of their sexual orientation. In *Lawrence* (and, indeed, in *Romer* seven years earlier), Kennedy did not “agonize” over the case, a character trait he has repeatedly been accused of exhibiting in his judicial decision-making.¹²⁴ Powell “waited and waffled” when deciding *Bowers*.¹²⁵ By contrast, in *Lawrence*, as he “later told Thurgood Marshall’s wife,” Kennedy considered “the right result” to be “so obvious” that he penned the opinion “over the course of one weekend.”¹²⁶ If the writing in *Lawrence* was “in the vicinity of the wall,”¹²⁷ after the justices voted in *Windsor* the identity of the majority opinion’s author was surely etched in indelible ink. As the Senior Associate Justice in the *Windsor* majority, Kennedy likely did not hesitate to self-assign the opinion. As Jeffrey Rosen observes, “[e]ver since Justice Kennedy held in *Lawrence v. Texas* that moral disapproval of homosexuality isn’t a legitimate purpose for any law, the writing was on the wall for DOMA.”¹²⁸ And as *Windsor* made clear, Kennedy “not only accepts, but welcomes the task of writing majestic opinions affirming the dignity of gay persons and couples.”¹²⁹

Kennedy’s assessment of section 3 of DOMA is blunt and unequivocal in *Windsor*: its “principal purpose is to impose inequality.”¹³⁰ DOMA tells Mark and Mary that when they got married in Des Moines they were immediately entitled to a plethora of federal benefits by virtue of being husband and wife; it simultaneously informs Mark and Mary’s Iowan neighbors, Sandra and Sarah, that they will be denied those very same benefits simply because they chose to enter into a lawful (in the eyes of Iowa) marital relationship with a person of the same sex. As Edith Windsor remarked about her late wife Thea Spyer (upon whose death Windsor was saddled with a \$353,053 federal tax

124. See Rosen, *supra* note 116, at 82–86.

125. JEFFRIES, *supra* note 96, at 514.

126. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 37 (2007).

127. Brust, *supra* note 122, at 24.

128. Jeffrey Rosen & Michael McConnell, *Debating the Court’s Gay Marriage Decisions*, NEW REPUBLIC (June 26, 2013), <http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate>.

129. Dorf, *supra* note 120.

130. 133 S. Ct. 2675, 2694 (2013).

bill): “If Thea was a Theo, I wouldn’t have had to pay.”¹³¹ Or, to use the description employed by Justice Ginsburg during the *Windsor* oral argument, DOMA tells Mark and Mary that their marriage is “full” while simultaneously informing Sandra and Sarah that their union is nothing more than “skim milk.”¹³² This inequality lies at the jurisprudential heart of Justice Kennedy’s opinion in *Windsor*—it reminds us that the parties harmed by DOMA, the parties deprived of their constitutionally guaranteed right to equal liberty, are the gay and lesbian individuals who wish to “marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”¹³³ Individuals who wish to marry and to give “further protection and dignity”¹³⁴ to the “personal bond”¹³⁵ that is neither created by nor dependent for its existence on government action.

This is clear in the *Windsor* opinion passage that Professor Dorf astutely describes as “the money quote from the majority”:¹³⁶

DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in

131. Jim Dwyer, *She Waited 40 Years to Marry, Then When Her Wife Died, the Tax Bill Came*, N.Y. TIMES (June 7, 2012) http://www.nytimes.com/2012/06/08/nyregion/woman-says-same-sex-marriage-bias-cost-her-over-500000.html?_r=0 (quoting Interview with Edith Windsor, in N.Y., N.Y. (June 6, 2012)).

132. Transcript of Oral Argument at 71, *Windsor*, 133 S. Ct. 2675 (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf.

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

134. *Id.* at 2692.

135. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

136. Dorf, *supra* note 120.

their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.¹³⁷

It is here that we see the crucial theme of the opinion: it is irrational, demeaning (privately and publicly), and, therefore, unconstitutional to treat any individual differently because of their sexual orientation.¹³⁸

A. *Justice Kennedy on Federalism*

The crucial theme is obscured if one focuses on the federalism references. This is not to say, however, that it is impossible to understand why some commentators latched onto those references. The vertical separation of powers in the American system of government is, after all, a subject about which Kennedy has spoken passionately and often throughout his judicial career.¹³⁹ Kennedy has called federalism the “most brilliant political theory breakthrough of many centuries,” a central “part of the dynamic of freedom that the Framers insisted upon”;¹⁴⁰ and in his solo concurrence in *U.S. Term Limits v. Thornton* he famously labeled it “our Nation’s own discovery.”¹⁴¹ When the Framers conceived of federalism, Kennedy wrote, they “split the atom of sovereignty.”¹⁴²

137. *Windsor*, 133 S. Ct. at 2694 (citation omitted).

138. *See id.*

139. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

140. Justice Kennedy, *Life in the Supreme Court* (C-SPAN television broadcast Dec. 14, 1999), available at <http://www.c-span.org/video/?154155-1/life-supreme-court>.

141. 514 U.S. at 838 (Kennedy, J., concurring).

142. *Id.* at 838–39. Kennedy has quoted the phrase “split the atom of sovereignty” in one other opinion. *See Alden v. Maine*, 527 U.S. 706, 751 (1999). Justice Kennedy’s colleagues have also quoted this phrase. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting); *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999). While *U.S. Term Limits* marked the first occasion in which Justice Kennedy used this atomic metaphor in a Supreme Court opinion, it was neither a new understanding of federalism for him, nor a description conceived by one of the individuals clerking for him during the October 1994 Term; it made an appearance in at least two of the speeches

Speaking to the Sacramento Chapter of the Rotary Club in October 1987 (six weeks before his Supreme Court nomination), Kennedy emphasized that his views about federalism were not borne of historic idol worship.¹⁴³ He asked the audience a rhetorical question: “Do we have simply an attachment to federalism because it has some antique, traditional attributes; do we wish simply to honor the memories of Madison and Hamilton[?]”¹⁴⁴ His answer was an unequivocal “no.”¹⁴⁵ Kennedy explained that his deep passionate commitment is not to federalism qua federalism.¹⁴⁶ Rather, of principal importance to him is the “underlying, fundamental, essential, ethical, moral value” that is “reflect[ed]” in the concept of federalism.¹⁴⁷ Kennedy continued,

The value is that it is wrong, legally wrong, morally wrong, for a person to delegate authority over his or her own life to an entity which is so far removed from his or her ability to control it that he or she parts with the essential freedom that inheres in every human personality.¹⁴⁸

None of this is a secret, and it has been well documented by scholars.¹⁴⁹ Additionally, during the oral argument in *Windsor*,

that he gave before joining the Supreme Court. See Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the Sacramento Chapter of the Rotary Club, Sacramento, Cal.: Rotary Speech 7 (October 15, 1987) (transcript available in the Committee on the Judiciary, Judiciary Nomination files, 100th Cong.) [hereinafter Justice Kennedy Rotary Club Address]; Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the Historical Soc’y for the U.S. Dist. Ct. for the N. Dist. of Cal., S.F., Cal.: Federalism: The Theory and the Reality, Speech 3 (October 26, 1987) (transcript available in the Committee on the Judiciary, Judiciary Nomination files, 100th Cong.).

143. Justice Kennedy Rotary Club Address, *supra* note 142.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. For example, I have discussed it on various occasions. See generally Helen J. Knowles, *A Dialogue on Death Penalty Dignity*, 11 CRIMINOLOGY & CRIM. JUST. 115 (2011); Helen J. Knowles, The Constitutional “Dignity” of States and Individuals (2007) (unpublished manuscript) (presented at the Annual Meeting of the American Political Science Association) (on file with author) [hereinafter Knowles, Constitutional “Dignity”]. Examples of other

Justice Kennedy's comments indicated that federalism was likely the principal lens through which he was viewing the issues in the case – that, the “federalism interest at stake here” was of considerable importance.¹⁵⁰ It was, therefore, unsurprising that the *Windsor* decision occasioned several commentators to focus upon Kennedy's references to federalism.¹⁵¹ However, the aforementioned crucial equal liberty theme of the opinion is obscured when one focuses on the federalism components of the opinion, as demonstrated by the following critique of the analyses offered by Professors Barnett and Hills.

B. *Analyzing Barnett*

In his SCOTUSblog commentary on *Windsor* titled *Federalism marries liberty in the DOMA decision*, Randy Barnett contends that Kennedy employed “‘federalism’ logic, but with a significant twist that converted it from an enumerated powers [argument] into a ‘liberty’ argument.”¹⁵² Kennedy, he says, “used the interference with the traditional province of states to regulate marriage to justify *heightened scrutiny under the Fifth Amendment’s Due Process Clause*.”¹⁵³ Barnett argues that it is this “novel” component of Kennedy's opinion that “seems to have confused the dissenters.”¹⁵⁴ Barnett describes the “logic” of the Justice's opinion in the following way:

- (1) The definition and regulation of the right to marry is traditionally *the province of states* (and is not among the enumerated powers of Congress[]).
- (2) When it enacted DOMA Congress was demonstrably *intending to and did interfere* with this traditional

scholars' works include: FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 135–39 (2009); Cynthia L. Cates, *Splitting the Atom of Sovereignty: Term Limits, Inc.'s Conflicting Views of Popular Autonomy in a Federal Republic*, 26 PUBLIUS 127, 127, 137–40 (1996); Earl M. Maltz, *Justice Kennedy's Vision of Federalism*, 31 RUTGERS L.J. 761, 761–62 (2000).

150. Transcript of Oral Argument, *supra* note 132, at 59, 70–71, 75–76, 82.

151. See, e.g., Alvare *supra* note 25; Barnett, *supra* note 21; Somin, *supra* note 26.

152. Barnett, *supra* note 21.

153. *Id.* (emphasis added).

154. *Id.*

function of states to define and regulate the right to marry . . .

(3) Therefore, the Court will use *heightened scrutiny* to evaluate the rationality of DOMA's imposed definition of marriage[.]

(4) This unusual deviation from the past practice of respecting state law definitions of marriage was *improperly motivated by animus*.¹⁵⁵

The first two components of Barnett's interpretation of the logic of Kennedy's opinion are uncontroversial, and do indeed speak to the federalism aspects of the opinion. However, if we accept parts three and four of Barnett's interpretation, then we reach a troubling and controversial conclusion. For, those parts of his interpretation indicate that Kennedy's opinion must be viewed as a significant jurisprudential departure from both *Romer* and *Lawrence*, an illiberal departure that sets back rather than advances the rights and liberties of the LGBT community.¹⁵⁶ It cannot, under this interpretation, be viewed as an “[*individual*] ‘liberty’ argument,” as Barnett suggests.¹⁵⁷ This is because “under Justice Kennedy's reasoning” as Barnett reads it, “*it is the fact that states have recognized same-sex marriage* that gives rise to heightened judicial scrutiny” of DOMA.¹⁵⁸ In other words, the harmed parties are states that have recognized same-sex marriage rather than those states' citizens. Barnett is right that in this case “state law is being used to identify a protected liberty or right within its borders”;¹⁵⁹ in this respect, his interpretation can peacefully coexist with the concept of state-conferred dignity, as discussed below. However, Barnett's interpretation is in tension with the human dignity references because it indicates that heightened scrutiny will be given to DOMA for its interference with the *legal recognition of individual liberty that a State chose to confer*.¹⁶⁰ Consequently, it is also difficult to reconcile it with the

155. *Id.* (citations omitted).

156. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

157. *See* Barnett, *supra* note 21.

158. *Id.*

159. *Id.*

160. *See id.*

true heart of Kennedy's *Windsor* opinion.

1. "It's a strange bird,"¹⁶¹ but is it "rational basis plus or intermediate scrutiny minus"?¹⁶²

Perhaps a more obvious flaw in Barnett's interpretation is his conclusion that the Court in *Windsor* subjected DOMA to "heightened scrutiny."¹⁶³ Admittedly, Justice Kennedy's opinion does not contain any statement explicitly identifying the standard of scrutiny employed to assess the law's constitutionality (just as such discussions were conspicuous by their absence in his opinions in *Romer* and *Lawrence*).¹⁶⁴ This has created doctrinal confusion that more than one jurist has lamented¹⁶⁵ – including Justice

161. Josh Gerstein, *The DOMA decision ripple effect*, POLITICO (June 26, 2013, 8:49 PM), <http://www.politico.com/story/2013/06/doma-decision-gay-marriage-ripple-effect-93479.html> (quoting Kevin Walsh, Professor, University of Richmond; Former Law Clerk to Justice Antonin G. Scalia, U.S. Supreme Court).

162. *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quoting Transcript of Oral Argument at 16, *Windsor*, 699 F.3d 169 (Nos. 12-2335-cv(L), 12-2435(Con.))).

163. Barnett, *supra* note 21.

164. See *United States v. Windsor*, 133 S. Ct. 2675, 2682–96 (2013); *Lawrence v. Texas*, 539 U.S. 558, 562–79 (2003); *Romer v. Evans*, 517 U.S. 620, 623–36 (1996).

165. Take, for example, the comments that formed part of the opinion penned by Chief Judge Dennis Jacobs for the Second Circuit in *Windsor*, 699 F.3d at 180–81. This was the first federal circuit opinion to hold that "heightened scrutiny" was the relevant standard of review in a gay rights case. See *id.* at 181. In so holding, the Second Circuit cited four factors, based on Supreme Court precedent, to be considered in determining whether to extend the "quasi-suspect class" designation to a new group. *Id.* at 181–82. The Jacobs-led majority was unequivocal in its conclusion that sexual orientation was such a classification, stating:

In this case, *all four factors justify heightened scrutiny*: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.

Id. (emphasis added). (I am grateful to Dan Pinello for bringing this to my attention). This followed Jacobs's observation that "no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case." *Id.* at 181. Jacobs also expressed frustration at the doctrinal uncertainty caused by the fuzzy standards of scrutiny in opinions such as *Romer* and *Lawrence*:

Scalia whose dissent in *Windsor* indicated that he would apply nothing more than rational basis review.¹⁶⁶ This was a decision, he concluded, that his colleagues in the majority agreed with – well, at least, “[a]s nearly as I can tell,” wrote Scalia, “the Court . . . does not apply strict scrutiny, and [while] its central propositions are taken from rational-basis cases . . . the Court certainly does not *apply* anything that resembles that deferential framework.”¹⁶⁷ So how, then, might we explain Barnett’s arrival

[S]everal courts have read the Supreme Court’s recent cases in this area to suggest that rational basis review should be more demanding when there are “historic patterns of disadvantage suffered by the group adversely affected by the statute.” Proceeding along those lines, the district court in this case and the First Circuit in *Massachusetts* both adopted more exacting rational basis review for DOMA. At argument, counsel for BLAG wittily characterized this form of analysis as “rational basis plus or intermediate scrutiny minus.” The Supreme Court has not expressly sanctioned such modulation in the level of rational basis review; discussion pro and con has largely been confined to concurring and dissenting opinions. We think it is safe to say that there is some doctrinal instability in this area.

Id. at 180–81 (citations omitted) (quoting *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012); Transcript of Oral Argument, *supra* note 162, at 16)). Justice Scalia has also been deeply critical of Kennedy’s failure to walk the walk, but not talk the talk for fundamental rights and suspect classes. See, e.g., *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). “The Court evidently agrees that ‘rational basis’ . . . is the governing standard,” Scalia wrote in his dissent in *Romer*, but in the subsequent pages of his dissent, he engaged in a lengthy expression of his incredulity at Kennedy’s inability to find a rational basis for Amendment 2 of the Colorado Constitution, which was the provision struck down in *Romer*. *Id.* at 639–41. Was there a “legitimate rational basis for the substance of the constitutional amendment”? *Id.* at 640. “[T]he answer is so obviously yes,” wrote Scalia. *Id.* The only irrationality lay in holding otherwise, as the Court did. The doctrinal errors were no less visible seven years later in *Lawrence*, wherein the Court proceeded to employ “an unheard-of form of rational-basis review” to strike down the Texas ban on homosexual sodomy. 539 U.S. at 586 (Scalia, J., dissenting).

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

167. *Id.* (emphasis added). Scalia ultimately concludes:

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution”; that it violates “basic due process” principles; and that it inflicts an “injury and indignity” of a kind that denies “an essential part of the liberty protected by the Fifth Amendment.” The majority

at the conclusion that Kennedy's opinion in *Windsor* employs "heightened scrutiny"? The opinion twice hints at the standard of review it is applying. DOMA "is invalid," writes Kennedy in the final paragraph, because "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."¹⁶⁸ This strongly indicates that the Court had used rational basis review. In support of part three of his summary, Barnett points to the other statement in the opinion that suggests a standard of scrutiny: "In determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration."¹⁶⁹ Other commentators agree that this "sounds more like heightened scrutiny,"¹⁷⁰ an observation that some also made about identical language in *Romer*.¹⁷¹ Ultimately, however, this statement does

never utters the dreaded(?) words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "ordered liberty."

Id. at 2706–07 (citations omitted) (quoting *id.* at 2695, 2693, 2692 (majority opinion); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). However, it is not clear how this discussion of the ills of substantive due process is related to the use (or not) of a specific standard of review since either identifying the rational basis for a law, or subjecting that law to strict scrutiny, is a judicial approach routinely used in both equal protection and due process cases.

168. *Windsor*, 133 S. Ct. at 2696 (emphasis added).

169. Barnett, *supra* note 21 (quoting *Windsor*, 133 S. Ct. at 2692).

170. Julie A. Nice, *And Marriage Makes Three: A Gay Rights Trilogy Secures a Legacy*, HUFFINGTON POST (July 3, 2013, 4:27 PM), http://www.huffingtonpost.com/julie-a-nice/and-marriage-makes-three_b_3537739.html.

171. See, e.g., Josh Blackman, *Equal Protection From Eminent Domain: Protecting the Home of Olech's Class of One*, 55 LOY. L. REV. 697, 745 (2009); Manuel Possolo, Note, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565, 577–79 (2013). One wonders whether it was coincidental that in 2011 the Obama Administration issued a statement indicating that "[a]fter careful consideration . . . the President has concluded that given a number of factors, including a documented history of discrimination, *classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.*" *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. DEPT JUST. (Feb. 23, 2011), <http://www>.

not support subjecting DOMA to “heightened scrutiny.”

In her commentary for the *Huffington Post*, Law Professor Julie A. Nice correctly observed that “[j]ust as he had in *Romer*,” in *Windsor* Kennedy once again “simply elided the tired tiers that characterize judicial scrutiny as strict, intermediate, or rationality-based. He similarly avoided the standard formula for determining whether a right is fundamental, apparently finding no need to reach that analysis, just as he had done in *Lawrence*.”¹⁷² This begs the question, “why?” The answer to that inquiry also serves as further support for the conclusion that federalism played nothing more than a “fairly extended, but ultimately inconclusive and nondispositive” role in *Windsor*.¹⁷³

Employment of rational basis review does not have to be a “conservative” judicial approach, as some commentators have described it.¹⁷⁴ Admittedly, it might seem “conservative” because when the government’s actions are merely required to be “rationally related” to a “legitimate government interest” those actions will almost always be constitutional. Indeed, one might say that typically rational basis review is a “feeble” level of scrutiny, in both “theory” and “fact.”¹⁷⁵ Justice Kennedy’s opinions in gay rights cases, however, consistently employ a flavor of rational basis review that is anything but feeble. It is a standard of scrutiny accurately described as “rational basis with bite.”¹⁷⁶ This reformulation of rational basis in equal protection cases emerged in the 1970s. It was borne of the frustration of several justices who saw inadequacies in the existing approach of providing higher levels of scrutiny to those groups identified by a

justice.gov/opa/pr/2011/February/11-ag-222.html (emphasis added).

172. Nice, *supra* note 170.

173. Alvare, *supra* note 25.

174. See, e.g., John Schwartz, *In Same-Sex Ruling, an Eye on the Supreme Court*, N.Y. TIMES (Aug. 4, 2010), http://www.nytimes.com/2010/08/06/us/06assess.html?_r=0.

175. This is a play on the words recently used by Justice Kennedy to assert that it is important to prevent the standard of *strict* scrutiny from becoming “strict in theory, but feeble in fact.” *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)).

176. See Kenji Yoshino, *Why the Court can strike down marriage restrictions under rational-basis review*, SCOTUSBLOG (Aug. 23, 2011, 8:38 AM), <http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/>.

majority of the Court as “suspect classes.”¹⁷⁷ As a result, the Court began to “use the [equal protection] clause as an interventionist tool without resorting to the strict scrutiny language.”¹⁷⁸ In Kennedy’s opinions in *Romer*, *Lawrence*, and now *Windsor*, this revised standard of review has been employed in a way that is anything but “conservative.”¹⁷⁹ Time and again, Kennedy has stated his belief that there can be no rational basis for discrimination based upon sexual orientation.¹⁸⁰

Some commentators have suggested that Kennedy exhibits particular empathy for members of the gay community.¹⁸¹ Inevitably, efforts have been made to identify a biographical explanation for the Justice’s embrace of gay rights. For example, a 2012 *Time* magazine cover article pointed to the likely influence of Gordon Schaber upon Kennedy’s gay rights views.¹⁸² Schaber, who was Dean of the McGeorge School of Law in Sacramento (where Kennedy has taught, in various capacities, since the 1960s), was “living the difficult secret life of a gay man in 1970s America.”¹⁸³ Similarly, in a Reuters article that appeared in the *Huffington Post* on the eve of the Court’s October 2012 Term, Joan Biskupic suggested that interactions with gay Court employees might have positively affected the Justice’s views of the rights

177. *See id.*; *see also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

178. Gunther, *supra* note 177, at 12. I also discuss the evolution of this standard in KNOWLES, *supra* note 3, at 89-125.

179. *See* Schwartz, *supra* note 174.

180. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 569–78 (2003); *Romer v. Evans*, 517 U.S. 620, 634–37 (1996).

181. *See, e.g.*, Lawrence C. Levine, Justice Kennedy’s “Gay Agenda”: *Romer*, *Lawrence*, and the Struggle for Marriage Equality 1–2 (Apr. 6, 2012) (unpublished manuscript) (presented at a symposium sponsored by McGeorge Law Review), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230626; Dahlia Lithwick, *It’s About the Empathy, Stupid*, SLATE (May 10, 2012, 4:15 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/05/barack_obama_s_decision_to_support_gay_marriage_was_a_rare_act_of_empathy_in_this_presidential_election.html.

182. Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, *available at* <http://content.time.com/time/magazine/article/0,9171,2116699,00.html>.

183. *Id.* This theory is also discussed in Tony Mauro, *At Center of Gay Rights Movement, A Justice Rises*, NAT’L L. J., July 8, 2013, at 7, *available at* <http://www.law.com/jsp/nlj/PubArticleSCI.jsp?id=1202609568427>.

belonging to the LGBT community.¹⁸⁴ Of course, only Justice Kennedy can really know (if, indeed, he does know) what motivates him to cast his vote in sexual orientation cases and write the judicial opinions that he does. However, all of this misses a vital point about Justice Kennedy's equal protection jurisprudence. On one level, Professor Dorf's quip is accurate. "Anthony Kennedy has now firmly secured his place in history as 'the first gay Justice'"¹⁸⁵ because of his opinions in *Romer*, *Lawrence*, and *Windsor*. But, from Kennedy's perspective, he is merely trying to guarantee equal treatment for *all*. In other words, Pete Wilson was right, it does "strike . . . [Justice Kennedy] as terribly unfair that *anyone's individual* potential should be in any way limited by their being classed as a member of a group, and treated in accordance with their group membership, rather than what they deserve to receive as *individuals*."¹⁸⁶

C. *Analyzing Hills*

"[D]iscriminations of an unusual character especially suggest careful consideration *to determine whether they are obnoxious to the constitutional provision*."¹⁸⁷

Professor Barnett used this quotation from *Romer* to support part three of his *Windsor* summary.¹⁸⁸ This quotation made *two* appearances in the *Windsor* opinion; however, Barnett's reference was only to the second appearance, a shortened version of the

184. Joan Biskupic, *Supreme Court On Gay Rights: Will Acceptance By The High Court Influence Rulings?*, HUFFINGTON POST (Sept. 9, 2012, 9:00 AM), http://www.huffingtonpost.com/2012/09/09/supreme-court-gay-rights_n_1868321.html. There is some academic support for this so-called "contact theory," but the literature also emphasizes the multitudinous factors that must be accounted for when seeking to explain how social interactions may or may not affect a person's attitudes about something. See generally Gregory M. Herek & John P. Capitanio, "Some of My Best Friends": *Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996).

185. Alex Seitz-Wald, *Anthony Kennedy: "The first gay justice"*, SALON (June 26, 2013, 1:39 PM), http://www.salon.com/2013/06/26/anthony_kennedy_the_first_gay_justice/ (quoting Dorf, *supra* note 120).

186. Rosen & McConnell, *supra* note 128 (emphasis added) (quoting Peter Wilson, 36th Governor, California).

187. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (emphasis added) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

188. Barnett, *supra* note 21.

first.¹⁸⁹ The entire quotation, printed above, includes in italics the text that did not appear in the second reference. That additional text is important because it speaks to the heart of Kennedy's opinion and helps us to understand the shortcomings of the second federalism argument critiqued in this Article, the PrawfsBlawg commentary authored by Rick Hills.¹⁹⁰

Professor Hills claims that Kennedy's opinion is a "recognition that state law can define, at least in part, the scope of federal constitutional rights by (for instance) defining what constitutes an arbitrary classification under the Fifth Amendment's Due Process clause."¹⁹¹ As a result, "the feds are more constrained by national constitutional rights than are the states."¹⁹² The justification for such an approach – that "individual states can go different ways in deciding whether a particular classification is arbitrary" – reflects the idea of the states as little laboratories.¹⁹³ In the famous words of Justice Brandeis, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁹⁴ Justice Kennedy believes that the federal system of government in the United States is a well-functioning system when "two governments" succeed in providing the populace with "more liberty than one."¹⁹⁵ The dignity of individual citizens will be enhanced when there is at least one level of government that, in theory at least, does not seem alien, detached, and disinterested in hearing about, respecting, and protecting the interests of its citizens.¹⁹⁶ In this respect, therefore, Professor Hills's conclusion supports a federalism interpretation of Kennedy's *Windsor* opinion. However, it is a flawed interpretation because – again reflecting *Romer* and *Lawrence* – Kennedy makes it very clear

189. *Windsor*, 133 S. Ct. at 2692–93; Barnett, *supra* note 21.

190. Hills, *supra* note 32.

191. *Id.*

192. *Id.*

193. *Id.*

194. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Interestingly, Justice Kennedy has never used this quotation in an opinion he has authored.

195. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

196. *See id.*

that treating someone differently because of their sexual orientation is automatically an unconstitutional, “arbitrary” classification.¹⁹⁷

1. *Why Justice Scalia is Correct – Windsor was a Decision that Did Not Bark*

As Professor Hills astutely observes, *Windsor* holds “that state law can define, *at least in part*, the scope of federal constitutional rights,”¹⁹⁸ but his commentary fails to put sufficient emphasis on the “at least in part” component of this conclusion. He is more circumspect than Barnett; the question he asks is whether the “ghost” of Justice Harlan “smile[d] today, because *Windsor* vindicated” something that he advocated with particular vigor.¹⁹⁹ By this he means the second Justice Harlan’s commitment to “the idea that rights against the federal government ought to be construed more broadly than analogous rights against the state government.”²⁰⁰ The answer he gives is equivocal. “Hints of Harlan’s theory” may “have been cropping up in a variety of [Supreme Court] opinions,” but Hills never quite says that such hints appear in *Windsor*.²⁰¹ What he does say, however, is that Kennedy’s opinion in that case “fits within this longstanding idea that subnational law can influence the scope of federal rights.”²⁰² Hills implies this means that the Court has not succumbed to the temptation of viewing the case through the lens of what Hills calls “rights fundamentalism”—“the notion that, because a right is very important, the right must be defined uniformly across jurisdictions.”²⁰³ Ultimately, however, Justice Scalia is correct that this is what his colleague’s opinion seems to do—even if it does so *sub silentio*, as the decision that did not bark.

In his *Windsor* opinion Justice Kennedy emphasizes, time and again, what he said in *Romer*—that, “discriminations of an

197. See *United States v. Windsor*, 133 S. Ct. 2675, 2717 (2013) (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) (internal quotation marks omitted).

198. Hills, *supra* note 32 (emphasis added).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”²⁰⁴ He repeatedly places an important limitation upon the power of the states to “defin[e] and regulat[e] the marital relation.”²⁰⁵ It may be “an area that has long been regarded as a virtually exclusive province of the States.”²⁰⁶ But, that province has constitutional boundaries because all state laws must “respect the constitutional rights of persons.”²⁰⁷ Perhaps Kennedy frequently reminds us of this simple truth because that is what it is, a simple truth. As Article VI of the U.S. Constitution informs us, that document is the “supreme Law of the Land,” and it guarantees that there are certain rights that “no state shall . . . abridge” (to employ the language of the Fourteenth Amendment).²⁰⁸ The devil is, of course, in the details, because what emerges from this simple truth is an important and far more complex question: what are the “rights of the persons” that all governments are constitutionally bound to respect?

Justice Kennedy’s opinion in *Windsor* provides one obvious answer to that question, but it also refuses to acknowledge that it has done so. Although it is not easy to clearly identify the jurisprudential path that Kennedy took in *Windsor*, his reasoning includes the following syllogism:

- In the United States, marriage is an aspect of life traditionally regulated by the governments of the fifty states. Many states have decided to “dignify” the “moral and sexual choices” of their gay and lesbian citizens by permitting same-sex couples to get married (and DOMA interferes with that sphere of state policymaking).
- The U.S. Constitution “protects” those “moral and sexual choices.”
- DOMA interferes with those choices, and is therefore unconstitutional.

204. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (emphasis added) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

205. *Id.*

206. *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

207. *Id.*

208. U.S. CONST. art. VI; U.S. CONST. amend. XIV, § 1.

- Therefore . . . any state law that interferes with those choices (i.e. that bans same-sex marriages) is _____.²⁰⁹

Fill in the blank (according to the syllogism): *unconstitutional*.

Oh, but wait. The opinion and holding in *Windsor* are explicitly “confined,” in their application, “to . . . lawful marriages.”²¹⁰ The opinion begs the question: what are the “rights of the persons” that the states are constitutionally bound to respect? It also begets the conclusion that there are constitutionally protected “rights of the persons” that any state law banning gay marriage violates. This is the “rights fundamentalism” which Professor Hills implies is absent from *Windsor*.²¹¹ In this respect, *Windsor* is, as Sherlock Holmes might have said, the gay marriage decision that did not bark.²¹²

What Sherlock Holmes did say (at least, as he was portrayed on British television by Jeremy Brett) was that “the law is what we live with. Justice is . . . harder to achieve.”²¹³ It may seem glib to say that the “rights of the persons” that the states are constitutionally bound to respect are whatever rights a majority of the U.S. Supreme Court says that they are. Yet, that is the reality – a reality that is also currently reflected in the narrower answer to the rights question. They are basically whatever Justice Kennedy says they are. As Tom Goldstein remarked, “[t]he basic principle is, it’s Justice Kennedy’s world and you just live in it.”²¹⁴ Admittedly, Kennedy’s opinion in *Windsor* neither exhibits nor exudes the type of passionate commitment to libertarian (and/or egalitarian) principles that one finds in his writings for the Court in *Romer* and *Lawrence*. It nevertheless indicates that in all likelihood it will not be long before the nation’s laws on same-sex marriage align with the promise of *justice*—the promise of “equal justice under law” that adorns the main portico of the home of the

209. See generally *Windsor*, 133 S. Ct. 2675.

210. *Id.* at 2696.

211. See Hills, *supra* note 32.

212. See Arthur Conan Doyle, *Silver Blaze*, in 1 THE NEW ANNOTATED SHERLOCK HOLMES 387 (Leslie S. Klinger ed., 2005).

213. *The Memoirs of Sherlock Holmes: The Red Circle* (Granada Television 1994).

214. Bill Mears, *Is Anthony Kennedy ‘the first gay justice’?*, CNN (June 28, 2013, 6:49 AM), <http://www.cnn.com/2013/06/27/politics/scotus-kennedy> (quoting Tom Goldstein, Co-founder & Publisher, SCOTUSblog).

U.S. Supreme Court.

What remains to be seen is whether that alignment comes from We the People or from, as Justice Scalia fears, “We the Court.”²¹⁵ Justice Scalia, along with Justices Thomas and Alito, viewed *Windsor*’s federalism references skeptically—just as they saw little more than fluffy rhetoric in the equal liberty discussions.²¹⁶ For example, Justice Alito asserted that the “whiffs of federalism” contained in the Court’s opinion would “soon be scattered to the wind.”²¹⁷ For Justice Scalia, federalism was one of the opinion’s “rootless and shifting . . . justifications,”²¹⁸ representing nothing more than a disingenuous effort by the majority to obscure its real agenda and to lay the groundwork for “the second, state-law shoe to be dropped.”²¹⁹ Although Scalia was “only guessing”²²⁰ about his colleagues’ motives, his acerbic dissent demonstrated no doubts in his opinion.²²¹ The majority’s ultimate goal is to invalidate state laws banning gay marriage, and that goal will be achieved very soon.²²² “Maybe not today, maybe not tomorrow, but soon,” and it will come in the form of a Supreme Court-issued judicial fiat, the consequences of which you, the nation’s disempowered citizenry, will have to live with “for the rest of your life.”²²³

It seems clear, from *Romer*, *Lawrence*, and now *Windsor*, that if such a decision comes from the Court it will include language and reasoning that *will* prompt “Harlan’s ghost [to] smile.”²²⁴ Not because of the inclusion of federalism language but, rather, because of the inclusion of reasoning reflective of Harlan’s libertarian views about due process. As I noted in *The Tie Goes to*

215. This phrase is taken from the title of an article by Larry Kramer, an article that rails against judicial supremacy. See Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

216. See *United States v. Windsor*, 133 S. Ct. 2675, 2697, 2705–07 (2013) (Scalia, J., joined by Thomas, J., dissenting); *id.* at 2711, 2720 (Alito, J., joined by Thomas, J., dissenting).

217. *Id.* at 2720 (Alito, J., dissenting).

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

219. *Id.*

220. *Id.*

221. See *id.* at 2697–11.

222. See *id.* at 2705, 2710.

223. CASABLANCA (Warner Brothers 1942).

224. Hills, *supra* note 32.

Freedom, those are views that Justice Kennedy has enthusiastically embraced.²²⁵ Most notably, Kennedy looked to them for jurisprudential guidance in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992.²²⁶ Here it is worth quoting from the same passage of Harlan's famous dissent in *Poe v. Ullman*,²²⁷ which Kennedy admiringly quoted in *Casey*. In *Poe*, Harlan wrote:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.²²⁸

Although Kennedy did not cite *Poe* in *Windsor*, the spirit of this passage runs through the 2013 opinion.²²⁹ To conclude otherwise is to ignore the unequivocal nature of the following, which appeared on the penultimate page of that opinion:

What has been explained to this point should more than suffice to establish that the 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, as it now does, that DOMA is

225. KNOWLES, *supra* note 3, at 182–83.

226. 505 U.S. 833, 848–50 (1992) (quoting *Poe v. Ullman*, 367 U.S. 541, 542 (1961) (Harlan, J., dissenting)).

227. *Poe*, 367 U.S. at 523–55 (Harlan, J., dissenting).

228. *Id.* at 542–43.

229. See *United States v. Windsor*, 133 S. Ct. 2675, 2682–96 (2013).

unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.²³⁰

This might not be the "the money quote from the majority."²³¹ However, ultimately it might just be the one that pays the biggest, long-term dividends, because it makes it difficult to see how gay marriage bans can continue to coexist with the Constitution. It also makes it difficult to agree with Professor Hills's assessment that *Windsor* embraces a theory of federalism that permits "individual states . . . [to] go different ways in deciding whether a particular classification is arbitrary in ways foreclosed to the feds."²³²

IV. THE HUMAN DIGNITY ROAD NOT TAKEN IN *WINDSOR*

Some of the commentators who have recognized that federalism is not the key component of Justice Kennedy's opinion in *Windsor* have sought to prove the existence of a different animating principle: dignity.²³³ This is a principle that, like federalism, is something about which Kennedy feels passionately. In the wake of *Windsor*, many people rushed to declare that the opinion's "foundation . . . and its real importance, lie in its insistence on human dignity as a constitutional value";²³⁴ that it

230. *Id.* at 2695 (citations omitted).

231. Dorf, *supra* note 120.

232. Hills, *supra* note 32.

233. See, e.g., Nice, *supra* note 170; Cass R. Sunstein, *Gay Marriage Ruling Safeguards Human Dignity*, BLOOMBERG VIEW (June 28, 2013, 4:15 PM), <http://www.bloomberglaw.com/articles/2013-06-26/gay-marriage-ruling-safeguards-human-dignity>.

234. Sunstein, *supra* note 233.

“enhanc[es] human dignity”;²³⁵ or that “it radically alters the landscape of rights in a number of ways,”²³⁶ primarily because “[u]nlike *any other case that the Supreme Court has ever decided*, the Court here relies emphatically on the principle of human dignity.”²³⁷ Some commentators seized upon the opinion’s ten references to “dignity”;²³⁸ some waxed lyrical about Catholic concepts of dignity (opposition of the Catholic Church to homosexuality notwithstanding);²³⁹ while others pointed to similarities between “dignity” in the opinion’s text and “dignity” in Jewish thought.²⁴⁰

Justice Kennedy’s opinion in *Windsor* is no more about individual, human dignity than it is about federalism. Upon close examination it becomes clear that Kennedy generally is not referring to any kind of pre-political dignity in *Windsor*. He is not referring to an inherent human dignity that exists quite apart from any form of civil society into which humans may or may not choose to enter.²⁴¹ Instead Kennedy primarily emphasizes a form of dignity that only belongs to individuals *when the State chooses to confer it upon them*.²⁴² Commentators are correct that Kennedy’s opinion in *Windsor* “was based on the idea that it interfered with ‘the equal dignity of same-sex marriages.’”²⁴³

235. Nice, *supra* note 170.

236. Erin Daly, *Dignity’s Debut: A Happy Marriage of Liberty and Equality*, *RATIO JURIS* (July 5, 2013, 9:16 AM), <http://ratiojuris.blogspot.com/2013/07/dignitys-debut-happy-marriage-of.html>.

237. *Id.*

238. See, e.g., Hellman, *supra* note 28; Sunstein, *supra* note 233.

239. See, e.g., Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, *TWO-WAY* (June 28, 2013, 2:42 PM), <http://www.npr.org/blogs/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor>; Andrew Sullivan, *Catholic Dignity Is Evident In DOMA Opinion By Justice Kennedy*, *HUFFINGTON POST* (June 28, 2013, 11:19 AM), http://www.huffingtonpost.com/2013/06/28/andrew-sullivan-catholic-dignity-doma_n_3516539.html.

240. See, e.g., Steven I. Weiss, *Jewish Thought in the DOMA Ruling: Looking at Jewish texts and the text of the ruling*, *TABLET* (June 28, 2013, 2:58 PM), <http://www.tabletmag.com/scroll/136563/jewish-thought-in-the-doma-ruling>.

241. See *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2692–93, 2696 (2013).

242. See *id.*

243. David G. Savage, *The Supreme Court’s new view of equal justice*, *L.A. TIMES*, (June 29, 2013), <http://articles.latimes.com/2013/jun/29/nation/la-na-court-term-20130630> (quoting *Windsor*, 133 S. Ct. at 2693).

However, that is only part of the quotation. For, what Kennedy actually wrote was: “the equal dignity of same-sex marriages, *a dignity conferred by the States.*”²⁴⁴

Dignity is a “vague but powerful idea”²⁴⁵ with widespread appeal. It is difficult to define; it is susceptible to multiple interpretations; it enjoys “non-partisan”²⁴⁶ support precisely because people do not have to agree about its actual content and boundaries; and it is useful to all. It is useful to the individual when, in a specific instance, he or she believes they have been harmed by the government but cannot identify a legal right that was violated. And it is useful for the government when it turns to the “dignity defense” in the absence of a more convincing and authoritative justification that has a statutory or constitutional basis. This existence of multiple “use-categories”²⁴⁷ of the concept of dignity is reflected in Supreme Court opinions, which have featured hundreds of references to miscellaneous types of dignity.²⁴⁸ Over the years, however, two types of dignity stand out for having played large roles in opinions—human dignity and the dignity of states.²⁴⁹

244. *Windsor*, 133 S. Ct. at 2693 (emphasis added).

245. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977).

246. Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 746 (2006).

247. Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L. J. 145, 150 (1984).

248. See, e.g., *Windsor*, 133 S. Ct. at 2692; *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793).

249. These observations come from a database I constructed that consists of the post-seriatim era U.S. Supreme Court decisions in which at least one opinion contained a standalone reference to the concept of dignity. By standalone, I mean that when a judge writes an opinion in which he or she uses the concept of “dignity” to make a distinct point about his or her own arguments, this is considered a standalone use. These differ from ‘dependent’ ones – which might include, for example, quotations from other opinions or from secondary sources, the descriptions of the holdings of other cases that explicitly rely on “dignity” or a related word, or simply references (usually negative ones in a separate opinion) to a judicial colleague’s invocation of the concept, see Helen J. Knowles, *From a Value to a Right: The Supreme Court’s Oh-So-Conscious Move From ‘Privacy’ to ‘Liberty,’* 33 OHIO N.U. L. REV. 595, 598–99 (2007). I did not confine my search to the word “dignity,” instead choosing to include the following related words: “indignity,” “dignified,” “undignified,” “dignities,” “indignities,” “indignation,” “indignant,” and “dignifies.” This is because in order to give substance and meaning to a concept, one needs to look at the usage of related words that suggest or imply

Arguably the most prevalent understanding of the concept of human dignity to appear in Supreme Court opinions is that which supports the idea that every person has, by virtue of being a human, a basic, inalienable dignity: “an intrinsic worth that should be recognized and respected” by all governments, no matter what.²⁵⁰ This pre-political dignity is part of the core of enumerated rights (rather than itself a constitutionally protected right)²⁵¹ and is theoretically and morally linked to due process. This is because, as William Parent points out, dignity and due process “are conceptually related through the mediating idea of arbitrariness.”²⁵² If we focus on this concept of human dignity, it is easy to understand why scholars who contended that Kennedy’s opinion in *Windsor* is grounded in principles of federalism shied away from the “dignity” references as evidence to substantiate their arguments.²⁵³ Over the course of the Supreme Court’s history, however, the other most common type of dignity to appear in the justices’ opinions—state dignity—offers a very different understanding of the concept, an understanding which might indeed support the *Windsor* federalism argument.

Writing in 1793, in *Chisholm v. Georgia*, the first case to feature an opinion containing a standalone use of the word “dignity,” Justice James Wilson observed: “A State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance.”²⁵⁴ Justice Wilson chose his words well. The individual is more important than the State; a State is born from the decisions of individuals to form a political society. Even after the creation of a State, the individual remains the primary political unit and

a violation or betrayal of the original concept.

250. Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in *ZUR AUTONOMIE DES INDIVIDUUMS* 249, 249–50 (Dieter Simon & Manfred Weiss eds., 2000).

251. See Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 115, at 10, 10–28. It is important not to confuse a universal understanding of human dignity with the idea of global/international human rights. See generally Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 *AM. POL. SCI. REV.* 801 (1986).

252. Parent, *supra* note 115, at 66.

253. See, e.g., Young & Blondel, *supra* note 32, at 117–18.

254. 2 U.S. 419, 455 (1793).

ultimate possessor of dignity. This makes even more sense in a constitutional system, for as Walter Murphy has persuasively argued, constitutionalism “enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.”²⁵⁵ Over the course of its history, however, some members of the U.S. Supreme Court have described the state as a sovereign entity with a type of “dignity” entitled to legal protection—and sometimes the state has been afforded this legal protection in a manner that threatens the dignity of its citizens. This does not describe all state dignity references, but it is an understanding that is as prevalent for this type of dignity as is the pre-political understanding of human dignity.

References to state dignity comprise only approximately eleven percent of all decisions containing at least one opinion including a standalone use of the concept of dignity.²⁵⁶ And, interestingly, there has been a clear downward trend in references to state dignity since a highpoint was reached during the period from the 1890s through the late 1930s.²⁵⁷ Nevertheless, in recent years the opinions penned in several high profile cases have suggested that the future might bear witness to a resurgence of interest in the state dignity concept.²⁵⁸ Describing a state as an entity whose sovereignty entitles it to legal protection of its dignity is reminiscent of the idea of sovereign dignity attaching to a monarch. If human dignity is a founding principle of constitutionalism, then a tension arises between the dignity of a state and the human dignity of its populace. Many of the more modern Supreme Court references to state dignity avoid this tension by departing from the monarchical analogy – they describe a dignified state as an entity that rules for the people, not over them.²⁵⁹ This in part reflects the aforementioned twentieth

255. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 3 (Douglas Greenberg, et al. eds., 1993).

256. See generally Knowles, Constitutional “Dignity,” *supra* note 149.

257. See generally *id.*

258. See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1645 (2011) (Roberts, C.J., dissenting).

259. See generally Knowles, Constitutional “Dignity,” *supra* note 149.

century evolution in understandings of human dignity—a human rights-based evolution that “changed the meaning of sovereignty” by establishing different responsibilities and liabilities for states.²⁶⁰ Nevertheless, there remain examples of opinions that pay little attention to the fact that “the state exists for the sake of individual human beings, and not vice versa.”²⁶¹

A. *Dignity in Windsor*

Justice Kennedy’s opinion in *Windsor* frequently employs a concept of dignity that eschews the notion of pre-political human dignity.²⁶² There is little about the references to dignity that is consistent with Justice Wilson’s observation that, “[a] State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance.”²⁶³ As Table 1 shows, the dignity references in *Windsor* instead principally speak to the concept of state-conferred dignity.

260. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1924, 1926 (2003).

261. Neuman, *supra* note 250, at 249–50.

262. See *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2689, 2692–94, 2696 (2013).

263. *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793).

Table 1: Passages from Justice Kennedy's *Windsor* opinion that reference state-conferred "dignity"

1	"It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman <i>in lawful marriage</i> ." ²⁶⁴
2	"Here <i>the State's decision</i> to give this class of persons the right to marry <i>conferred upon them a dignity</i> and status of immense import." ²⁶⁵
3	"The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." ²⁶⁶
4	"For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a <i>relationship deemed by the State worthy of dignity</i> in the community equal with all other marriages." ²⁶⁷

264. *Windsor*, 133 S. Ct. at 2689 (emphasis added).

265. *Id.* at 2692 (emphasis added).

266. *Id.*

267. *Id.* (emphasis added).

5, 6	“The history of DOMA’s enactment and its own text demonstrate that interference with the <i>equal dignity of same-sex marriages, a dignity conferred by the States</i> in the exercise of their sovereign power, was more than an incidental effect of the federal statute.” ²⁶⁸
7	“Responsibilities, as well as rights, <i>enhance the dignity and integrity of the person</i> . And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.” ²⁶⁹
8	“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 <i>a status the State finds to be dignified and proper</i> .” ²⁷⁰
9	“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those <i>whom the State, by its marriage laws, sought to protect in personhood and dignity</i> .” ²⁷¹

Passages 8 and 9 identify the entity to which “dignity” adheres in this case (or, phrased another way, the ‘dignified entity’), and it is not the individual. Instead, it is the institution of marriage entered into by a homosexual couple. This is an institution that is the *creation of state law*. The “dignified and proper” “status” which DOMA “refus[es] to acknowledge” is the status of being lawfully married to an individual of the same

268. *Id.* at 2693 (emphasis added).

269. *Id.* at 2694 (emphasis added).

270. *Id.* at 2695–96 (emphasis added).

271. *Id.* at 2696 (emphasis added).

sex.²⁷² DOMA “disparage[s] and . . . injure[s] those whom the State, *by its marriage laws*, sought to protect in personhood and dignity.”²⁷³ The real victims of DOMA are the gay and lesbian individuals who are lawfully married under the laws of their state, and Justice Kennedy recognized this reality.²⁷⁴ However, he did not view it as an injurious reality that was an affront to individual liberty. It is not the dignity of gay and lesbian individuals that the federal statute negatively affects, but rather the dignity that their state afforded them by writing into its laws the right to marry the consensual adult partner of their choice, whether of the opposite or same sex.

This reading of the majority of the opinion’s dignity references finds further support in the other passages listed in Table 1. Passage 1 confirms that the dignity in question is a creation of the state because it is the dignity attached to a “lawful marriage.”²⁷⁵ As Passage 3 demonstrates, when we turn from dignity to “indignity” nothing changes – once again the subject at hand is a government-created entity.²⁷⁶ The only difference is that this time the entity is a law, and the issuing body is the federal government. Similarly, in Passages 2, 4, 5, and 6 the “dignity” to which the Court refers is something that comes from the “State’s decision” to permit homosexual couples to marry.²⁷⁷

Passage 7 is susceptible to two different interpretations. On the one hand, when the Court speaks of “enhanc[ing] the dignity and integrity of the person”²⁷⁸ it indicates that individuals have a dignity that is not the creation of the state. Rather, it is an inherent human trait, the existence of which is neither derived from nor dependent upon any governmental entity. On the other hand, however, the passage also indicates that human dignity can be shaped (in this case, positively) by state action, thereby suggesting that there is an element of that dignity which, ultimately, is state-conferred.

By this point, I imagine that more than one reader of this

272. *Id.*

273. *Id.* (emphasis added).

274. *See id.*

275. *See id.* at 2689.

276. *See id.* at 2692.

277. *See id.* at 2692–93.

278. *Id.* at 2694.

Article is understandably saying, "hold on, all of these references to state-conferred dignity surely indicate that the opinion *was* indeed based on federalism principles." This is a fair comment, and one might consider it surprising that so few of the commentators who argued that Kennedy's opinion in *Windsor* is federalism-focused chose to substantiate their arguments using the Justice's invocation of state-conferred dignity.²⁷⁹ However, when one turns to the *Windsor* references to *pre-political, human dignity*, one finds that they are few in number but heavy in significance and substance.²⁸⁰ As Table 2 indicates, the opinion only contains two references to human dignity,²⁸¹ but those references speak to the equal liberty heart of the opinion. When one recognizes this it becomes easier to understand why the advocates of a "based on federalism"²⁸² argument did not point to the discussions of dignity.

The *Windsor* opinion's two references to human dignity both clearly indicate the existence of an individualized, pre-political human dignity.²⁸³ The "class" mentioned in Passage A below consists of same-sex couples living in a State that has conferred upon them a legal right to marry.²⁸⁴ The "community" language can consequently be interpreted as referring to either the LGBT community or the broader "community" within which these couples live and interact.

279. See, e.g., Young & Blondel, *supra* note 32, at 117–18.

280. See *Windsor*, 133 S. Ct. at 2694, 2696.

281. *Id.* at 2692.

282. Weiner, *supra* note 19.

283. See *Windsor*, 133 S. Ct. at 2692.

284. See *id.* at 2680.

Table 2: Passages from Justice Kennedy's *Windsor* opinion that reference pre-political human "dignity"

A	"When the State used its historic and essential authority to define the marital relation . . . <i>its role and its power in making the decision enhanced the recognition, dignity, and protection</i> of the class in their own community." ²⁸⁵
B	"Private, 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.' By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, <i>New York sought to give further protection and dignity</i> to that bond." ²⁸⁶

Regardless of the precise nature of that community, however, Justice Kennedy's language is unequivocal. The community's members have a "dignity," the "recognition" of which was "*enhanced*" by the State's decision to "[use] . . . its historic and essential authority to define the marital relation" as one recognized by law.²⁸⁷ As with Passage 7 in Table 1, Passage B in Table 2 is open to multiple interpretations. An element of state-conferred dignity is present because of Kennedy's statement that the "personal bond" between the two individuals in a same-sex partnership was "*give[n] further protection and dignity*" by New York's decision to permit those individuals to get married or to recognize, as legally valid, a same-sex marriage into which they might have entered in a different jurisdiction.²⁸⁸ However, the operative word here is "further"; the state is giving "further

285. *Id.* at 2692 (emphasis added).

286. *Id.* (emphasis added) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

287. *Id.* (emphasis added).

288. *Id.* (emphasis added).

protection and dignity” to a “personal bond” which cannot be anything other than pre-political.

Therefore, what *United States v. Windsor* truly stands for is the foreclosure, *to any governmental entity, federal or state*, of the power to diminish the pre-political dignity of individuals by treating them differently because of their sexual orientation. The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution,²⁸⁹ which are “conceptually related” to dignity “through the mediating idea of arbitrariness,”²⁹⁰ demand no less. And for a Kennedy-led majority, that is a conclusion at which the Court can arrive using (a) nothing more than rational basis review and (b) reasoning that stands “quite apart from principles of federalism.”²⁹¹ What, then, does the future portend?

V. CONCLUSION: LIFE AFTER *WINDSOR*

“I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case?”²⁹² During the oral argument in *Windsor*, Chief Justice Roberts put this question to Roberta Kaplan (who was arguing on behalf of Edie Windsor).²⁹³ Roberts never received what he considered to be a satisfactory answer to his question. His tone suggested he was genuinely struggling to understand what accounted for the clear, positive change in the nation’s attitudes towards the rights of the LGBT community since the passage of DOMA in 1996. “I am just trying to see how—where that that [sic] moral understanding came from, if not the political effectiveness of a particular group,” explained Roberts.²⁹⁴ Responding to questions about the intent of Congress when it passed DOMA in 1996, Kaplan had earlier contended that “the only conclusion that can be drawn is what was in the House Report, which is moral disapproval of gay people, which the Congress thought was permissible in 1996 because it relied on the Court’s *Bowers* decision.”²⁹⁵ After observing that in *Lawrence*, the

289. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

290. Parent, *supra* note 115, at 66.

291. *Windsor*, 133 S. Ct. at 2692.

292. Transcript of Oral Argument, *supra* note 132, at 107.

293. *Id.*

294. *Id.* at 109.

295. *Id.* at 105.

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Court emphatically said “*Bowers* was not correct when it was decided, and it is not correct today”;²⁹⁶ Kaplan made a “times can blind” and 2013-is-most-definitely-not-1996 argument.²⁹⁷ It was this that prompted Roberts’ causal inquiry about the intervening years of gay rights advancements. Even if there was disagreement inside the courtroom about *why* 2013 was not 1996, no one disputed that over the past seventeen years “enormous changes in the surrounding social and political contexts” had taken place and that “extraordinary developments [were] afoot with regard to attitudes and practices involving sexual orientation.”²⁹⁸

When the Court decided *Lawrence* on June 26, 2003, no state had legalized gay marriage. Five months later, on November 18, the Massachusetts Supreme Judicial Court announced its decision in *Goodridge v. Department of Public Health*, holding that the state’s ban on gay marriage violated the Massachusetts Constitution.²⁹⁹ That ruling took effect on May 17, 2004, the date upon which the first same-sex marriages were conducted in the Bay State area.³⁰⁰ By the tenth anniversary of *Lawrence*, the poignant date upon which the Court chose to issue its decision in *Windsor*, gay and lesbian couples were able to legally marry in nine states and the District of Columbia.³⁰¹ And, within six months of *Windsor*, that number had jumped, quite remarkably, to fifteen states.³⁰² Indeed, it seems certain that by the time this Article is published the number in the previous sentence will have

296. *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* Transcript of Oral Argument, *supra* note 132, at 105–06.

297. Transcript of Oral Argument, *supra* note 132, at 105–06.

298. Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130, 135 (2013).

299. 798 N.E.2d 941, 948–49 (Mass. 2003).

300. *See* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), <http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html?src=pm&pagewanted=1>; *Same-sex couples exchange vows in Massachusetts*, CNN (May 17, 2004, 11:02 PM), <http://www.cnn.com/2004/LAW/05/17/mass.samesex.marriage/>.

301. Massachusetts (‘04), Connecticut (‘08), Iowa (‘09), Vermont (‘09), New Hampshire (‘10), District of Columbia (‘10), New York (‘11), Maine (‘12), Washington (‘12), and Maryland (‘13).

302. The states that legalized gay marriage within their borders between *Windsor* and December 2013 are California, Delaware, Hawaii, Minnesota, New Jersey, and Rhode Island.

changed numerous times (upwards). “At least in this context, federalism is a one-way ratchet toward liberty . . . A civil rights advocate is tempted to think, *Vive la Fédéralisme!*”³⁰³

“[C]autions are,” however, most definitely “in order,”³⁰⁴ because just as easily as the American federal system can with one hand give liberty to the LGBT community, it can take it away with the other. So many signs point to an immediate future in which we will see a continuing increase in the numbers of states legalizing gay marriage, and the percentage of Americans supporting not just that institution, but the extension of further civil rights protections to gays and lesbians.³⁰⁵ Although, it is undeniable that federalism has played positive *and* negative roles in the evolution of gay rights in the United States.³⁰⁶ As I have demonstrated in this Article, what the forces of federalism did *not* control was the U.S. Supreme Court’s 2013 decision in *United States v. Windsor*, nor did they constitute the dominant theme in Justice Kennedy’s majority opinion in that case. To conclude otherwise is to ignore the extent to which his opinions in *Romer*, *Lawrence*, and *Windsor* should be viewed together as a set of judicial writings—through which runs an abiding commitment to advancing the cause of equal liberty for individuals regardless of their sexual orientation.

As a May 21, 1964 talking points memorandum from Bill Moyers to George Reedy indicates, the themes of Lyndon Johnson’s Great Society speech were consciously long-term in nature.³⁰⁷ Of the eight points in the memo, four were explicitly focused upon the consequences for America beyond the election

303. Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. LAW & SOC. CHANGE 199, 210 (2013).

304. *Id.*

305. See Klarman, *supra* note 298, at 155–57.

306. These roles have been extensively documented elsewhere. A good overview is provided in Tribe & Matz, *supra* note 303. For an excellent comparative analysis of the ways in which the forces of federalism shaped the civil rights of gays and lesbians in the United States and Canada, see generally MIRIAM SMITH, *POLITICAL INSTITUTIONS AND LESBIAN AND GAY RIGHTS IN THE UNITED STATES AND CANADA* (2008).

307. See WARNER, *supra* note 8, at 5.

year of 1964.³⁰⁸ The intention was to construct a Great Society for “the next generation”³⁰⁹—or, perhaps in the preambular words of the Constitution, for “ourselves and our Posterity.”³¹⁰ As we have seen, in 1964 the inclusive nature of those long term Great Society principles was decidedly limited; they were not viewed as extending to members of the LGBT community. This has since changed—change has come incrementally, but it has come. Therefore, while there is still much progress to be made, fifty years later we can look at the legacy of the Great Society and say that it was built upon key principles that are entirely consistent with the themes of equal justice under the law that represents the body and soul of Justice Kennedy’s opinion in *Windsor*. In other words, upon close examination we can see that it is necessary to take Justice Kennedy’s own words seriously, because that opinion was indeed crafted “quite apart from principles of federalism.”³¹¹

308. *See id.* at 5, 8.

309. *Id.* at 5 (quoting Memorandum from Bill Moyers to George Reedy (May 21, 1964)) (internal quotation marks omitted).

310. U.S. CONST. pmbl.

311. *United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting) (quoting *id.* at 2692) (internal quotation marks omitted).