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The Return of Noncongruent Equal Protection

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THE RETURN OF NONCONGRUENT EQUAL PROTECTION

Brian Soucek*

Contemporary equal protection doctrine touts the principle of congruence: the notion that equal protection means the same thing whether applied to state or to federal laws. The federalism-tinged equal protection analysis at the heart of Justice Kennedy’s opinion in United States v. Windsor, however, necessarily violates the congruence principle. Commentators and courts—especially those deciding how Windsor’s federalism should affect the ever-growing number of state same-sex marriage cases—have so far failed to account for Windsor’s noncongruent equal protection, much less ask whether noncongruence is generally desirable, and if so, what form it should take.

This Article draws answers to those questions from the Supreme Court’s alienage discrimination cases, which offer three distinct models of noncongruence, each of which is reflected in Windsor. The alienage cases show that instead of applying different levels of scrutiny to federal and state laws, a better understanding of noncongruence would allow different levels of government to assert different interests in defending their laws. By reconstructing and evaluating the ways that structure and rights intersect in the alienage cases, this Article considers for the first time what the return of noncongruent equal protection could mean both for cases that follow Windsor and for equal protection doctrine more broadly.

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INTRODUCTION

Federalism clearly plays a role in *United States v. Windsor*,¹ the decision striking down Section 3 of the Defense of Marriage Act.² It's just not entirely clear what that role is.³

The *Windsor* Court refused to treat federalism concerns⁴ as an independent ground for its decision: Justice Kennedy's opinion for the

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

2. Pub. L. No. 104-199, 110 Stat. 2419, 2419 (codified at 1 U.S.C. § 7 (2012)) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."). Since only Section 3 of the Defense of Marriage Act (DOMA) was at issue in *Windsor*, and is at issue here, I refer to that section simply as "DOMA" in all that follows.

3. See, e.g., *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (citation omitted) ("[N]o one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the [majority] opinion has formally disclaimed reliance upon principles of federalism, mentions of 'the usual tradition of recognizing and accepting state definitions of marriage' continue. What to make of this? The opinion never explains.").

4. As discussed below, see *infra* Part I.A, these concerns were raised in one of the lower-court opinions striking down DOMA and in an amicus brief filed by a prominent group of federalism scholars. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); Brief of Federalism Scholars as Amici Curiae in Support of Respondent at 2–3, *Windsor*, 133 S. Ct. 2675 (No. 12–307) [hereinafter Federalism Scholars' Brief] ("DOMA falls outside Congress's powers. Marriage is not commercial activity, and DOMA is not limited to federal-benefit programs that might rest on the Spending Clause. Any action by Congress that falls outside its specifically enumerated powers must be justified under the Necessary and Proper Clause, and DOMA cannot pass that test. DOMA's definition of marriage is not 'incidental' to an enumerated power . . .").

majority found it “unnecessary to decide whether this federal intrusion on state power”—DOMA’s limitation of marriage to opposite-sex couples—“is a violation of the Constitution because it disrupts the federal balance.”⁵ And yet Justice Kennedy also emphasized that “[t]he State’s power in defining the marital relation is of *central relevance* in this case quite apart from principles of federalism.”⁶ Though the dissenters dismissed such statements as “federalism noises”⁷ or mere “whiffs of federalism,”⁸ the *Windsor* Court itself described states’ traditional power over marriage as *centrally relevant* to DOMA’s unconstitutionality. But relevant how, and to what provision of the Constitution?⁹

In the months since *Windsor* was decided, scholars have offered answers to those questions—answers that push beyond the temptation to dismiss Justice Kennedy’s reliance on state power as hopelessly muddled.¹⁰ The most convincing readings to have emerged describe an equal protection analysis tinged by federalism, or, as the First Circuit described it in its own encounter with DOMA, an equal protection “uniquely reinforced by federalism concerns.”¹¹ According to these readings, laws that are unusual within our federal system are said to trigger somewhat heightened equal protection scrutiny.¹² Moreover (or alternatively), when scrutinized, those measures can be justified based *only* on aims that are deemed appropriate—again, under our federalism—to that specific level of government.¹³

5. *Windsor*, 133 S. Ct. at 2692 (majority opinion). While officially the Court merely declined to decide whether DOMA exceeded Congress’s enumerated powers, it also described as “established” Congress’s power to depart from state determinations of marital status when it comes to, for example, immigration law and Social Security benefits. *See id.* at 2690.

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

7. *Id.* at 2709 (Scalia, J., dissenting).

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

9. *Cf. id.* at 2707 (Scalia, J., dissenting) (“The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) . . .”).

10. *Cf.* Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 40 n.4 (2013) (citing descriptions of Justice Kennedy’s opinion as “muddled,” intellectually awkward, and a “logical mishmash”). Others have described *Windsor* as strategically ambiguous rather than simply muddled. *See, e.g.,* Neil Siegel, *Federalism As a Way Station: Windsor As Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 1, 7 (2014) (“Overall, the majority opinion defies decisive interpretation . . . [I]t seems to insist on preserving for itself a certain Delphic obscurity.”).

11. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012).

12. *See* Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 163 (2013), available at <http://columbialawreview.org/windsor-federalism-and-family-equality> (“[T]he departure from the traditional allocation of power was not an independent ground for striking down the statute; the fact that the statute was unusual was simply a trigger for more careful review under principles of equal protection.”).

13. Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 CATO SUP. CT. REV. 117, 137 (“Federalism also constrained the interests that could justify DOMA by tightening the Court’s standard of review and prompting the Court to reject Congress’s primary interest outright.”); *see also* Will Baude, *Federalism and DOMA*, PRAWFSBLAWG (June 26, 2013, 1:45 PM), <http://prawfsblawg.blogspot.com/2013/06/federalism-and-doma.html> (“Windsor is

Compelling and correct as I think they are, these readings miss one crucial point: that federalism-tinged equal protection scrutiny necessarily violates a core tenet of contemporary equal protection doctrine—the principle of congruence. Congruence requires that state and federal laws be subjected to the same scrutiny. Named and reaffirmed by Justice O’Connor in *Adarand Constructors v. Peña*,¹⁴ the congruence principle reflects the “long-held notion that ‘it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government’ than it does on a State to afford equal protection of the laws.”¹⁵ Congruence means that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”¹⁶

Windsor’s federalism-tinged equal protection is noncongruent by nature: it calls for different scrutiny depending on whose classification is being scrutinized. Commentators, however, have thus far failed to notice that *Windsor* flouts the congruence principle’s unitary view of equal protection. The *Windsor* opinion seems to require that which the Court has elsewhere described as “unthinkable.”¹⁷

And yet, the unthinkable *has* previously been thought. Despite the Court’s professed allegiance to the congruence principle, one bastion of noncongruence still remains, sometimes unnoticed,¹⁸ within equal protection doctrine.¹⁹ This is the law concerning alienage discrimination.²⁰

an equal protection decision to which federalism is relevant, both because it shores up the interest on *Windsor*’s side and it diminishes or eliminates many of the interests on the federal government’s side.”).

14. 515 U.S. 200 (1995).

15. *Id.* at 225 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

16. *Id.* at 224 (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)); *see also* *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”). *Adarand* overruled the short-lived holding of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had examined federal affirmative action programs under intermediate scrutiny while subjecting state affirmative action programs to strict scrutiny. Since *Adarand*, affirmative action programs have been subjected to strict scrutiny whether they are state or federal. For a sophisticated discussion of the congruence principle’s theoretical underpinnings—and arguments for why the congruence principle should not always be followed—see Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005).

17. *Bolling*, 347 U.S. at 500.

18. In its opinion striking down Wisconsin’s ban on same-sex marriage, the U.S. District Court for the Western District of Wisconsin, for example, said that it was unaware of any cases “in which the [Supreme] Court applied equal protection principles differently to state and federal government.” *Wolf v. Walker*, 986 F. Supp. 2d 982, 1017 (W.D. Wis. 2014).

19. Alienage may be the one area in which noncongruence is made explicit, but as Adam Winkler has shown, judges sometimes scrutinize laws noncongruently in practice without acknowledging that they are doing so. *See* Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153 (2009) (finding a “degree of sliding-scale deference in free speech cases” that is harsher on local and state laws than on federal laws that restrict speech); Adam Winkler, *The Federal Government As a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931 (2007) (finding courts more likely to uphold federal affirmative action policies than state policies).

20. Reaffirming the congruence principle in *Adarand*, Justice O’Connor brushed aside the glaring exception to that principle offered by the Court’s alienage cases. As she wrote: “We do not understand a few contrary suggestions appearing in cases in which we found

Equal protection claims brought by noncitizens are treated differently depending on whether the discrimination against them occurred at the state or federal level. State attempts to discriminate on the basis of alienage generally face far higher hurdles than do those of the federal government.

Importantly, however, the nature of those hurdles has varied across the Court's alienage cases. In some instances, state alienage laws have been preempted outright by the federal government's occupation of the field in regard to immigration. In other cases, state laws were subjected to heightened scrutiny even as federal alienage classifications received only rational basis review. Finally, no matter what level of scrutiny applied, the Court has sometimes disregarded certain governmental interests asserted by states in defense of their alienage laws, branding them improper concerns of that level of government.

If it is not already clear, I have just described the mirror image of the three roles federalism has played, or might have played, in striking down DOMA. Federal preemption of state alienage laws is simply the reverse of the so-called categorical federalism challenge to DOMA—the claim, bypassed in *Windsor*, that Congress lacks the power to define marital relations, a traditional state concern. Similarly, by ratcheting up the scrutiny it applied to DOMA, an unusual federal intrusion into state matters, the *Windsor* Court flipped the higher scrutiny that state alienage laws face in comparison to their federal counterparts. Finally, insofar as the *Windsor* Court limited what interests the federal government could assert in regard to DOMA, it again reversed the pattern in the alienage cases, where the President and Congress have been allowed to assert interests not available to others. This is all to say that the noncongruent treatment of state and federal alienage laws—harsher on the states—finds a mirror image in the tougher treatment seemingly given to federal, as opposed to state, limitations on marriage in *Windsor*. Noncongruence works in both directions.

Given that commentators have so far failed to grapple with *Windsor*'s noncongruence, it is hardly surprising that most have also failed to note *Windsor*'s deep analogies with the alienage cases, which subvert the congruence principle in such similar ways.²¹ Although these cases have

special deference to the political branches of the Federal Government to be appropriate, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101–102, n.21 (1976) (federal power over immigration), to detract from this general rule.” *Adarand*, 515 U.S. at 217–18.

21. There is one notable, albeit brief, exception: in an insightful blog post about the Ninth Circuit's reading of *Windsor* in *SmithKline Beecham Corp. v. Abbott Laboratories*, a case about peremptory jury challenges based on jurors' sexual orientation, Professors Vikram Amar and Alan Brownstein point to alienage law as an area where, as in *Windsor*, there is “a structural dimension to equal protection doctrine.” Vikram David Amar & Alan E. Brownstein, *The Ninth Circuit, in SmithKline v. Abbott Labs, Bars Lawyers from Removing Gay/Lesbian Jurors*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (Jan. 31, 2014), <http://verdict.justia.com/2014/01/31/lawyers-allowed-remove-jurors-based-sexual-orientation>. Discussing the analogy only in passing—but describing the alienage cases, as I do, as *Windsor*'s “mirror image”—Amar and Brownstein elide the distinct ways, discussed in this Article, that structural concerns might impact equal protection analysis. See *infra* Part III.

been reduced within equal protection doctrine to little more than a black letter punchline, a careful rereading of the alienage cases of the 1970s unearths a potential model—or better, *three* potential models—for understanding how federalism concerns and equal protection scrutiny, structure and rights, might intersect in *Windsor*'s wake.

A great deal is at stake in deciding which of these potential models to follow. As attention has turned from DOMA, a federal statute, to state bans on same-sex marriage, the question that keeps arising is whether and to what extent federalism influenced the *Windsor* decision. The way that courts understand the interaction of federalism and equal protection in *Windsor* could—and I think should—determine the strength of that opinion's precedential force over the ever-multiplying same-sex marriage cases in the states.²²

The return of noncongruent equal protection in *Windsor* is thus among the most important, if least understood, doctrinal developments in that case. But no one has yet asked whether noncongruence, which the Court has so long and often rejected, should be welcomed back—and, if so, in what form. The alienage cases help answer both of these questions. In doing so, they point the way to an equal protection doctrine that *incorporates* structural concerns rather than putting them aside or pitting them against rights discourse.

Parts I and II of this Article explore the various forms that noncongruent equal protection can take—first in the context of *Windsor*, then in the alienage cases. Part III then draws lessons from the alienage context to better understand which of *Windsor*'s “federalism noises”²³ are most worth

22. See, e.g., *Robicheaux v. Caldwell*, No. 13-5090, 2014 WL 4347099 (E.D. La. Sept. 3, 2014); *Brenner v. Scott*, 298 F.R.D. 689 (N.D. Fla. 2014); *Bowling v. Pence*, No. 1:14-CV-00405-RLY, 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); *Burns v. Hickenlooper*, No. 14-CV-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY-TAB, 2014 WL 2884868 (S.D. Ind. June 25, 2014), *aff'd* Nos. 14-2386 to 14-2388, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd sub nom.* *Baskin v. Bogan*, No. 14-2526, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Lee v. Orr*, No. 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom.* *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *aff'd sub nom.* *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012); *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Ch. Div. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013). For a list of currently pending cases, see *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Sept. 21, 2014).

23. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

amplifying. It shows how noncongruent equal protection helps clarify the marriage challenges that have followed DOMA's demise and, properly understood, could also reshape the case law in areas beyond marriage—alienage included.

I. *UNITED STATES V. WINDSOR*

Federalism concerns impacted—or might have impacted—the equal protection analysis in *United States v. Windsor* in any of three ways, as the following sections detail. Part I.A describes the most direct way structural concerns could have played a role: namely, by making equal protection analysis unnecessary. This is what I refer to below as the “categorical federalism”²⁴ approach—a path urged on the Court unsuccessfully in *Windsor*. Meanwhile, Parts I.B and I.C describe two ways that equal protection analysis can be inflected—rather than usurped—by structural concerns. The first type of federalism-tinged equal protection, described in Part I.B, varies the level of scrutiny applied to state versus federal laws. In the second, described in Part I.C, the level of scrutiny is kept constant; what changes are the governmental interests defendants are allowed to assert when attempting to survive that scrutiny.

Part I.D, finally, discusses why I refer to these three approaches in terms of *noncongruence*. All three have one thing in common: they allow for the possibility that the same form of discrimination—in this instance, restrictions on marriage based on sexual orientation—might prove constitutional in one case and unconstitutional in another, based solely on the governmental body doing the discriminating.²⁵

24. Judith Resnik gave the term “categorical federalism” a broader and more pejorative use in a 2001 essay. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001) (“Categorical federalism’s method first assumes that a particular rule of law regulates a single aspect of human action. . . . Second, categorical federalism relies on such identification to locate authority in state or national governments. . . . Third, categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs *only* to the states.”). For more recent discussions tied to DOMA, see, for example, David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805 (2011) and Joslin, *supra* note 12.

25. In tracing how noncongruent equal protection varies between *levels of government*, this Article’s discussion is distinct from those that have shown how the Supreme Court lowers its scrutiny in particular *areas of law*, often abandoning its professed commitment to colorblindness. See, e.g., Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537 (2014) (discussing the Court’s departure from strict scrutiny of race-based classifications in the domain of family law); see also, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9 (2003) (same for the census); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (same for race-based suspect selection). Adam Winkler has described this as a difference between “vertical” and “horizontal” tailoring. Winkler, *supra* note 19, at 184 (“[T]ailoring can happen vertically with courts treating the federal government differently than state or local governments. Or it can happen horizontally, with courts treating different governmental actors at the same level of government (such as educational institutions or prisons) in distinct ways.” (internal citation omitted)). This Article focuses solely on vertical tailoring.

A. Categorical Federalism

In the run-up to *Windsor*, many questioned whether, as Justice Kennedy asked during oral argument, “the Federal government, under our federalism scheme, has the authority to regulate marriage.”²⁶ As a group of federalism scholars argued in their amicus brief filed on Edith Windsor’s behalf (the “Federalism Scholars’ Brief”): “States derive the power to define marriage from their police powers, but Congress has no such power. Nor can Congress justify DOMA under the Commerce, Spending, or Necessary and Proper Clauses.”²⁷ The power to define marriage, in other words, is categorically barred to the national government under our federal system’s division of power. This “categorical federalism” argument was itself sufficient to hold Section 3 of DOMA unconstitutional, amici argued, since the question of whether DOMA denied Windsor equal protection of the laws would not need to be asked if Congress lacked the power to pass DOMA in the first place.

One of the earlier courts to consider DOMA’s constitutionality had, in fact, followed the approach spelled out in the Federalism Scholars’ Brief.²⁸ According to the federal district court for the District of Massachusetts, DOMA violated the Tenth Amendment both because it was an impermissible use of Congress’s power under the Spending Clause²⁹ and because DOMA intruded on “a core area of state sovereignty—the ability to define the marital status of its citizens.”³⁰

On appeal, the First Circuit rejected the district court’s Tenth Amendment argument—though it used federalism principles to strike down DOMA in another way, as the following section discusses. Congress, said the First Circuit, “surely has an interest in who counts as married,” given the many federal programs that disperse benefits and determine revenues based in part on marital status.³¹ “That Congress has traditionally looked to state law to determine” whom to consider married “does not mean that the Tenth Amendment or Spending Clause require it to do so.”³² According to the First Circuit, DOMA neither commandeered the states nor directed their internal operations, even if it may have “put a thumb on the scales and influence[d] a state’s decision as to how to shape its own marriage

26. Transcript of Oral Argument at 76, *Windsor*, 133 S. Ct. 2675 (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf.

27. Federalism Scholars’ Brief, *supra* note 4, at 12.

28. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

29. *Id.* at 248–49 (“[A]s DOMA imposes an unconstitutional condition on the receipt of federal funding, this court finds that the statute contravenes a well-established restriction on the exercise of Congress’ spending power.”). The district court drew on a companion case, *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), in finding that DOMA’s funding conditions were unconstitutional. For criticism of the circularity of this approach, see Cruz, *supra* note 24, at 809–10.

30. *Massachusetts*, 698 F. Supp. 2d at 249.

31. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012).

32. *Id.*

laws”³³—for example, by threatening to rescind federal Medicaid funding to states, like Massachusetts, which considered the combined income of same-sex married couples in their state Medicaid programs.³⁴

The case that the Supreme Court ultimately heard was neither *Massachusetts v. U.S. Department of Health & Human Services*³⁵ nor *Gill v. Office of Personnel Management*,³⁶ the First Circuit’s cases, but rather *Windsor*, which the Second Circuit had decided on equal protection grounds, applying intermediate scrutiny and finding DOMA wanting.³⁷ Still, the Federalism Scholars’ Brief put an expanded version of the Tenth Amendment argument that had prevailed in the district court in *Massachusetts* solidly before the Supreme Court in *Windsor*. DOMA’s sweeping regulation of marital status, the federalism scholars argued, fell within neither the Commerce nor Spending Clauses, as marital status (unlike weddings themselves) does not involve interstate commercial activity and DOMA’s definition of marriage extended to matters (such as copyright, ethics regulations, and evidentiary rules) not tied to spending.³⁸

Moreover, DOMA upended the historical “federal dependence on state marriage law.”³⁹ By creating, “for the first time, a blanket federal marital status that exists independent of States’ family-status determinations,” DOMA—the federalism scholars argued—went far beyond previous limits on what marriages would be recognized for the purpose of certain defined federal benefits, such as immigration.⁴⁰ DOMA, they argued, interfered with “some States’ policy judgment that ‘family and society’ would be strengthened by permitting committed adult couples to marry legally”—a judgment at the “heart of States’ police powers.”⁴¹

I follow others in referring to claims such as these as “categorical federalism” arguments.⁴² Their common denominator is the argument that under our federal system, the power to define marriage categorically falls to the states rather than the federal government. The Supreme Court found it “unnecessary to decide” the merits of the categorical federalism arguments raised in *Windsor*.⁴³ Suggesting opposition, however, the Court did note instances in which the federal government has, on the one hand, refused to

33. *Id.* at 12–13.

34. *See id.* at 7.

35. 682 F.3d 1 (1st Cir. 2012).

36. 699 F. Supp. 2d 374 (D. Mass. 2010).

37. For a discussion of the way that federalism concerns impacted the Second Circuit’s equal protection analysis, see *infra* Part I.C.

38. Federalism Scholars’ Brief, *supra* note 4, at 13–14.

39. *Id.* at 29.

40. *Id.* at 29–30.

41. *Id.* at 35.

42. *See supra* note 24.

43. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”).

recognize valid state marriages and, on the other, recognized common law marriages not recognized within certain states.⁴⁴ The federal government, in other words, has not always abdicated the power to define what counts as a marriage.⁴⁵

According to Professor Courtney Joslin, the Court's refusal to endorse categorical federalism in this area is a good thing, at least for supporters of gay rights.⁴⁶ "While its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA," Joslin argues, "it also would have curtailed the ability of federal officials to protect same-sex couples and other families."⁴⁷ A categorical federalism decision might have limited the federal government's ability to make up for discriminatory state marriage laws by, for example, counting couples in civil unions or domestic partnerships as "married" for federal purposes.⁴⁸ Were marriage status solely for the states to determine—as the categorical federalism argument would have it—such "anti-DOMA" provisions would be no more constitutionally acceptable than DOMA itself.

B. Scrutiny-Enhancing Federalism

Although the First Circuit disagreed with the district court on the issue of categorical federalism—rejecting the notion that defining marital status is a prerogative of the states alone—it gave weight to federalism concerns nonetheless. It used them, in short, to heighten the level of equal protection scrutiny it applied to the federal law under review. In Judge Boudin's words: "Given that DOMA intrudes broadly into an area of traditional state regulation, a *closer examination* of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is *uniquely reinforced by federalism concerns*."⁴⁹ According to the First Circuit, DOMA's impact on a minority *combined with* the federalism concerns it raised together required "somewhat more . . . than [the] almost automatic deference" that would be given under ordinary rational basis review.⁵⁰

What "somewhat more" might mean, however, was left largely undefined. The First Circuit insisted that it was not applying intermediate scrutiny, as that option had been foreclosed in *Cook v. Gates*,⁵¹ a "Don't

44. *See id.* at 2690.

45. *See* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. (forthcoming 2014), available at <http://ssrn.com/abstract=2485595> (describing further instances in which the federal government made family status determinations both to expand and to limit state status determinations, particularly regarding the status of children).

46. *See generally* Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. (forthcoming 2014).

47. Joslin, *supra* note 12, at 158.

48. *See, e.g.*, Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43 (2014) (advocating the creation of a federal domestic partnership registry).

49. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012) (emphasis added).

50. *Id.* at 15.

51. 528 F.3d 42 (1st Cir. 2008).

Ask Don't Tell" challenge in which the First Circuit in 2008 had refused to treat sexual orientation as a suspect classification.⁵² Instead, the court cited the rational-basis-with-bite canon⁵³ for the proposition that rational basis review should be applied more stringently when discrimination against an unpopular group might be afoot, compared to when "ordinary economic legislation" is under review.⁵⁴ This is a familiar move within at least certain pockets of equal protection law, including cases dealing with sexual orientation.⁵⁵ Yet, the First Circuit went further. Prompted by its federalism concerns, the opinion offered a rational basis review with yet *more* bite—though still not (at least officially) intermediate scrutiny. This rational-basis-with-extra-bite test required "that the federal government interest in intervention *be shown with special clarity*" "in areas where state regulation has traditionally governed."⁵⁶

Professor Joslin has identified a similar move in the Supreme Court's *Windsor* opinion. According to what she calls the "unusualness trigger argument," departures from the historic allocation of power between the states and the federal government lead to a "more careful review under principles of equal protection."⁵⁷ Thus, Justice Kennedy's majority opinion in *Windsor*, even after disclaiming the categorical federalism approach, went on to underscore the states' "historic and essential authority to define the marital relation" and noted that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage."⁵⁸ Quoting *Romer v. Evans*,⁵⁹ the opinion then declared: "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."⁶⁰

52. *Id.*

53. *Massachusetts*, 682 F.3d at 10–11 (citing *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

54. *Id.* at 11.

55. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–63 (2011) (discussing the Court's use of the "rational basis with bite standard" of review). Professor Katie Eyer has recently shown how in the 1970s, before the middle tier of intermediate equal protection scrutiny was established for sex and illegitimacy, the Supreme Court regularly applied a more rigorous form of rational basis review in cases brought by groups beyond the formally protected classes. Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2427272> ("[W]here group or rights based concerns are implicated—including but not limited to the early sex, illegitimacy and sexual orientation cases—there is a robust history of the Court applying more than *de minimis* rational basis review, even outside of the formally heightened tiers.").

56. *Massachusetts*, 682 F.3d at 10 (emphasis added).

57. Joslin, *supra* note 12, at 163.

58. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

59. 517 U.S. 620 (1996).

60. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928))). *Louisville Gas* makes clear that "the constitutional provision" at issue is the Equal Protection Clause.

Joslin aptly argues that the unusualness trigger argument need not be tied to federalism.⁶¹ In other words, the trigger for closer scrutiny need not be set off by anything that is unusual from a federalism perspective.⁶² What was unusual in *Romer*, in fact, was the indiscriminately sweeping nature of Colorado's constitutional amendment, which stripped gays and lesbians of antidiscrimination protections across the state, in all areas of law, and which prohibited any future protections from being enacted. DOMA, which amended the federal Dictionary Act⁶³ rather than any individual law, was similarly unusual in its sweep.⁶⁴

And yet, in *Windsor*, DOMA's unusually broad scope was precisely what made DOMA unusual from a federalist perspective as well.⁶⁵ Put another way, the federal government's traditionally limited power to define marriage is what made DOMA so sweeping. Rather than defining what counts as marriage for a specific purpose like Social Security, DOMA involved the federal government more broadly—*unusually* broadly—in an area of traditional state concern, and thereby—according to the *Windsor* Court—triggered a somewhat elevated level of scrutiny under the Equal Protection Clause.⁶⁶

Notoriously, the majority opinion in *Windsor* said even less than the First Circuit in specifying just what level of scrutiny was warranted.⁶⁷ As Justice Scalia complained, the majority opinion “does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.”⁶⁸ Although the majority opinion undoubtedly discussed both federalism and equal protection concerns, it is not clear that it employed the doubly heightened rational-basis-with-extra-bite test that the First Circuit introduced.⁶⁹ Indeed, it is hardly clear that the result in *Windsor* required anything higher than the scrutiny employed in *Romer*, a case which lacked *Windsor*'s federalism concerns. In both cases, the governmental interest at stake was said to reduce to a bare desire to harm a politically unpopular group.

61. Joslin, *supra* note 12, at 167.

62. *Id.*

63. 1 U.S.C. § 7 (2012).

64. An example of a different sort comes from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, where unusual departures from ordinary legislative or administrative procedures was offered as one factor that might lead to heightened scrutiny of a facially race-neutral classification or decision. 429 U.S. 252, 267 (1977).

65. “DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law . . .” *Windsor*, 133 S. Ct. at 2692 (emphasis added).

66. *Id.* at 2690–92.

67. *Cf. id.* at 2706 (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”).

68. *Id.*

69. See Siegel, *supra* note 10, at 6 (describing *Windsor* as “talk[ing] the talk of rational basis review, even as it applied what might be called rational basis ‘double-plus’”).

And yet, in *Windsor*, it was “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” that provided the “strong evidence of a law having the purpose and effect of disapproval of that class” of same-sex couples who had entered into state-sanctioned marriages.⁷⁰ To repeat, then, DOMA’s *unusualness within the federal system* is what raised suspicions of animus in *Windsor*. Take away its federalism concerns and the Court’s scrutiny of DOMA might not have been as beady-eyed.

To summarize: concerns about state authority in *Windsor* affected the level of equal protection scrutiny given under the Fifth Amendment to DOMA, a federal law. It follows that a similarly discriminatory *state* law would necessarily receive a more lenient form of scrutiny under the Fourteenth Amendment, for federalism concerns would no longer serve to ratchet up the scrutiny. If this reading of *Windsor* is correct, the Court cannot still say—if it ever truly could—that its “approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”⁷¹ The unusualness trigger argument, insofar as it is triggered specifically by federalism concerns, makes *Windsor*’s equal protection necessarily noncongruent, for the higher scrutiny it triggers will apply only to federal laws, not their state counterparts.

C. Interest-Constraining Federalism

No matter what level of scrutiny the Court ultimately employed in *Windsor*—rational basis with or without either bite or extra bite—federalism concerns might still have affected the Court’s equal protection analysis in another way: namely, by limiting the interests that the federal government could offer to withstand scrutiny.⁷²

Looking back at *Windsor* after it was decided, two authors of the Federalism Scholars’ Brief, Ernest Young and Erin Blondel, argued that federalism principles “played a critical role in defining the contours of the equality right at stake, limiting which governmental interests could weigh against that right.”⁷³ Whereas DOMA’s defenders had claimed that the federal government has the same latitude as the states to define marriage, at least for its own purposes,⁷⁴ Young and Blondel contend that the two levels

70. *Windsor*, 133 S. Ct. at 2693 (majority opinion).

71. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

72. In *Roth v. United States*, Justice Harlan unsuccessfully urged the Court to take a similar approach in the First Amendment context. *See* 354 U.S. 476, 503–05 (1957) (Harlan, J., dissenting) (“[I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results.”). For other examples, see Rosen, *supra* note 16, at 1557–62.

73. Young & Blondel, *supra* note 13, at 119.

74. *See generally* Brief for Respondent, *Windsor*, 133 S. Ct. 2675 (No. 12-307); *see also* Young & Blondel, *supra* note 13, at 140.

of government differ significantly in what interests they can legitimately assert. Young and Blondel argue that the federal government cannot, for example, claim an interest in preserving the “traditional definition” of marriage, since that end does not fall within Congress’s enumerated powers.⁷⁵ Equal protection analysis must therefore scrutinize a different set of interests depending on whether a state or federal law is being analyzed.

The lower courts’ opinions in *Windsor* offered versions of this argument. Both the district court, which applied rational basis review, and the Second Circuit, which applied intermediate scrutiny, canvassed four interests DOMA might serve: definitional uniformity, fiscal savings, preserving the traditional understanding of marriage, and encouraging responsible procreation.⁷⁶ DOMA, however, poorly served the second and fourth of these interests—preserving the fisc and encouraging procreation—because DOMA’s definition of marriage applied to any number of laws unrelated to fiscal matters and added no incentives for heterosexual couples to procreate, responsibly or otherwise.⁷⁷ The remaining two interests, however, were rejected at least in part because they were seen more properly, or traditionally, as state prerogatives.⁷⁸

Both courts emphasized that states set internally consistent marriage policies; the national government traditionally has not.⁷⁹ Given the longstanding variation in state marriage requirements, any attempt by the federal government to achieve national uniformity would require it to “sanction[] some of those [states’] decisions and reject[] others.”⁸⁰ The consistency interest, in other words, was not only seen as suspiciously unusual,⁸¹ but it also reduced to Congress’s other asserted interest:

75. Young & Blondel, *supra* note 13, at 120; *see also* Federalism Scholars’ Brief, *supra* note 4, at 7 (“When this Court considers whether DOMA—under any standard of equal-protection review—serves legitimate government objectives, it can and should consider whether those ends fall within Congress’s enumerated powers.”).

76. *Windsor v. United States*, 699 F.3d 169, 185–88 (2d Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394, 403–06 (S.D.N.Y. 2012).

77. *Windsor*, 699 F.3d at 185–88; *Windsor*, 833 F. Supp. 2d at 403–06.

78. *Windsor*, 699 F.3d at 185–88; *Windsor*, 833 F. Supp. 2d at 403–06.

79. *See Windsor*, 699 F.3d at 186 (“To the extent that there has ever been ‘uniform’ or ‘consistent’ rule in federal law concerning marriage, it is that marriage is ‘a virtually exclusive province of the States.’” (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))); *Windsor*, 833 F. Supp. 2d at 405 (“[B]efore DOMA, any uniformity at the federal level with respect to citizens’ eligibility for marital benefits was merely a byproduct of the states’ shared definition of marriage. The federal government neither sponsored nor promoted that uniformity.”); *see also Windsor*, 133 S. Ct. at 2692 (“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”).

80. *Windsor*, 833 F. Supp. 2d at 405.

81. Here, the unusualness argument, unlike that described above, was not used to trigger closer scrutiny—the Second Circuit was already applying intermediate scrutiny, after all—but rather as evidence that Congress’s asserted interest in uniformity on this single issue was pretextual. *See Windsor*, 699 F.3d at 186 (noting other variations in state marriage laws that the federal government had left standing); *see also* David B. Cruz, “*Amorphous Federalism*” and the Supreme Court’s Marriage Cases, *LOY. L. REV.* (forthcoming) (manuscript at 40–41), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352038.

preserving or endorsing the traditional conception of marriage.⁸² As to *that* interest, the lower *Windsor* courts were in agreement: since couples get married under state law, traditional limitations on who can get married can only be preserved or reformed by the states.⁸³ Given the ordinary allocation of power within the federal system, DOMA's attempt to enact a substantive moral judgment about marriage was both ineffectual, since the federal government does not actually marry anyone, and inappropriate—since such judgments, to the extent they are still allowed after *Lawrence v. Texas*,⁸⁴ are more properly part of the states' general police power.⁸⁵

The upshot of the lower courts' reasoning in *Windsor* is that certain motivations for excluding same-sex couples from the definition of marriage are simply unavailable to the federal government, even if they might be available to the states. Unlike the categorical federalism argument, which purports to keep the federal government out of the marriage definition business entirely, this “interest-limiting federalism” merely cabins the interests the federal government may assert (or, under rational basis scrutiny, the interests a court may hypothesize on the federal government's behalf) when justifying whatever definitional limits it has adopted.

A version of the interest-limiting federalism argument survives in Justice Kennedy's opinion in *Windsor*, though couched in the language of dignity rather than tradition or morality. Marriage offers what Justice Kennedy refers to as a “dignity and status of immense import.”⁸⁶ But crucially, it is a dignity that the *states* confer; indeed, doing so is part of their “historic and essential authority.”⁸⁷ DOMA's purpose, according to Justice Kennedy, was “to influence or interfere with state sovereign choices about who may be married.”⁸⁸ Kennedy's argument, it seems, is that deciding which couples should be dignified as married is the prerogative of the states, not the federal government. DOMA thus cannot be defended based on any asserted federal interest in conferring, or withholding, such dignity. That interest is unavailable to the federal government, regardless of whether it remains available for states to assert.

82. See *Windsor*, 833 F. Supp. 2d at 405 (“To accomplish that consistency, DOMA operates to reexamine the states' decisions concerning same-sex marriage. It sanctions some of those decisions and rejects others. But such a sweeping federal review in this arena does not square with our federalist system of government . . .”).

83. See *Windsor*, 699 F.3d at 187; *Windsor*, 833 F. Supp. 2d at 403.

84. 539 U.S. 558, 577–78 (2003).

85. Cf. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) (“For generations, moral disapproval has been taken as an adequate basis for legislation, although usually in choices made by state legislators to whom general police power is entrusted. But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis.” (citation omitted)).

86. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

87. *Id.* (“Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.”).

88. *Id.* at 2693.

Much of *Windsor*'s precedential force turns on this last qualification. Justice Kennedy's opinion is frustratingly opaque on the question of whether states might have reasons other than "improper animus" or a "bare . . . desire to harm a politically unpopular group" for choosing to withhold the dignity of marriage to same-sex couples.⁸⁹ Successfully or not, the majority opinion purports to limit its holding to couples who are lawfully married under state law.⁹⁰ The interest-constraining federalism argument supports that limitation. It suggests that the conferral of dignity through marriage status might be a permissible interest for states to assert, even though the federal government could not do so.⁹¹

But if that is the case—and if, as Justice Kennedy's opinion suggested, DOMA does not serve any *other* legitimate federal interests⁹²—then it is unclear why the majority opinion needed to place so much emphasis on animus. That is, having disallowed the asserted interest on federalism grounds, it would seem unnecessary (or redundant) for the Court to reject it also as illegitimately motivated by animus. The Court's reliance on *U.S. Department of Agriculture v. Moreno*⁹³—where a law failed rational basis scrutiny because its only purpose was to harm an unpopular group⁹⁴—suggests a broader holding, untethered from any federalism concerns, in which even states' refusal to confer the dignity of marriage on same-sex couples would be seen as an expression of bare animus. According to Justice Scalia, this is *Windsor*'s inevitable result.⁹⁵

Chief Justice Roberts disagreed. The "logic of [the Court's] opinion does not decide," he claimed, the "question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."⁹⁶ He continued:

89. *Id.*

90. Compare *id.* at 2696 (Roberts, C.J., dissenting), with *id.* at 2709 (Scalia, J., dissenting).

91. This is decidedly *not* to say that this interest, when asserted by the states, will prove important enough, or will be found to have been pursued with sufficiently tailored means, to survive equal protection scrutiny. In other words, states could very well lose an equal protection challenge to their same-sex marriage ban even though, in defending those bans, the states are able to assert governmental interests that were unavailable to the federal government in *Windsor*. See *infra* Part III.

92. The majority opinion suggests this in two ways: first, by claiming that "interference with the equal dignity of same-sex marriages" was DOMA's "essence," *Windsor*, 133 S. Ct. at 2693 (majority opinion), and, second, by failing even to mention any of the other asserted interests DOMA was meant to serve. But see *id.* at 2707 (Scalia, J., dissenting) ("The majority . . . affirmatively conceal[s] from the reader the arguments that exist in justification. It makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them.").

93. 413 U.S. 528 (1973).

94. *Id.*

95. *Windsor*, 133 S. Ct. at 2710 ("[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the 'personhood and dignity' which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that 'personhood and dignity' in the first place.").

96. *Id.* at 2696 (Roberts, C.J., dissenting) (citation omitted).

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next." Thus, while "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions.⁹⁷

The Chief Justice's opinion shows how equal protection analysis might look different when applied to a state limitation on marriage as opposed to DOMA's federal limitation. The "normal allocation of responsibility between State and Federal Governments"⁹⁸—that is to say, federalism—might allow for certain interests to be asserted in state cases but not in federal cases. The same form of discrimination—limiting marriage to opposite-sex couples—would thus be more likely to survive equal protection scrutiny at the state level than it proved to be at the federal level. That is not, of course, to say that a state same-sex marriage ban would survive equal protection scrutiny. But the list of interests that would have to be considered in making that decision would, at the very least, be somewhat longer than it was in *Windsor*.

D. Noncongruent Equal Protection

Noncongruence results when a court's equal protection scrutiny is allowed to differ based on whose law is being scrutinized. Defined at this level of generality, each of the three approaches described in the previous three sections might count as a type of noncongruence. Categorical federalism would have entirely precluded equal protection scrutiny at the federal (as opposed to state) level. Scrutiny-enhancing federalism, as the term implies, ratchets up the tier or level of scrutiny applied at the federal level. Interest-limiting federalism constrains the governmental purposes that can be asserted to withstand the scrutiny.

This notion of "noncongruence" derives from—and negates—the congruence principle described by Justice O'Connor in *Adarand Constructors, Inc. v. Peña*, where the Court reaffirmed that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."⁹⁹ Congruence requires that discrimination against a particular group, or on the basis of a particular trait, must receive the same level of scrutiny no matter "whatever federal, state, or local

97. *Id.* at 2697 (citations omitted).

98. *Id.*

99. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

governmental actor” is doing the discriminating.¹⁰⁰ Under the congruence principle, for example, classifications based on race, benign or not, now receive strict scrutiny at all levels of government. Arguing for congruence, the *Adarand* Court emphasized how many Fifth Amendment cases had relied on Fourteenth Amendment precedents, and vice versa.¹⁰¹ Recalling its words in *Bolling v. Sharpe*,¹⁰² decided in tandem with *Brown v. Board of Education*¹⁰³ in May 1954, the Court in *Adarand* held that “‘it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government’ than it does on a State to afford equal protection of the laws.”¹⁰⁴

Windsor and, as I discuss next, the Supreme Court’s alienage cases both show that the “unthinkable” has occasionally been thought when equal protection analysis collides with federalism concerns. In fact, in reaffirming the congruence principle, *Adarand* itself was rejecting an especially prominent instance of noncongruence: the Court’s prior affirmative action case law. Before *Adarand*, the Court had subjected benign uses of race at the federal level to a lower tier of scrutiny than that given affirmative action programs at the state or local levels.¹⁰⁵

The following part details some of the arguments that have been made for and against the congruence principle.¹⁰⁶ The point for now is instead to emphasize what it means for equal protection to be congruent or noncongruent in the first place. As the discussion of *Adarand* has already suggested, the congruence principle, as originally described, specifically targeted the second, scrutiny-enhancing mode of noncongruence described above in Part I.B. *Adarand* overturned precedent that had subjected affirmative action programs to different *levels* of scrutiny at different levels of government. Such variation in the levels or tiers of scrutiny applied is what the narrowest understanding of the congruence principle prohibits. The First Circuit’s federalism-enhanced, rational-basis-with-extra-bite equal protection scrutiny of DOMA clearly violated the principle in this way because its extra bite applied only to the federal government.

The interest-constraining federalism applied by the lower courts in *Windsor* runs afoul of the congruence principle in a subtly different way. There, the federalism concerns did not affect the *level* of scrutiny applied. Instead, they limited the governmental *interests* that could be asserted in attempting to withstand such scrutiny. Still, the end result was much the same: it became possible that a particular classification could survive at the state level while being struck down on equal protection grounds on the federal level, since the states but not the national government could assert

100. *Id.* at 227.

101. *Id.* at 215–17.

102. 347 U.S. 497 (1954).

103. 347 U.S. 483 (1954).

104. *Adarand*, 515 U.S. at 225 (quoting *Bolling*, 347 U.S. at 500).

105. Compare *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (intermediate scrutiny), with *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (strict scrutiny for state and local governments).

106. See *infra* Part II.B.

an interest sufficient to survive the scrutiny applied. Here again, the law's constitutionality in regard to equal protection would hinge, or at least could hinge, on what level of government passed the law. For that reason, I refer to this too as a form of noncongruent equal protection.

Finally, consider the categorical federalism with which I began. This, it must be said, is not technically a form of noncongruent equal protection, for it is not really an instance of equal protection analysis at all. In fact, the categorical federalism claim in *Windsor*, had it been successful, would have allowed the Court to decide the case without ever reaching the equal protection question. I speak somewhat loosely, then, when I group categorical federalism and, in the following section, categorical preemption arguments together with the scrutiny-enhancing and interest-limiting modes of noncongruent equal protection. The connection is merely that, once again, an equal protection claim might turn out differently depending on whether it was brought against state or federal government. In this case, however, the results would diverge because the equal protection claim would become superfluous once the federal law was struck down on federalism grounds—grounds which obviously would not bar a state law on the same subject.

The three arguments just canvassed are perhaps best described as three ways of navigating equal protection and the structure of our federalism. And all three paths have, in fact, been taken—in cases that remain good law. Although categorical federalism was not employed in *Windsor*—unlike the two other modes of noncongruent equal protection, either or both of which can be found in Justice Kennedy's opinion—Part II shows that its mirror image, preemption, has been explicitly invoked as an alternative to equal protection analysis in the context I turn to next: alienage law.

II. ALIENAGE DISCRIMINATION

State laws that discriminate against noncitizens legally present in the United States are generally subject to strict scrutiny; federal laws that discriminate on the same basis receive only rational basis review.¹⁰⁷ This black letter rule admits of one general exception: state limits on who can “participate in the processes of democratic decisionmaking” need only

107. See, e.g., *Hamad v. Gates*, 732 F.3d 990, 1005–06 (9th Cir. 2013) (“Although the Supreme Court has noted the ‘substantial limitations upon the authority of the States in making classifications based upon alienage,’ the federal government’s interests with respect to aliens differ substantially from those of the states, and there are legitimate reasons for Congress to make classifications based on alienage. . . . Accordingly, we review alienage classifications drawn by Congress under a rational basis test.” (internal citations omitted) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982))); Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1426 (1995) (“Alienage discrimination by Congress remains subject to the rational basis test, because of the Court’s asserted incapacity to distinguish federal policy toward immigrants from federal immigration policy. . . . State discrimination against permanent resident aliens, in contrast, is usually subject to strict scrutiny, but not when the discrimination excludes the alien from the exercise of a ‘political function.’”).

survive rational basis review.¹⁰⁸ Expanded far wider than originally intended,¹⁰⁹ the exception has been held to apply not just to who can vote or serve on a jury, but also to who is eligible for government jobs that involve “discretionary decisionmaking, or execution of policy.”¹¹⁰

Black letter alienage law thus makes clear that when it comes to legally present noncitizens, equal protection is decidedly noncongruent. Federal alienage classifications receive far less rigorous equal protection scrutiny than most of their state law counterparts. As the Supreme Court held in a 1976 alienage case, in sharp contrast to its later statement of the congruence principle in *Adarand*, the “concept of equal justice under law is served by the Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. . . . [And yet while] both Amendments require the same type of analysis . . . the two protections are not always coextensive.”¹¹¹

A. *Four Cases*

Two pairs of cases decided in the 1970s show how noncongruence came about in the alienage context. Together, they demonstrate how, at least originally, the differing approaches to state and federal alienage laws were multiple and complex enough to provide precedent for each of the three ways that structural concerns and equal protection might have intersected in *Windsor*.

1. *Graham v. Richardson*

Alienage joined the short list of traits that garner strict scrutiny in *Graham v. Richardson*,¹¹² a 1971 case striking down state attempts to limit welfare benefits only to U.S. citizens and to resident aliens who had satisfied a residency requirement.¹¹³ According to the Supreme Court in *Graham*, “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”¹¹⁴ As to why alienage should receive such scrutiny, the Court explained, without elaboration, that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”¹¹⁵

Even as it struck down Arizona’s and Pennsylvania’s alienage-based welfare limits on equal protection grounds, however, the *Graham* Court went on to adduce an alternate ground for its decision. In the Court’s

108. *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978).

109. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 456 (1982) (Blackmun, J., dissenting) (“As originally understood, the *Sugarman* [political function] exception was exceedingly narrow.”).

110. *Foley*, 435 U.S. at 296.

111. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

112. 403 U.S. 365 (1971).

113. *Id.*

114. *Id.* at 372.

115. *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

words: “An *additional reason* why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations.”¹¹⁶ Congress, the *Graham* Court held, had provided a “comprehensive plan for the regulation of immigration and naturalization”—a plan that took indigence into account—and had thereby occupied the field.¹¹⁷ “State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area constitutionally entrusted to the Federal Government.”¹¹⁸ Eight Justices had branded the state alienage laws unconstitutional under the Equal Protection Clause; a unanimous Court found the same laws to have been preempted.¹¹⁹ *Graham*’s two holdings were thus presented as independent routes to the same end: the invalidation of state welfare restrictions based on alienage.¹²⁰

2. *Sugarman v. Dougall*

Two years after *Graham*, the Supreme Court again applied strict scrutiny to a state alienage classification—this time, to New York’s “flat statutory prohibition against the employment of aliens in the competitive classified civil service.”¹²¹ In *Sugarman v. Dougall*¹²²—a case brought by noncitizen typists, human resources technicians, and administrative assistants at New York City’s Human Resources Agency—the Court, citing *Graham*, subjected the state’s alienage restriction to “close judicial scrutiny” and found it wanting.¹²³ Though states have the power to establish their own form of government and define their political community, the Court held that New York’s bar on alien employees was not narrowly tailored to that goal.¹²⁴ “Its imposed ineligibility may apply to the ‘sanitation man, class B,’ . . . as well as to the person who directly participates in the formulation and execution of important state policy.”¹²⁵

Sugarman’s result was a two-tiered system of equal protection review for state public employment restrictions based on alienage. As the Court would later describe it: “We have . . . developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labeled the ‘political function’ exception and applies to laws that exclude aliens from positions intimately related to the process of

116. *Id.* at 376–77 (emphasis added).

117. *Id.* at 377.

118. *Id.* at 378.

119. Justice Harlan did not join the Court’s equal protection holding.

120. The independence of the *Graham* Court’s equal protection holding from its preemption holding is confirmed by the fact that in *Sugarman*, discussed below, the Court was able to reach the same result without reaching the preemption claim that had been decided in the aliens’ favor in the court below. *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973).

121. *Id.* at 639.

122. 413 U.S. 634 (1973).

123. *See generally id.*

124. *Id.* at 636–43.

125. *Id.* at 643 (citation omitted).

democratic self-government.”¹²⁶ The narrowness of this exception has become a point of contention, however, in the years since *Sugarman*. Police officers, public school teachers, and even deputy probation officers have all been said to fall within the political function exception,¹²⁷ while lawyers and notaries public have not.¹²⁸

Given the discussion to come, it is important to note that *Sugarman*’s “exception” is to the level of scrutiny courts ordinarily give state alienage laws. Cases that fall within the public function exception are *not* ones in which the state’s asserted interest—in having, say, public school children taught only by U.S. citizens—is found compelling enough to survive strict scrutiny. Instead, these are cases where strict scrutiny is not even applied. As Justice Blackmun wrote for the Court in *Sugarman*, “our scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives.”¹²⁹ Justice Blackmun did not, of course, say that this less demanding scrutiny was merely the rational basis test, but later Courts did. For governmental positions that “involve[] discretionary decisionmaking, or execution of policy, which substantially affects members of the political community,”¹³⁰ restrictions based on alienage have, since *Sugarman*, received only rational basis review.¹³¹

The *Sugarman* Court put off for another day the question of whether citizenship requirements for *federal* employment were equally vulnerable.¹³² That day came three years later, in *Hampton v. Mow Sun Wong*,¹³³ a Fifth Amendment challenge to the federal Civil Service Commission’s exclusion of noncitizens from most federal jobs.¹³⁴ Were equal protection analysis congruent in regard to alienage, *Sugarman* would have clearly dictated the outcome. But as *Mow Sun Wong* and another case decided the same day, *Mathews v. Diaz*,¹³⁵ make clear, equal protection does not apply congruently to state and federal government in regard to alienage. Yet as these two cases also show, noncongruence can be achieved in markedly different ways.

3. *Hampton v. Mow Sun Wong*

In *Hampton v. Mow Sun Wong*, five Chinese residents of San Francisco claimed that they had been unconstitutionally denied federal employment

126. *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

127. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (police).

128. See *Bernal*, 467 U.S. at 226–27 (notaries); *In re Griffiths*, 413 U.S. 717 (1973) (attorneys).

129. *Sugarman*, 413 U.S. at 648 (emphasis added).

130. *Chavez-Salido*, 454 U.S. at 441 (internal quotation marks omitted).

131. See *Foley*, 435 U.S. at 296 (“The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.”).

132. *Sugarman*, 413 U.S. at 646 n.12.

133. 426 U.S. 88 (1976).

134. *Id.*

135. 426 U.S. 67 (1976).

solely because of their citizenship status.¹³⁶ But for the level of government involved, *Mow Sun Wong* practically repeated the facts of *Sugarman*. And yet, in *Mow Sun Wong*, the Supreme Court denied that equal protection is coextensive under the Fifth and Fourteenth Amendments.¹³⁷ “Not only does the language of the two Amendments differ,” Justice Stevens wrote for the Court, “but more importantly, there may be *overriding national interests* which justify selective federal legislation that would be unacceptable for an individual State.”¹³⁸ Considering the constitutionality of the bar on noncitizens in the federal civil service, the Court determined that “the paramount federal power over immigration and naturalization forecloses a simple extension of the holding in *Sugarman*.”¹³⁹

Importantly, however, the noncongruence between *Sugarman* and *Mow Sun Wong* did not result from the application of different levels of scrutiny. In fact, the *Mow Sun Wong* Court—to the chagrin of the four dissenters—failed even to establish what level of equal protection scrutiny should apply, choosing instead to strike down the alienage classification on procedural due process grounds.¹⁴⁰ The Court stated that “[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.”¹⁴¹

The problem in *Mow Sun Wong* was that the regulation at issue—the employment bar for noncitizens—had come from the Civil Service Commission, not the President or Congress.¹⁴² Unlike the President and Congress, who *might*—the Court assumed without deciding that they *could*—have based an alienage restriction on uniquely federal concerns such as foreign affairs, treaty negotiations, or national immigration and naturalization policies,¹⁴³ the only interest the Court said the Civil Service

136. *Mow Sun Wong*, 426 U.S. at 91.

137. *Id.* at 100. Describing the congruence principle in *Adarand*, Justice O’Connor acknowledged this passage from *Mow Sun Wong*, at least in passing. After canvassing cases which had treated Fifth and Fourteenth Amendment equal protection analysis as equivalent, she added: “We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101–102, n.21 (1976) (federal power over immigration), to detract from this general rule.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217–18 (1995).

138. *Mow Sun Wong*, 426 U.S. at 100 (emphasis added).

139. *Id.*; see also *id.* at 101 (“[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State.”).

140. *Id.* at 117 (Brennan, J., concurring) (concurring on the understanding that “there are reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government”); *id.* at 119 (Rehnquist, J., dissenting) (“[W]hile posing an equal protection problem, the Court does not rely on an equal protection analysis The Court instead inexplicably melds together the concepts of equal protection and procedural and substantive due process.”).

141. *Id.* at 103 (majority opinion).

142. *Id.* at 90–91.

143. *Id.* at 114.

Commission could legitimately espouse was “the promotion of an efficient federal service.”¹⁴⁴ And *that* interest—administrative convenience in hiring—was found insufficient to justify a wholesale bar on noncitizen employment.¹⁴⁵

The *Mow Sun Wong* Court held that to deny aliens “substantial opportunities for employment” without sufficient reason was to deprive them of liberty without due process.¹⁴⁶ And the Court made clear that what makes a reason sufficient or not—this is the crucial point for present purposes—depends in part on the entity asserting the reason.¹⁴⁷ According to the Court, the “overriding national interests” that might have allowed Congress or the President to discriminate against aliens were not available to the Civil Service Commission.¹⁴⁸ Nor would they be available to state governments.¹⁴⁹

What I have just described is the mirror image of the interest-limiting federalism discussed in Part I. When it came to defining marriage, certain interests were said to be assertable by the states but not by the federal government. Here, we find interests that the federal government—or more specifically, the President or Congress—could assert to justify alienage laws, even though state governments could not do so. Prefiguring the interest-limiting federalism of *Windsor*, *Mow Sun Wong* offers what we might call interest-limiting preemption.

Two Justices concurred in *Mow Sun Wong* to emphasize that its procedural due process holding did not require the Court to decide whether the uniquely federal interests available to the President or Congress would have survived an equal protection challenge—a question which would, in turn, have forced the Court to specify what level of equal protection scrutiny applied to federal alienage discrimination.¹⁵⁰ Inexplicably, however, neither justice objected when the Supreme Court, in *Mathews v. Diaz*, another alienage case decided the same day, appeared to settle that very question.

4. *Mathews v. Diaz*

Mathews v. Diaz, *Graham*'s federal doppelgänger, asked the Supreme Court to consider whether Congress could prevent permanent residents from receiving Medicare benefits until they had lived in the United States for five years.¹⁵¹

Because some noncitizens—those who met the residency requirement—were given Medicare benefits, the Court framed the classification in

144. *Id.*

145. *Id.* at 115–16.

146. *Id.* at 116–17. *But see id.* at 118 (Rehnquist, J., dissenting) (“[N]either an alien nor a citizen has any protected liberty interests in obtaining federal employment.”).

147. *Id.* at 119.

148. *Id.*

149. *Id.*

150. *Id.* at 117 (Brennan, J., concurring).

151. *Mathews v. Diaz*, 426 U.S. 67 (1976).

Mathews as a distinction within the class of aliens, not a distinction between aliens and citizens.¹⁵² (The Court’s framing of the issue notwithstanding, aliens and citizens who failed to meet the five-year residency requirement were of course treated differently under the statute, just as resident aliens had been under the welfare laws struck down in *Graham*.¹⁵³) The Court then went on to apply what one commentator called “an astonishingly lenient version of the rational-basis test.”¹⁵⁴ The residency requirement, the Court held, was not “wholly irrational” since those who have lived in the United States longer “may reasonably be presumed to have a greater affinity with the United States than those who do not.”¹⁵⁵ The Court neither questioned whether “greater affinity with the United States” was relevant to the federal government’s interest in providing Medicare benefits, nor whether increased affinity was even one of Congress’s goals in passing the residency requirement for aliens.¹⁵⁶ Instead, the Court likened the choice of a five-year residency requirement for aliens to the “task of drawing lines for federal tax purposes”¹⁵⁷—the sort of congressional line-drawing courts give near-total deference.

Why did the Court subject Congress’s discrimination against aliens in Medicare to rational basis review, even though it had strictly scrutinized nearly identical discrimination against aliens in state welfare programs? Primarily, it seems, because “the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”¹⁵⁸ Not wanting to inhibit the political branches from setting immigration policies that flexibly respond to changing world conditions and affect foreign affairs, the Court confined itself to “a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”¹⁵⁹

152. *Id.* at 80.

153. See Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 290 (observing that a residency requirement imposed on one racial group but not another could hardly avoid strict scrutiny despite the fact that the classification could be framed as intraracial).

154. *Id.* at 284. Otherwise described, the Court applied the form of rational basis scrutiny traditionally used when reviewing economic regulation, not the more rigorous form of rational basis scrutiny that was frequently used, particularly in the 1970s, for reviewing group-based legislation. See generally Eyer, *supra* note 55.

155. *Diaz*, 426 U.S. at 83.

156. See Rosberg, *supra* note 153, at 285.

157. *Diaz*, 426 U.S. at 83.

158. *Id.* at 81.

159. *Id.* at 82. Left undiscussed in *Diaz* is the question of whether providing medical insurance to legal residents who happen to be noncitizens actually implicates immigration and naturalization concerns. The federal political branches’ near-plenary power over who can enter the country and become a citizen may well be distinguishable from their control over which of the people allowed to enter are provided Medicare benefits. Cf. Rosberg, *supra* note 153, at 328 (“When the government distinguishes between citizens and aliens with respect to welfare benefits or federal employment, the Court can scrutinize the legislation without fear of enmeshing itself in the complex process of formulating immigration policy.”); *id.* at 334 (“The provision restricting alien participation in the Medicare insurance program was not in any obvious way concerned with immigration. It

The *Diaz* Court noted that *Graham*'s second ground—its preemption holding—reinforced the decision to give *federal* alienage classifications comparatively lenient scrutiny.¹⁶⁰ *Graham*'s equal protection analysis, meanwhile, was said to involve “significantly different considerations because it concern[ed] the relationship between aliens and the States rather than between aliens and the Federal Government.”¹⁶¹ States, the Court claimed, have no reason to treat legal aliens differently than citizens of other states when it comes to welfare, since they lack the power to restrict entry to either. The political branches of the federal government, on the other hand, are constitutionally empowered to regulate entry and naturalization.

On their face, these arguments would seem to fit the interest-limiting preemption found in *Mow Sun Wong*. Were that the case, the President and Congress, given what is often described as their near-plenary power to regulate immigration and naturalization,¹⁶² would be able to assert interests not available to the states—interests that would make it far easier for the federal government to survive the scrutiny that doomed state alienage laws in *Graham* and its successors.

This was not the move made in *Diaz*, however. Instead of expanding the interests that the federal government could assert (compared to the states), the *Diaz* Court simply lowered the level of scrutiny it applied.¹⁶³ Prefiguring (and mirroring) the scrutiny-enhancing federalism employed in the First Circuit's DOMA opinion, the Supreme Court in *Diaz* invoked the federal government's traditional power over immigration to justify less rigorous scrutiny of federal alienage laws compared to those of the states. As a result, laws like the welfare or Medicare restrictions at issue in *Graham* and *Diaz*—laws that discriminate in the same way against the same minority group—now receive strict scrutiny when passed by states and rational basis review when passed by Congress. When it comes to alienage, the noncongruence that the Supreme Court deemed “unthinkable” in *Bolling* and *Adarand* is simply black letter law.

B. Evaluating the Alienage Decisions

The cases just canvassed offer three ways in which the allocation of power within the federal system has affected equal protection analysis in

did not operate as an express condition on the right of resident aliens to enter the United States or to make this country their home.”).

160. *Diaz*, 426 U.S. at 84.

161. *Id.* at 84–85.

162. *But see* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (calling for the Court to “abandon the special deference it has accorded Congress in the field of immigration”).

163. *See* Rosberg, *supra* note 153, at 284 (“[S]ince the federal government has responsibilities not shared by any state, it may well have interests, compelling or otherwise, that no state can assert. Thus, the upholding of the federal provision would not necessarily indicate that the Court had tested it under a standard different from that applicable to the states. But the Court [in *Diaz*] left no doubt that it had, in fact, applied a different standard.”).

the alienage context. *Graham*'s alternate holding provides the clearest reason for treating state and federal alienage laws differently: if the federal government is seen to occupy the field and state laws are thereby preempted, equal protection scrutiny becomes unnecessary.

In *Graham* itself, however, strict scrutiny under the Equal Protection Clause was applied anyway, despite the preemption holding. Read in connection with its successor, *Diaz*, which applied rational basis scrutiny, *Graham* thus points to another form noncongruence can take: the Court can simply apply a higher level of scrutiny to state laws than to federal laws.

Finally, *Mow Sun Wong* suggests a third approach, suggested but not followed in both *Sugarman* and *Diaz*: instead of varying the level of scrutiny, courts can expand or constrain what interests different governmental entities are allowed to assert in defense of their alienage classifications.

Unlike *Windsor*'s noncongruent equal protection, which, to date, has gone largely unnoticed by commentators, the alienage cases garnered a fair amount of scholarly comment around the time they were decided. Partisans emerged for each of the three approaches just described, and it is worth excavating their arguments, if only to determine—as Part III will do—whether they might usefully be reflected in debates over *Windsor*'s reach.

1. Varying Levels of Scrutiny

The Court's purest form of noncongruence—giving different levels of equal protection scrutiny to state versus federal laws—is also its most controversial. As Gerald Rosberg asked in 1977: “[I]f alienage is a suspect classification when made the basis of state legislation, should it not remain suspect when it is used by the federal government?”¹⁶⁴

The response, according to Jesse Choper, is that “Congress has specifically delegated power in Article I of the Constitution to regulate immigration and naturalization of aliens.”¹⁶⁵ On this argument, it makes little sense to treat federal alienage distinctions with constitutional suspicion, given that the Constitution itself gives the federal government the power to make such distinctions.¹⁶⁶

Gerald Neuman offers two other defenses of the noncongruent levels of scrutiny applied to alienage laws at the federal versus state level. First, he argues that these “varying standards of review” are merely pragmatic

164. *Id.* at 294.

165. Jesse Choper, *Discrimination Against Aliens*, in JESSE CHOPER ET AL., 4 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981–82, 5, 17 (1983).

166. Professor Rosberg's article, though written before Choper's, offers a response: the federal government should be granted great deference when it sets a “condition precedent” for an immigrant's entry to the country; conditions subsequent, however—those conditions that linger after entry and divide legal residents into unequal castes—should be closely scrutinized under equal protection principles no matter whether the condition was imposed by the federal government or the states. *See* Rosberg, *supra* note 153, at 331–32; *see also* Legomsky, *supra* note 162, at 256 (distinguishing the Congress's purportedly plenary power over immigration law, which deals with the admission and expulsion of aliens, from alienage law, which deals with the rights and obligations of admitted noncitizens).

judicial tests, not to be confused with the substance of the constitutional command of equal protection.¹⁶⁷ In other words, equal protection does not mean different things when applied to the federal government as opposed to state governments. Rather, it is the scrutiny courts are willing to employ that varies depending on the costs of judicial interference in a particular area or “the limits of judicial competence.”¹⁶⁸

Professor Neuman’s second argument against those who would insist on congruence is that “the dynamics of the political process may leave a group more vulnerable at the state level than at the federal level.”¹⁶⁹ This argument, which dates back to James Madison and the Federalist Papers¹⁷⁰ was also made by members of the Supreme Court during the interregnum in which its scrutiny of affirmative action policies was noncongruent.¹⁷¹ Justice Scalia, for example, argued in his concurrence in *City of Richmond v. Croson*¹⁷² that “racial discrimination against any group finds a more ready expression at the state and local than at the federal level.”¹⁷³ From this, Justice Scalia drew the conclusion that even “benign” race-conscious measures—that is to say, affirmative action—might require closer scrutiny when employed by states rather than by the federal government.¹⁷⁴

Professor Neuman makes much the same claim about aliens as a suspect class. Citing in particular California’s sorry history of discrimination against Chinese immigrants, Neuman argues that the “geographical distribution of immigrants from various countries has often led to localized anti-alien movements”; precisely because states lack control over whom to admit, their residents sometimes “channel their frustration and resentment about unwelcome federal policies into hostility toward the aliens who are admitted.”¹⁷⁵ This is said to justify the more stringent scrutiny given to state alienage laws.

2. Federal Preemption

The unusualness—though not, after *Windsor*, the uniqueness—of noncongruent scrutiny applied to alienage laws has caused some to question whether alienage properly presents a question of equal protection law at all. Prominent here is Michael Perry, who claims that “[t]he Court’s practice of

167. Neuman, *supra* note 107, at 1434.

168. *Id.*

169. *Id.* at 1435.

170. THE FEDERALIST NO. 10 (James Madison) (warning of the greater dangers of majoritarian tyranny in smaller political communities).

171. *See supra* note 16.

172. 488 U.S. 469 (1989).

173. *Id.* at 523 (Scalia, J., concurring in the judgment).

174. *Id.* at 522 (“A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory.”). The opposite conclusion might just as well have been drawn from Justice Scalia’s premise: if racial discrimination is more likely to occur on the state and local level, affirmative action measures meant to counteract such discrimination should be granted *more* leeway rather than less in comparison to federal affirmative action measures.

175. Neuman, *supra* note 107, at 1436–37.

disfavoring state laws disadvantaging aliens is best understood and justified . . . in terms of the supremacy clause principle that no state may take action that would interfere with—and so is presumptively precluded by—congressional immigration policy.”¹⁷⁶

Perry prefers preemption to equal protection in explaining the Court’s alienage case law because he believes that alienage, unlike race, is a morally relevant basis on which the government can draw distinctions.¹⁷⁷ The moral relevancy of a person’s citizenship status excuses what would otherwise be, for Perry, an impermissible double-standard in the Court’s alienage cases. Recalling an argument voiced above, Perry contends: “If it is unjust for a state to treat a person as inferior on the basis of a morally irrelevant trait, there is no conceivable basis for concluding that it is any less unjust for the federal government to do the same.”¹⁷⁸ Thus, noncongruent equal protection, according to Perry, is simply not equal protection at all. Preemption doctrine rescues what would otherwise be a serious mistake in the Court’s treatment of noncitizens.

The Supreme Court itself picked up this theme in *Toll v. Moreno*,¹⁷⁹ a 1982 decision striking down, on preemption grounds, Maryland’s denial of in-state tuition to nonimmigrant aliens. As the Court observed there, “Commentators have noted . . . that many of the Court’s decisions concerning alienage classifications . . . are better explained in pre-emption than in equal protection terms.”¹⁸⁰ The Court cited not just Perry for its claim but also a 1979 note written by now-Dean David Levi.¹⁸¹

Levi’s note remains the most complete defense of the preemption approach to alienage law. Preemption, he claims, provides both “a coherent explanation for the Court’s past decisions, and a workable framework for future cases.”¹⁸² Levi’s guiding idea is that the federal government, given its power over immigration, invites aliens into the country on terms that are not for the states to alter.¹⁸³ This, he argues, explains the lower level of scrutiny given both to state alienage laws under the political function exception and to federal alienage laws, as compared to ordinary state classifications.

In regard to the political function exception, Levi claims that “the federal government has not admitted aliens to the states’ *political* systems”—or so courts might find.¹⁸⁴ This would allow courts in political exception cases (unlike those involving ordinary state alienage laws) to “balance state and

176. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063 (1979).

177. *Id.* at 1061–62.

178. *Id.* at 1062.

179. 458 U.S. 1 (1982).

180. *Id.* at 11 n.16.

181. See David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979).

182. *Id.* at 1091.

183. *Id.* at 1070.

184. *Id.* at 1079.

federal interests.”¹⁸⁵ Meanwhile, Levi explains the difference between state and federal scrutiny—*Graham* versus *Diaz*—by claiming that it is “within federal power to exempt itself” from providing aliens and citizens equal treatment.¹⁸⁶ On Levi’s theory, the requirement that states treat legal aliens equally to citizens stems solely from the fact that the federal government decided to admit them “without restriction.”¹⁸⁷ What the federal government can give under its immigration power, it can presumably also take away.

Another note, written a year after Levi’s, attempted to offer a more rigorous test for when state classifications of aliens conflict with the federal government’s authority over immigration.¹⁸⁸ State alienage laws should be “presumptively preempted,” the author suggested, unless the state regulation was authorized by Congress or could be analogized to some federal regulation.¹⁸⁹

Yet, according to Harold Koh, the problem with these preemption arguments, no matter how they are phrased, is that they “subordinate[] fourteenth amendment equal protection doctrine governing discrimination against resident aliens to the vagaries of federal immigration policy.”¹⁹⁰ Not only do the preemption theories fail to distinguish “what is constitutional from what federal policymakers happen to think is wise,”¹⁹¹ but their refusal to constrain the federal government runs counter to other ways in which federal authority over immigration is subject to constitutional limits.¹⁹²

Koh registers another type of complaint against preemption theories as well: they fail to answer “the moral and philosophical claims that resident aliens make against their state governments.”¹⁹³ Noncitizens, Koh claims, are rarely heard to complain that the wrong level of government discriminated against them.¹⁹⁴ Rather, the objection plaintiffs make in the alienage cases is that they were not judged as individuals.¹⁹⁵ Their pleas

185. *Id.*; *see also id.* at 1090 (“[T]he Court appears to reason that there is an area of state political activity which the states may reserve to citizens without violating the terms of the federal ‘invitation,’ and which is so central to the states that the Court will not find preemption, absent a stronger expression of federal intent.”).

186. *Id.* at 1086.

187. *Id.*

188. *See Note, State Burdens on Resident Aliens: A New Preemption Analysis*, 89 *YALE L.J.* 940 (1980).

189. *Id.* at 949.

190. Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 98 (1985).

191. *Id.* at 99.

192. *See, e.g.,* Rosberg, *supra* note 153, at 329–30 (discussing constitutional prohibitions on convicting a noncitizen without a trial or deporting him or her without providing due process); *see also* Legomsky, *supra* note 162, at 299 (decrying the inconsistency of protecting immigrants’ due process rights but not substantive constitutional guarantees such as free speech or equal protection).

193. Koh, *supra* note 190, at 99.

194. *See id.* at 100.

195. *See id.*

therefore sound in equal protection, not the structural concerns of the Supremacy Clause.¹⁹⁶

3. Varied Interests

Despite his criticisms of preemption theories, Professor Koh ultimately argues for an equal protection analysis that takes preemption arguments more explicitly into account. “A court could blend preemption arguments into its equal protection analysis to narrow the range of legitimate state motives that may be invoked to justify an alienage classification,” Koh suggests.¹⁹⁷ This would, of course, lead to noncongruence: the federal government would be granted more leeway than the states to discriminate against aliens without violating equal protection. But this leeway would be given not because alienage is something other than a suspect classification, or because federal discrimination against aliens does not offend the constitutional norm of equal treatment, but because the federal government has power that states lack to define who aliens are and to invoke unique overriding national interests in support of alienage classifications.¹⁹⁸

Koh’s position here echoes one earlier stated by Gerald Rosberg.¹⁹⁹ The federal government, Rosberg argued, could justify alienage classification based on “several interests that a state cannot assert—for example, an interest in creating a bargaining chip for use in negotiating with other countries or an interest in preserving an incentive for aliens to seek naturalization.”²⁰⁰ Importantly, though, differences in the interests that could be asserted do not equate to differences in the level of scrutiny those interests would endure. Rosberg, like Koh, thus argues for the kind of interest-constraining preemption that was suggested in *Mow Sun Wong*.

Still, the categorical preemption theorists, Levi in particular, are unlikely to be convinced. Levi argues that none of the “overriding government interests” asserted in *Mow Sun Wong* could have survived strict scrutiny, even if they had been asserted by the President or Congress rather than the Civil Service Commission.²⁰¹ Had the Court engaged solely in equal protection analysis and given federal alienage laws the same scrutiny as state laws, the Court would have either had to (1) strike down the federal classifications in *Mow Sun Wong*²⁰² and *Diaz*; or (2) credit the federal interests asserted and thereby water down the strict scrutiny standard—a

196. *See id.*

197. *Id.* at 101–02.

198. *Id.* at 102.

199. *See generally* Rosberg, *supra* note 153.

200. *Id.* at 314.

201. Levi, *supra* note 181, at 1088. The interests he considers are: (1) creating an incentive for citizenship; (2) giving a bargaining chip in foreign negotiations; and (3) assuring the loyalty of governmental employees. *Id.* at 1087.

202. That is to say, the Court would have had to strike down the *Mow Sun Wong* regulation on equal protection grounds, thereby preventing Congress or the President from reinstating the regulation.

move “which would have had undesirable effects” on other suspect classes in need of protection.²⁰³

To this, we might well respond: too bad for the alienage classifications in *Mow Sun Wong* and *Diaz*. That is a response not available to Levi, who offers preemption at least in part as a descriptive account of why the Court’s alienage cases came out the way they did.²⁰⁴

As we finally turn back, however, to the question of how best to understand *Windsor* and noncongruent equal protection more broadly, Levi’s constraint drops away. The alienage cases do not just provide a precedent for *Windsor*’s seemingly noncongruent equal protection. They provide several different precedents, and thus several possible ways of hearing the “federalism noises” in Justice Kennedy’s opinion.

III. THE POSSIBILITIES OF NONCONGRUENCE

The return of noncongruent equal protection in *Windsor* has largely been lost on the courts and commentators trying to determine how that case should be read or followed. Some seem unaware of the very possibility of noncongruence—or of the line of alienage cases, still in force, that make noncongruence more than a mere possibility. In its opinion striking down Wisconsin’s same-sex marriage ban, for example, the federal district court for the Western District of Wisconsin held that *Windsor* must apply squarely to state marriage challenges—just as Justice Scalia had argued in his dissent—because the court was “not aware of *any other case* in which the Court applied equal protection principles differently to state and federal government.”²⁰⁵ The discussion in Part II is meant as a corrective to claims of that sort.

Having assumed congruence, courts and commentators are at a justifiable loss in trying to explain what role federalism plays in *Windsor* and should play in its successors. If, as the congruence principle would have it, federalism cannot vary the equal protection scrutiny employed at different levels of government, only two other options remain: either (1) federalism and equal protection are pitted (or balanced) against each other; or (2) federalism interests are simply disregarded. Since federalism interests cannot save a state law from the Equal Protection Clause—that is the point of the Fourteenth Amendment, after all—both options end up making structural concerns, and *Windsor*’s extended discussion of them, entirely superfluous.

Parts I and II suggest that there is a better way to read *Windsor* and understand the relationship between federalism interests and equal protection. The alienage cases point to the way—or ways. By looking more closely at the cases that have followed in *Windsor*’s wake, Part III.A

203. Levi, *supra* note 181, at 1089.

204. *See id.*

205. *Wolf v. Walker*, 986 F. Supp. 2d 982, 1017 (W.D. Wis. 2014) (emphasis added) (“Equal protection analysis [with respect to the federal government] in the Fifth Amendment area is the same as that under the Fourteenth Amendment [with respect to the states.]” (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976))).

describes the doctrinal and interpretive confusion caused by their shared assumption of congruence. The resulting, avoidable confusion provides further reason to find in *Windsor* the return of noncongruent, federalism-tinged equal protection.

Given that the alienage cases provide more than one model of what noncongruent equal protection can look like, Part III.B turns to the question of which of these is the most appealing. Here, *Windsor* actually helps settle the dispute that arose over that question in the alienage context—the dueling views described in Part II.B. To give away the punchline: the interest-limiting mode of noncongruence should be the winner.

But what would it win? My hope is that it wins greater recognition and wider acceptance within equal protection doctrine. Part III.C shows what that would look like, both in the same-sex marriage context and in regard to alienage. Both areas would look different if they embraced interest-limiting noncongruence. Part III.C confronts the question of exactly what might change—which is to say, what is at stake—should the return of noncongruent equal protection prove lasting.

A. *Post-Windsor Decisions*

Since *Windsor*, the cases that have attracted the most attention are the challenges to same-sex marriage bans being pursued in every state that has one.²⁰⁶ But *Windsor*'s impact has been felt more broadly—particularly in the Ninth Circuit, where *Windsor* was used to overturn circuit precedent and establish sexual orientation as a suspect classification for equal protection purposes. I look at each of these developments in turn.

1. State Same-Sex Marriage Cases

Kitchen v. Herbert,²⁰⁷ the first of the post-*Windsor* decisions to invalidate a state's same-sex marriage ban, is representative of what has come since, both in its result and in its treatment of *Windsor*'s federalism. In *Kitchen*, the federal district court in Utah began its discussion of *Windsor* by noting how each side had claimed the case as its own: the state underscored *Windsor*'s emphasis on the national government's long "reliance on state law to define marriage;"²⁰⁸ the gay couples who had brought the suit, meanwhile, argued that just as the Fifth Amendment (in *Windsor*) barred the federal government from demeaning their relationships, so too did the Fourteenth Amendment prevent the states from doing so.²⁰⁹

"[T]he protection of states' rights and individual rights are both weighty concerns," the district court acknowledged.²¹⁰ Yet, whereas "[i]n *Windsor*, these interests were allied against the ability of the federal government to

206. *See supra* note 22.

207. 961 F. Supp. 2d 1181 (D. Utah 2013).

208. *Id.* at 1193 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013)).

209. *Id.*

210. *Id.*

disregard a state law that protected individual rights,” in a *state* marriage case, the Utah court found, federalism and equal protection interests “directly oppose each other.”²¹¹ Citing and describing *Loving v. Virginia*²¹² as a case in which the Supreme Court had “balance[ed] the state’s right to regulate marriage against the individual’s right to equal protection and due process,” the *Kitchen* court concluded that “the Fourteenth Amendment requires that individual rights *take precedence over* states’ rights where these two interests are in conflict.”²¹³

In place of an equal protection analysis which could be infused (and made noncongruent) by federalism concerns, the *Kitchen* court saw equal protection and federalism as two independent interests—ones which might or might not align. Federalism worries are weighed *with* the equal protection concerns in the federal context but *against* them in a state case, such as *Kitchen*. As the Chief Justice wrote in his dissent in *Windsor*: states’ rights “come into play on the other side of the board in . . . cases about the constitutionality of state marriage definitions.”²¹⁴ Federalism does not, however, affect the equal protection analysis itself. Equal protection analysis, it is assumed, remains unchanged in the move from federal to state law.

It is worth pausing to note how unsatisfying this approach is, however common it may be. In a constitutional challenge to a state law, balancing states’ rights and equal protection is necessarily futile, since the former can never outweigh the latter. (Or as the *Kitchen* court put it, since “the Fourteenth Amendment requires that individual rights take precedence over states’ rights.”²¹⁵) States simply cannot violate the Equal Protection Clause. The only proper question is whether the state *has* violated the Equal Protection Clause, not whether it *can* do so—that is, whether its interest in doing so somehow *outweighs* the interests protected by the Fourteenth Amendment.

It follows that if equal protection is congruent, federalism concerns will *never* prove determinative in cases like *Kitchen* and *Windsor*. If a state violates the Fourteenth Amendment by illicitly classifying on the basis of a protected trait, no federalism interest can save the classification. Likewise, if the state classification violates the Fourteenth Amendment, congruence dictates that parallel federal classifications will violate the equal protection component of the Fifth Amendment as well. But in that case, any additional federalism concerns about the federal classification—like those voiced in *Windsor*—would at best provide an alternate ground for striking the classification down; federalism would never be a necessary part of the holding. The result is different when noncongruence is allowed: if equal

211. *Id.* at 1193–94.

212. 388 U.S. 1 (1967).

213. *See Kitchen*, 961 F. Supp. 2d at 1194 (emphasis added); *see also id.* (“[T]he important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”).

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

215. *Kitchen*, 961 F. Supp. 2d at 1194.

protection analysis can vary (in the various ways described above) according to the level of government involved, it is always at least theoretically possible that the resulting variance in the level of scrutiny, or the assertable interests, could lead to a different outcome.

Having seen the *Kitchen* court's approach and its shortcomings, other recent state same-sex marriage opinions can be summarized more quickly. Several have ignored *Windsor*'s discussion of federalism entirely.²¹⁶ Others, like that of the Eastern District of Virginia in *Bostic v. Rainey*,²¹⁷ have taken pains to emphasize that "federal intervention is best exercised rarely" in domestic relations cases and even that *Windsor* upheld "state law against conflicting federal law."²¹⁸ Putting aside any inaccuracies in the latter claim, what is striking about *Bostic* is the fact that its talk of federalism does no work whatsoever. Having just underscored *Windsor*'s federalism, the next sentence in the opinion reads: "The propriety of invoking such protection [*e.g.*, due process and equal protection] remains compelling when faced with the task of evaluating the constitutionality of state laws."²¹⁹ Like *Kitchen* before it, *Bostic* cites and quotes Justice Scalia's dissent in *Windsor* as support for its claim that *Windsor*'s equal protection analysis inevitably applies no less to the states than to the federal government.²²⁰

There is one important exception to this trend. In *Bishop v. United States ex rel. Holder*,²²¹ Oklahoma's same-sex marriage case, the district court drew the following principle from *Windsor*: "[A] state law defining marriage is not an 'unusual deviation' from the state/federal balance, such that its mere existence provides 'strong evidence' of improper purpose. A state definition must be approached differently, and with more caution, than the Supreme Court approached DOMA."²²² I take this to mean that the unusualness trigger discussed in Part I.B—in which DOMA's attempt to

216. See, *e.g.*, *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *4 n.11 (W.D. Ky. Feb. 12, 2014) (describing the state claim brought under the Fourteenth Amendment as "subject to the same substantive analysis" as the Fifth Amendment claim in *Windsor*); *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (discussing *Windsor* without mentioning federalism); *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *1, *3 (S.D. Ohio July 22, 2013) (describing *Windsor*'s holding as merely "ostensibly limited" to federal interference with state marriage laws and equating *Windsor*'s equal protection analysis with that of *Romer v. Evans*, 517 U.S. 620 (1996), a Fourteenth Amendment case).

217. 970 F. Supp. 2d 456 (E.D. Va. 2014).

218. *Id.* at 476.

219. *Id.*

220. *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting)); *Kitchen*, 961 F. Supp. 2d at 1194 ("The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law."), *aff'd*, 755 F.3d 1193 (10th Cir. 2014). See generally Jesse Wegman, *Scalia Has Seen the Future, and Its Name Is Marriage Equality*, N.Y. TIMES (Feb. 14, 2014), <http://takingnote.blogs.nytimes.com/2014/02/14/scalia-has-seen-the-future-and-its-name-is-marriage-equality/> (describing several federal judges as "hav[ing] a little fun with Justice Scalia's dire warnings" in *Windsor*).

221. 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

222. *Id.* at 1279 (emphasis added).

define marriage was found unusual *within the federal system*—is lacking in state cases, and state classifications should thus be given a somewhat lower level of scrutiny than the Supreme Court gave DOMA. On this reading, *Bishop* is the rare case that has flirted with noncongruent equal protection—specifically, scrutiny-altering noncongruence, the kind described in Parts I.B and II.B.1. Since it found that state definitions of marriage were to be given more leeway than federal laws like DOMA, the *Bishop* court could follow Tenth Circuit precedent and apply rational basis scrutiny²²³ even if the Supreme Court, in *Windsor*, had employed a more rigorous level of review.

The Tenth Circuit has now reviewed both *Bishop* and *Kitchen*, the Utah case, and affirmed their results—though on substantive due process grounds rather than equal protection.²²⁴ The Fourth Circuit took the same approach in *Bostic*, affirming same-sex couples’ fundamental right to marry.²²⁵ Importantly, both courts did so only after denying that federalism interests had played a meaningful role in *Windsor*.²²⁶ (The Seventh Circuit, by contrast, ignored the federalism component of *Windsor* entirely.²²⁷) Additionally, the Fourth Circuit expressed concern that

[i]n *Windsor*, the Court did not label the type of constitutional scrutiny it applied, leaving us unsure how the Court would fit its federalism discussion within a traditional heightened scrutiny or rational basis analysis. The lower courts have taken differing approaches, with some discussing *Windsor* and federalism as a threshold matter and others . . . considering federalism as a state interest underlying the same-sex marriage bans at issue.²²⁸

As I have already indicated, *neither* of these alternatives makes sense. To treat federalism as a “threshold matter” is to take the categorical federalism approach. But since *Windsor* specifically disclaimed that path, lower courts are right to do so as well. The result, however, is that those courts have to set aside federalism interests entirely, since they lack another way of incorporating them into their analysis. The second alternative, considering federalism itself as a state interest *within* equal protection scrutiny, is similarly unavailing since states’ rights can never rescue a law that would otherwise violate equal protection. Both of the Fourth Circuit’s alternatives thus reduce *Windsor*’s talk of federalism to mere surplusage.

223. *Id.* at 1287 (citing *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008)).

224. *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen*, 755 F.3d at 1193.

225. *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014).

226. *Id.* at *11 (“[T]he Court did not lament that section 3 [of DOMA] had usurped states’ authority over marriage due to its desire to safeguard federalism. Its concern sprung from section 3’s creation of two classes of married couples within states that had legalized same-sex marriage.” (citation omitted)); *Kitchen*, 755 F.3d at 1207 (“Rather than relying on federalism principles, the Court framed the question presented as whether the ‘injury and indignity’ caused by DOMA ‘is a deprivation of an essential part of the liberty protected by the Fifth Amendment.’”).

227. *See Baskin v. Bogan*, No. 14-2526, 2014 WL 4359059 (7th Cir. Sept. 4, 2014).

228. *Bostic*, 2014 WL 3702493, at *11 n.8.

2. *Windsor*'s Other Progeny

State marriage cases such as these are not the only ones to grapple with *Windsor*'s import. In *SmithKline Beecham Corp. v. Abbott Laboratories*,²²⁹ for example, the Ninth Circuit was asked to decide whether peremptory strikes during jury selection could be based on sexual orientation.²³⁰ In answering that question, the panel relied on *Windsor* to overturn prior Ninth Circuit precedent and hold that classifications based on sexual orientation receive heightened scrutiny.²³¹ What mattered to the *SmithKline* court was not what *Windsor* said, but what it *did*.

By way of background: the Supreme Court has held that peremptory challenges during jury selection cannot be based on traits, like race or gender, that trigger heightened scrutiny under the Equal Protection Clause.²³² The Ninth Circuit had previously determined, however, that classifications based on sexual orientation should receive only rational basis review.²³³ In *SmithKline*, sexual orientation could therefore join race and gender as a proscribed basis for peremptory challenges only if the Ninth Circuit raised the level of scrutiny it had previously given sexual orientation. *Windsor*, the court held, required it to do exactly that.

Recognizing that the majority opinion in *Windsor* studiously avoided mentioning tiers of scrutiny, the Ninth Circuit instead emphasized three things it did do: (1) it focused on Congress's actual reasons for passing DOMA rather than hypothesizing possible aims; (2) the *Windsor* majority talked of "legitimate" state interests that "justify" the law's treatment of same-sex couples; and (3) *Windsor*'s equal protection analysis relied in part on other heightened scrutiny cases.²³⁴ These three moves, according to the *SmithKline* court, together showed that "*Windsor* scrutiny 'requires something more than traditional rational basis review.'"²³⁵ For classifications based on sexual orientation, "*Windsor* requires heightened scrutiny."²³⁶

In an analysis written soon after *SmithKline* was decided, Professors Vikram Amar and Alan Brownstein rightly observed that "[t]here is virtually no mention in *SmithKline* of the federalism argument that makes up so much of Justice Kennedy's opinion in *Windsor*."²³⁷ Uncertainty about how federalism and equal protection interact in *Windsor* might have led the Ninth Circuit to ignore federalism entirely, they argued—just as I have argued in regard to so many of the recent state same-sex marriage

229. 740 F.3d 471 (9th Cir. 2014).

230. *See id.*

231. *See id.* at 481.

232. *See* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race); *cf. J.E.B.*, 511 U.S. at 143 (allowing peremptory challenges against members of groups that receive only rational basis review).

233. *See* *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

234. *SmithKline*, 740 F.3d at 480–81.

235. *Id.* at 483 (citing *Witt v. Dep't of Air Force*, 527 F.3d 806, 813 (9th Cir. 2008)).

236. *Id.*

237. Amar & Brownstein, *supra* note 21.

decisions. Noting *Windsor*'s parallel with the alienage cases (as no other commentators have done), Amar and Brownstein argued that because the federal government has the power to regulate immigration and naturalization, "state laws discriminating against non-citizens are more problematic and suspicious than discriminatory federal legislation;" similarly, "[b]ecause marriage is quintessentially a matter of state sovereignty and control, it is *federal* laws discriminating against couples a state deems to be married that seem suspicious and problematic and warrant at least rational basis with teeth review."²³⁸

In the confines of their online essay, Amar and Brownstein did not discuss the fact that the equal protection analysis they described in *Windsor*, like that of the alienage cases, violates the congruence principle. Nor were they able to consider the ways—described in Parts I and II of this Article—that federalism concerns might impact equal protection analysis other than by varying its level of scrutiny. This becomes especially important in light of their provocative conclusion: that by neglecting the role that federalism played in *Windsor*, the Ninth Circuit in *SmithKline* might have missed the fact that the heightened scrutiny in *Windsor*, such as it was, was tied to DOMA's unusual federal intrusion into marriage law, not to sexual orientation classifications in general. In Amar and Brownstein's words, "it is hard[] to read *Windsor* as holding that *all* laws discriminating against gays and lesbians should receive heightened scrutiny, where there is no structural basis for distinguishing between the exercise of federal or state sovereignty in the government's actions."²³⁹

What is provocative here is the idea that *Windsor* might have accorded heightened equal protection scrutiny not to sexual orientation discrimination per se, but solely to sexual orientation discrimination in the sphere of marriage. The claim, in other words, is that the level of scrutiny might vary not just between federal and state laws—thereby violating the congruence principle—but also among the many domains in which discrimination can occur. Laws discriminating against same-sex couples in regard to marriage might trigger a different tier of scrutiny at the federal compared to state level *and* in comparison to other areas of law, such as jury selection.

As the following section will show, making the level of equal protection scrutiny domain-specific in this way is a move that courts have made before. But it is a bad idea, and one that upends a good deal of established equal protection doctrine. Fortunately, it is a bad idea that the interest-constraining version of noncongruent equal protection is able to avoid—a fact that, as I will argue, weighs in the latter's favor.

B. Which Form of Noncongruence Is Best?

Parts I and II describe how noncongruence in *Windsor* might be understood as taking either of two forms, both of which hearken back to the

238. *Id.* (emphasis added).

239. *Id.*

alienage discrimination cases of the 1970s. Structural concerns—federalism in *Windsor*, preemption in the alienage cases—could lead courts to apply different *levels* of scrutiny to state versus federal laws. Alternatively, the respective roles of state and national government might limit the *interests* each could assert when one of its laws is subjected to equal protection scrutiny. On this latter approach, the tier of scrutiny would remain constant; what would vary are the aims that courts might hypothesize (if rational basis is being used) or (if heightened scrutiny is employed) that the government could offer to justify its use of a protected trait.

Parts I and II also identified yet another approach: categorical federalism or preemption. Academic criticism, however, has questioned both the accuracy and the desirability of claims that the states do or should have the exclusive power to define marriage,²⁴⁰ or that the federal government has sole control over immigration and alienage regulations.²⁴¹ In any case, the Supreme Court explicitly disclaimed reliance on categorical federalism arguments in *Windsor*. And, as already noted, categorical federalism (or preemption) *supplants* equal protection analysis rather than making it noncongruent. For that reason, categorical claims are set aside in what follows, where the question is how the *infusion* of structural concerns *into* equal protection might best be understood.

The scrutiny-varying mode of noncongruence—the mode that was employed by the First Circuit when it struck down DOMA, suggested by Justice Kennedy in *Windsor*, hinted at by the district court that struck down Oklahoma’s same-sex marriage ban, and, finally, that remains fundamental to black letter alienage law—is vulnerable, at least on its face, to what might seem like a decisive objection: that the morality of discrimination does not vary among levels of government.²⁴² A person’s race, for example, becomes no more relevant to that person’s worth or ability to contribute to society at the state level than at the federal level (or vice versa). What’s more, a person whose government treats her unequally on the basis of her race surely does not care primarily about which level of government has done so.

As the tiers of scrutiny are ordinarily employed, a class or classification is deemed suspect, then laws targeting that class, or making that classification, are subjected to heightened review. Here again it seems strange to think that federalism concerns should affect whether a group is considered a suspect class, allowing for different answers at different levels of government. If heightened scrutiny is meant to “smoke out” the prejudice or stereotyping to which certain groups are thought to be

240. See, e.g., Joslin, *supra* note 45, Joslin, *supra* note 46; Joslin, *supra* note 12; Resnik, *supra* note 24.

241. See, e.g., Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013).

242. See Perry, *supra* note 176, at 1062.

unusually susceptible,²⁴³ it would seem that such prejudice could be found anywhere, at any level of government.

The factors currently used to determine whether heightened scrutiny of a group or trait is warranted offer the makings of a counterargument, however. Courts traditionally ask whether those sharing the trait have historically been subjected to discrimination; whether the trait typically bears a relation to one's ability to contribute to society; whether the trait is immutable and distinguishing; and whether those sharing the trait are politically powerless.²⁴⁴ The second and third of these factors—relation to ability and immutability—can hardly vary by level of government. But historical discrimination and political powerlessness *could* do so: recall Professor Neuman's assertion that anti-immigrant sentiment has historically run higher in the states,²⁴⁵ or Justice Scalia's Madisonian belief that racial discrimination is, as a matter of "social reality and governmental theory," likely to be worse the smaller the community.²⁴⁶

Equal protection doctrine has not traditionally considered past discrimination and political powerlessness in such a fine-grained way. But it could.²⁴⁷ In determining suspectness, courts could consider, within each jurisdiction, the amount of discrimination a group has experienced and the level of political power the group has attained there. This, of course, would lead to the possibility that the list of suspect classes might vary not only between levels of government, but also from state to state, or even city to city.²⁴⁸ Were there a particularly enlightened state in which, say, women had always been powerful and well-treated, women would not comprise a protected class there, and laws in that state that classified on the basis of gender would receive only rational basis scrutiny.

As I said, courts have not traditionally proceeded this way. Moreover, the two factors that would allow for such variation among jurisdictions are

243. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . ."); see also Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 785–86 (2001). Some have questioned whether strict scrutiny is still "intended to 'smoke out' invidious uses of race" now that a majority on the Court purports to treat all racial classifications as invidious. See Eyer, *supra* note 25, at 573. Even so, as discussed below, those who judge racial classifications to be inherently invidious are especially unlikely to vary that judgment based on the level of government doing the classifying.

244. See, e.g., *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).

245. See Neuman, *supra* note 107.

246. *Croson*, 488 U.S. at 522–23 (Scalia, J., concurring in the judgment).

247. For a recent attempt to do this empirically in the voting rights context, see Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2262954>.

248. The Court gestured in this direction in a 1954 equal protection case, *Hernandez v. Texas*, challenging the systematic exclusion of Mexican-Americans from juries in Jackson County, Texas. See 347 U.S. 475 (1954). Addressing the question of whether "persons of Mexican descent" formed a protected class under the Fourteenth Amendment, the Court held that "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need . . . protection. Whether such a group exists within a community is a question of fact"—one the Court went on to answer specifically in regard to Jackson County. *Id.* at 479–80.

notable, not least, for being the factors that speak to the suspectness of a *class*, as opposed to a *classification*.²⁴⁹ Past discrimination and political powerlessness are tests that identify particular groups—such as African-Americans, women, or gays and lesbians—as likely targets of animus. The relevance to ability and immutability tests, by contrast, pick out traits such as race, gender, or sexual orientation. For better or (no doubt) worse, the Supreme Court has lately cared far more about suspect traits than groups.²⁵⁰ Anti-classificationist rather than anti-subordinationist—outside the context of sexuality, at least—the current Court’s equal protection case law aims to keep the government from using suspect traits such as race in *any* context; recent cases show no special concern for protecting historically vulnerable groups of people.²⁵¹ White plaintiffs thus receive a higher level of scrutiny when challenging the use of race in affirmative action programs than female plaintiffs do when alleging gender discrimination. The current Court, therefore, is especially unlikely to rely on the history of discrimination and political powerlessness tests to vary equal protection scrutiny among levels of government, or from jurisdiction to jurisdiction. If, as the anti-classificationists on the current Court believe, our Constitution is colorblind, then it surely follows that race is not to be seen by any governmental actor. Considerations like these suggest how hard it would be for courts to openly embrace an equal protection doctrine that allowed for scrutiny-varying noncongruence.

Moreover, in the context of *Windsor*, there is a more specific reason for looking beyond the scrutiny-varying mode of noncongruence. This stems from the problem with which the last section ended. As I noted there, *Windsor*’s federalism provides little basis for applying heightened scrutiny to gays and lesbians *as a group*. The unusualness trigger²⁵² used to heighten the scrutiny in *Windsor* is specific to one particular domain—marriage, or family status determinations more broadly—not to the law’s general treatment of sexual minorities. As Professors Amar and Brownstein suggested in their discussion of *SmithKline*, the federalism concerns raised in *Windsor* fail to provide a similar basis for treating *all* laws that impact gays and lesbians with increased suspicion.²⁵³

Admittedly, *Windsor* would not be the first—or last—same-sex marriage case to toy with the idea that gays and lesbians should be considered a

249. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485, 563 (1998) (“The tension between the class-based view and the classification-based view manifests itself in the standard heightened scrutiny test.”).

250. *Id.* (“The Supreme Court has resolved this tension in favor of the classification-based approach.”).

251. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (arguing that the Supreme Court has used its intent and colorblindness doctrines to ignore the persistence of racial discrimination against non-whites); Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) (describing a bifurcated case law that, at least in the context of race, treats equal protection claims brought by majority groups more favorably than those brought by minorities).

252. See *supra* Part I.B.

253. See *supra* note 21; *supra* Part III.A.2.

suspect class in some spheres but not others. Consider, for example, *Hernandez v. Robles*,²⁵⁴ the unsuccessful 2006 challenge to New York's same-sex marriage ban. The New York Court of Appeals observed that a law should receive rational basis scrutiny whenever the group challenging the law is linked by some characteristic that is relevant to the law's aim.²⁵⁵ When the group's shared trait is irrelevant to the law's purposes, heightened scrutiny is needed.²⁵⁶ The Court of Appeals then continued:

Perhaps that principle would lead us to apply heightened scrutiny to sexual preference discrimination in some cases, but not where we review legislation governing marriage and family relationships. A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best. In this area, therefore, we conclude that rational basis scrutiny is appropriate.²⁵⁷

The Second Circuit rightly rejected an equivalent argument in *Windsor*, holding that the procreative ability of same-sex couples was relevant not to the *level* of scrutiny applied but to whether marriage restrictions could withstand such scrutiny.²⁵⁸ Surely this is correct: the Supreme Court's equal protection cases, including the one the New York Court of Appeals cited in *Hernandez*,²⁵⁹ establish the proper tier of scrutiny by asking whether a group's shared trait "*generally*" or "*frequently* bears [a] relation to ability to perform or contribute to society."²⁶⁰ The level of scrutiny, in other words, is established by the trait's general relevance to the law. Whether that trait is relevant to any particular law—whether sexual orientation is relevant to marriage, for example—is what courts determine when they go on to *apply* the chosen level of scrutiny. The higher the scrutiny, the more relevant the trait will need to be to the law's aims. The *Hernandez v. Robles* approach to equal protection, in short, simply misunderstands the way that tiers of scrutiny are established and applied.

A post-*Windsor* example of this misunderstanding can be offered as well. Dicta²⁶¹ in the recent Wisconsin marriage case offered intermediate

254. 7 N.Y.3d 338 (2006).

255. *Id.* at 364.

256. *Id.*

257. *Id.* at 364–65 (emphasis added).

258. *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012).

259. *Hernandez*, 7 N.Y.3d at 364 (citing *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985)).

260. *Cleburne*, 473 U.S. at 440–41 (emphasis added) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

261. I refer to this as dicta because, like many other marriage opinions have done—see, for example, *Baskin v. Bogan*, No. 14-2526, 2014 WL 4359059, at *3 (7th Cir. Sept. 4, 2014) (“The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny.”); *De Leon v. Perry*, 975 F. Supp. 2d 632, 652–53 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 n.16 (E.D. Va. 2014) (“Although this Court need not decide whether Virginia’s Marriage Laws warrant heightened scrutiny, it would be inclined to so find.”); *Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294, 310–34 (D. Conn. 2012) (pre-*Windsor* DOMA decision that exhaustively discussed the “traditional indicia of suspectness,” found that heightened scrutiny should apply to classifications based on sexual

scrutiny as the proper tier for examining sexuality-based discrimination.²⁶² In reaching that conclusion, however, the district court had to distinguish somewhat dated Seventh Circuit precedent that subjected sexual orientation discrimination to only rational basis review.²⁶³ The district court argued that rational basis review only applies to sexual orientation discrimination *in military contexts*.²⁶⁴ Here again, courts seem to have lost sight of the reason certain group classifications are treated with suspicion and why the resulting level of scrutiny should apply across the board.²⁶⁵ If gays and lesbians are deserving of special judicial solicitude, that is for reasons that surely apply in military contexts no less than in civilian life. Gays and lesbians undoubtedly have no more political power, no less ability to contribute, are united by no less an immutable trait, and have experienced no less a history of discrimination in the military than elsewhere. It makes little sense, then, for their status as a suspect class to vary by context.²⁶⁶ The level of scrutiny required hardly lessens in the military context; what changes is the importance of the governmental interests involved.²⁶⁷

This, finally, points to a way around the reading of *Windsor* given in the previous section, under which sexual orientation would receive heightened scrutiny at the federal level only in the realm of marriage. The solution comes from the interest-limiting mode of noncongruent equal protection. Unlike scrutiny-varying noncongruence, the interest-limiting mode allows courts to pick a tier of scrutiny for a given group or trait and stick with it, both across areas of law and between levels of government. Yet federalism still has a role to play in the equal protection analysis. Rather than altering the level of scrutiny applied, federalism concerns would constrain what governmental interests the federal government, compared to the states, is able to assert when its regulation of a particular domain is under scrutiny.

orientation, but then held that DOMA failed rational basis review)—the district court in the Wisconsin case considered at length why heightened scrutiny should apply, only then to decide that rational basis with bite was all that was needed to strike down the state’s ban. *See Wolf v. Walker*, 986 F. Supp. 2d 982, 1009–17 (W.D. Wis. 2014).

262. *See Walker*, 986 F. Supp. 2d at 1009–17.

263. *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989).

264. In this, the district court followed a Seventh Circuit opinion post-dating *Ben-Shalom v. Marsh*. *See Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (“In this case we need not consider whether homosexuals are a suspect or quasi-suspect class, which would subject the defendants’ conduct to either strict or heightened scrutiny. Our court has already ruled that, *in the context of the military*, discrimination on the basis of sexual orientation is subject to rational basis review.” (emphasis added)).

265. They also lose sight of precedent such as *Rostker v. Goldberg*—a case challenging gender inequity in the draft—where the Court recognized the deference owed the political branches in military affairs, but refused to abandon or “further refine” the intermediate scrutiny test for gender-based discrimination established in *Craig v. Boren*, 429 U.S. 190 (1976). *See Rostker*, 453 U.S. 57, 69 (1981).

266. *But see supra* note 25, describing contexts—such as family law, governmental record keeping, and criminal suspect selection—in which the Supreme Court seems to have varied the level of scrutiny it gives classifications based on race.

267. A parallel argument can be made in the context of prisons, where the Supreme Court has rejected the invitation to lower its scrutiny of race-based classifications. *See Johnson v. California*, 543 U.S. 499 (2005).

Varying equal protection scrutiny across levels of government and domains of law untethers the tiers of scrutiny from the factors by which those tiers are meant to be selected. Instead of focusing on a trait's relevance or immutability, or a group's powerlessness and history of discrimination, tier selection instead gets relativized jurisdiction by jurisdiction and topic by topic. Were this path followed, the tiers would soon multiply beyond any possible usefulness.²⁶⁸ The fact that the interest-limiting mode of noncongruent equal protection avoids this messy result is yet another—I think decisive—reason, in addition to those offered in the alienage discussion of Part II, to prefer it over its scrutiny-varying counterpart. What remains to be seen is how interest-limiting noncongruence would reshape the areas of case law that this Article describes.

C. Interest-Limiting Noncongruence

Interest-limiting noncongruence boasts two virtues. First, it incorporates structural concerns into equal protection analysis, allowing for the possibility that parallel federal and state classifications need not always stand or fall together. Second, it does so without requiring that discrimination against a particular group receive shifting degrees of scrutiny based solely on which level of government does the discriminating. In short, interest-limiting noncongruence respects federalism as well as the intuitive notion that equal protection scrutiny should mean the same thing at all levels of government.

I have drawn the notion of interest-limiting noncongruence—the idea that interests assertable for equal protection purposes might vary at different levels of government—from both the alienage case law, especially *Mow Sun Wong*,²⁶⁹ and from *Windsor*.²⁷⁰ But in doing so, I hardly mean to suggest that interest-limiting noncongruence is commonly found in either the alienage cases or in *Windsor*'s line of successors. It is not. As a result, my take on those two lines of cases is necessarily going to be a revisionary one. The question thus becomes: What would need to change—and what is at stake in doing so? I look first at alienage, then at the marriage cases.

268. In saying this, I am only adding to the powerful criticisms that have been made against the tiers' usefulness in general. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 17 U. PA. J. CONST. L. (forthcoming 2014), available at <http://ssrn.com/abstract=2241335>; Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006). A more flexible version of the tiers that incorporated interest-limiting noncongruence might respond to some of the criticisms that have been offered, though detailing this is beyond the scope of the present piece.

269. See *supra* Part II.A.3.

270. See *supra* Part I.C.

1. Effects on Alienage

Although *Hampton v. Mow Sun Wong* offered what can be understood as an interest-limiting rationale—striking down a federal alienage restriction because it served an interest that was not the Civil Service Commission’s to assert—the more common approach in the alienage cases has been to vary the level of scrutiny between federal and state governments, and between state discrimination that does or does not pertain to political functions. Federal alienage laws thereby get rational basis review, ordinary state alienage laws get strict scrutiny, and state alienage laws pertaining to political functions are reviewed for rational basis.

These distinctions are, of course, products of their history. When *Graham* was decided, establishing noncitizens as a suspect class in 1971, intermediate scrutiny did not yet exist. Even most of the early rational basis with bite cases were still to come.²⁷¹ By the time the Court considered *Graham*’s federal analogue, *Mathews v. Diaz*, in 1976, the Justices were simultaneously debating how to scrutinize age discrimination, and new cases based on gender and illegitimacy had been accepted for the following Term.²⁷² In the midst of this onslaught, the Court, in *Diaz*, retreated to rational basis review for federal alienage classifications, purportedly out of fear that strict scrutiny would overly inhibit the federal government’s flexibility in managing immigration.²⁷³ Classifications based on citizenship are the very substance of immigration law, which the Constitution entrusts to Congress. It makes little sense, then, to treat such classifications with the suspicion that strict scrutiny demands—or so the Court concluded.²⁷⁴

The problem in *Diaz* is that the alienage-based Medicare restrictions at issue in that case were not, in any obvious way, part of immigration law at all. To borrow a distinction drawn by Gerald Rosberg, the Medicare regulations were not “conditions precedent” for an alien’s entry; they were conditions subsequent to entry, used to divide legal residents of this country into unequal castes.²⁷⁵ In trying to give the political branches of the federal government nearly free rein to decide which noncitizens can enter the United States,²⁷⁶ the Supreme Court reined in its own ability to review the federal government’s discriminatory treatment of noncitizens who had

271. See, e.g., *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (gender). See generally Eyer, *supra* note 55 (describing this history).

272. Eyer, *supra* note 55, at 24; Earl M. Maltz, *The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of Massachusetts Board of Retirement v. Murgia*, J. SUP. CT. HIST. (forthcoming 2014), available at <http://ssrn.com/abstract=2357616>.

273. See *Mathews v. Diaz*, 426 U.S. 67, 80–82 (1976) (“Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.”).

274. *Id.* at 81–82 (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”).

275. See Rosberg, *supra* note 153, at 331–32 & n.215.

276. *But see* Legomsky, *supra* note 162 (criticizing the Court’s excessive deference to the political branches even in matters properly categorized as immigration, rather than alienage, law).

already been allowed to enter. The Court let the importance of certain federal governmental interests drive the choice about what level of scrutiny to provide, rather than choosing a level of scrutiny based on the usual factors (history of discrimination, relevance to ability, immutability, and political powerlessness) and then asking whether the asserted interests were important enough to survive such scrutiny. This is an important general point: by failing to allow different governmental actors to assert different interests, the Court may be pushed to extremes in selecting which tier of scrutiny to apply, for it needs to rely on the tier to more-or-less determine the outcome.

Without that need, the Court might well have decided—or could decide now—that alienage deserves intermediate scrutiny, since noncitizens have long been the target of animus and lack the right to vote—factors that point toward heightened scrutiny—but also, unlike racial minorities, share a trait which is not always or generally irrelevant to governmental decision making. Intermediate scrutiny would be sufficient to strike down the benefits restrictions in *Diaz* and *Graham*, since neither the state nor the federal government would likely be able to assert an interest important enough to justify its residency requirement.²⁷⁷ But true immigration laws—which necessarily must discriminate based on citizenship—would survive intermediate scrutiny, since the importance of the federal government’s interest in regulating entry is constitutionally decreed.

A shift of this sort to interest-limiting noncongruence proves revisionary insofar as it would lead not just to a different outcome in *Diaz*, but to a consistent level of scrutiny given to alienage discrimination at all levels of government. At the same time, it would retain the existing case law’s emphasis on the federal government’s distinctive interest in controlling immigration. And, importantly, it would allow—as the current case law does—that parallel federal and state cases like *Diaz* and *Graham* could, at least in principle, come out differently. They could do so precisely because of differences in the interests assertable at the two levels of government.

To provide more specific examples: states, unlike the federal government, might not be able to assert interests in preventing lawfully admitted aliens from entering the state; encouraging naturalization; discouraging unlawful immigration; conducting foreign policy; and preserving federal resources.²⁷⁸ Of course, the exclusively federal nature of any of these individual interests could be contested—as Judith Resnik has done, for example, by showing the dynamic boundaries of authority in federations like the contemporary United States, where even the authorities themselves (nation, states, cities, as well as translocal and transnational

277. On the other hand, a shift from strict to intermediate scrutiny at the state level would make state alienage-based affirmative action programs—preferences for noncitizens in areas such as university admissions—more likely to survive constitutional challenge.

278. This list of interests is adapted from Koh, *supra* note 190, at 101 & n.247.

organizations) are overlapping and in constant flux.²⁷⁹ Particularly in the immigration and alienage context, the increasing intermingling of federal and state authority over immigration enforcement and the devolution of federal policymaking authority in areas like welfare make it nearly impossible to separate neatly what is federal from what is state—as traditional scrutiny-varying noncongruence in alienage law requires.²⁸⁰ In an era of immigration federalism, the states and the federal government might increasingly be able to assert equivalent interests.

The political function cases provide other examples where federal and state governments share common interests in making distinctions based on alienage. Both sovereigns share a “constitutional responsibility for the establishment and operation of [their] own government, as well as the qualifications of an appropriately designated class of public office holders.”²⁸¹ As Justice Blackmun described in *Sugarman*, this class encompasses “persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.”²⁸² For alienage restrictions to survive in these cases, lower scrutiny is not necessarily needed; alienage laws regarding political functions could survive simply because the state has a greater interest to assert in regard to them than it did in welfare cases like *Graham* or civil service cases like *Sugarman*. Interest-limiting noncongruence thus retains some of the current contours of alienage law even as it alters and clarifies others.

2. Effects on Marriage

The state marriage cases present a different question. There, unlike in the alienage context, the issue is not “Which of these cases should come out differently?” but rather: “How should the reasoning in these cases change and why does it matter?”

In the post-*Windsor* challenges to state same-sex marriage bans, interest-limiting noncongruence would look like something like the following. Courts would decide what level of scrutiny discrimination based on sexual orientation should receive. Looking to the Supreme Court on this question would provide limited help, other than to show that fully deferential rational basis review is not appropriate. For present purposes, the important point is that the level of scrutiny courts identify in *Windsor*, whatever it is, would not be lessened simply because *Windsor* looked at a federal law under the

279. Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY 363 (2014).

280. See, e.g., Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417 (2014); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

281. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973).

282. *Id.* at 647.

Fifth Amendment, while the state cases examine state laws under the Fourteenth. (This is interest-limiting, not scrutiny-varying noncongruence, after all.) After the courts chose the level of scrutiny, states would have to show that the interests served by their marriage restrictions were sufficient to survive that scrutiny. This, finally, is where *Windsor* would be distinguishable. Interests that were unavailable to the federal government in *Windsor* might, given our federal structure, still be assertable by the states. Thus, while the national government could not claim an interest in preserving the historic definition of marriage, for example, or upholding traditional morality, the states would remain free to do so.

Whether doing so would allow the states to win is, of course, another story. An interest may well be assertable but discounted for other reasons. It could be found pretextual, for example, or too closely tied to religion. Similarly, the interest might not be related tightly enough to the means chosen to advance it. This is the tailoring or “fit” problem on which many of the states’ procreation arguments have floundered.²⁸³

Since *Windsor*, the various interests asserted by the states or their amici in support of their same-sex marriage bans have repeatedly failed to survive even rational basis review. To date, only one federal court has found *any* of the asserted interests sufficient to survive equal protection scrutiny.²⁸⁴

But if the outcomes in the overwhelming majority of the cases decided so far are right—and I think they are—why does it matter that they are reached without giving *Windsor*’s federalism its due? Pausing to be clear about the risks: the embrace of noncongruence—allowing federalism into equal protection analysis—would distinguish *Windsor* from its successors. It would make the state marriage cases harder for plaintiffs to win than *Windsor* was. It would require courts considering state laws to stop and consider governmental interests that the *Windsor* Court was safely able to ignore. Since I am in complete agreement with the outcome of nearly all of the state marriage cases to date, the burden is clearly on me to offer reasons why a tougher route to the same end is worth the trouble. I conclude by offering several.

The first and surely most predictable reason is that interest-limiting noncongruence simply makes better sense of *Windsor* than cases to date have done. As I have already shown, assuming the congruence principle renders federalism utterly superfluous in *Windsor*—and in equal protection law generally, aside from those few cases in which categorical federalism arguments would preclude equal protection analysis of a federal law entirely. I take it as an axiom of interpretation that a reading which leaves out a significant part of an opinion—particularly a part that its author says

283. Courts have repeatedly discounted claims linking marriage to procreation and child rearing, since states do not require opposite-sex couples to be fertile or disallow gay couples from raising kids. *See, e.g., Bostic v. Rainey*, 970 F. Supp. 2d 456, 478–79 (E.D. Va. 2014).

284. *Robicheaux v. Caldwell*, No. 13-5090, 2014 WL 4347099, at *5–6 (E.D. La. Sept. 3, 2014) (holding that Louisiana’s same-sex marriage ban serves legitimate interests in “linking children to an intact family formed by their biological parents” and ensuring that “fundamental social change” be “cultivated through democratic consensus”).

is “of central relevance”²⁸⁵—is a worse reading than one that incorporates the whole. This is especially true of the federalism and equal protection aspects of *Windsor*, which Justice Kennedy referred to at oral argument as “intertwined.”²⁸⁶

Second, the noncongruent reading of *Windsor* allows for a more coherent equal protection doctrine—one that highlights the connections between the often-forgotten alienage cases and current controversies. Significantly, reincorporating the alienage cases back into mainstream equal protection doctrine would also provide an opportunity to revisit their reasoning, allowing for them to be adapted to an immigration landscape in which federal-state distinctions are no longer as sharp as they once were.

Intellectual coherence is nice, of course, but it matters more if the less coherent alternatives are dangerous. This brings me to my third point. If *Windsor*’s federalism is not seen to make equal protection analysis noncongruent, then it is liable to be put to another task. For one thing, it could be weighed against equality. Courts’ talk of balancing federalism and equal protection in the state marriage cases has so far led nowhere, but the framing is misguided,²⁸⁷ and we should fear the judge who thinks that the scales could ever tip in favor of states’ rights. The problem with the balancing approach is that although it always makes, or should make, federalism interests irrelevant, the importance of states’ rights makes misapplication of the balancing test a temptation. Noncongruence avoids this dilemma by giving federalism real weight *within* equal protection analysis.

The other possible use for *Windsor*’s federalism has it doing its work outside the doctrine, behind the scenes. In short, federalism talk becomes merely a way of buying time for “the second, state-law shoe to be dropped later,” as Justice Scalia wrote in angry dissent.²⁸⁸ According to one proponent of this view, Professor Neil Siegel, *Windsor*’s federalism is a “way station”—a type of temporizing rhetoric used “in times of transition, when the country is in flux and the Court wants to nudge a national conversation in a certain direction rather than end it.”²⁸⁹ This is to say that *Windsor*’s talk of federalism is a red herring; the distinction it purports to draw between DOMA and state marriage laws is not a genuine difference. *Windsor*’s federalism is a lie, even if a noble one.

285. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

286. Transcript of Oral Argument at 76, *Windsor*, 133 S. Ct. 2675 (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf (“I think we are assuming now that there is Federal power and asking about the degree of scrutiny that applies to it. Or are we going back to whether there is a Federal power? They are—they are intertwined.”).

287. *See, e.g., Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (inaccurately describing *Loving v. Virginia*, 388 U.S. 1 (1967), as having “balance[d] the state’s right to regulate marriage against the individual’s right to equal protection and due process under the law”).

288. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

289. *See Siegel, supra* note 10, at 7.

I have two worries about this account. First, it feeds directly into—even if it does not necessarily share—the cynicism and distrust, so corrosive to rule of law values, that lie at the heart of Justice Scalia’s critique of the Court’s opinion in *Windsor*.²⁹⁰ The implication of Professor Siegel’s interpretation, stated more directly by Justice Scalia, is that the Court has erected a rhetorical smokescreen to be blown away as soon as the cover of federalism is no longer needed. Federalism is used purely instrumentally; the Court’s actual words are not worthy of reliance.

Second, the cynical reading of *Windsor*, even if it is true, is useless to lower courts. District and appellate courts cannot say in their opinions that the Supreme Court was obfuscating in *Windsor* when it wrote of federalism’s central relevance. Nor can they suggest that *Windsor*’s federalism was merely a temporizing nudge in the national conversation over same-sex marriage. Professors and dissenting Justices can always second-guess a majority’s motives and an opinion’s staying power, but lower courts are in the business of following what the Supreme Court writes. Unlike the temporizing account, noncongruence can help courts go about their business. My noncongruent reading of *Windsor* is an interpretation of the opinion the Court actually gave us, not a prediction of opinions possibly yet to come.

Finally, in addition to its intellectual coherence and its superiority to competing accounts, the incorporation of federalism values into equal protection analysis—the approach I urge in the state marriage cases—promises to give even greater force to whatever victories the plaintiffs in those cases eventually achieve. To date, courts have validated plaintiffs’ equal protection rights only by putting federalism values aside. The return of noncongruent equal protection opens up a different possibility. By including within their equal protection scrutiny certain interests that are unique to the states, courts would be able to declare that marriage equality claims should prevail *even accounting for federalism*. Distinguishing the state marriage cases from *Windsor*, courts would underscore how states’ rights can be heard, and prove relevant, even in cases where the equality principle ultimately wins out.

Recognizing the noncongruence in *Windsor*—and hearing in its “federalism noises” echoes of the noncongruence of the alienage cases—would allow courts to honor the structural differences between state and federal governments in their responsibilities concerning marriage. Perhaps as importantly, it would allow courts to treat *Windsor*’s own discussion of such differences as something more than muddled confusion, or misleading obfuscation. In the end, an equal protection in which structural concerns are truly made to matter is one whose protections are all the more constitutionally meaningful.

290. See *Windsor*, 133 S. Ct. at 2709 (“It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here. . . . I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.”).