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# Windsor, Shelby County, and the Demise of Originalism: A Personal Account

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## ***Windsor, Shelby County, and the Demise of Originalism: A Personal Account***

DAWN JOHNSEN\*

By the final day of the Supreme Court's 2012–2013 Term, when the Court issued decisions in challenges to two laws that discriminated against same-sex marriages,<sup>1</sup> a remarkable consensus anticipated essentially the outcomes announced. Court watchers expected that Justice-in-the-middle Anthony Kennedy would lead the Court cautiously toward protecting against sexual orientation discrimination and, in any event, would not set back the cause of marriage equality by upholding either law. Although a substantial and passionate minority of the U.S. population continued to oppose the ability of gays and lesbians to marry, by June 6, 2013, the issue's eventual resolution seemed quite clear and few believed that the Court would put itself on the “wrong side” of that history.<sup>2</sup>

A closely divided Court in *United States v. Windsor* met these expectations by declaring unconstitutional the section of the Defense of Marriage Act (DOMA) that limited marriage for federal law purposes to a man and woman.<sup>3</sup> A different five-Justice majority in *Hollingsworth v. Perry* declined to reach the constitutionality of similar discrimination in a state law, California's Proposition 8, by finding that the plaintiffs lacked standing.<sup>4</sup> The two decisions, in effect, ended more than one thousand forms of federal discrimination against married same-sex couples<sup>5</sup> and, by allowing the *Perry* district court ruling to stand, made California the thirteenth state, plus the District of Columbia, to permit same-sex couples to marry. More than thirty-eight percent of the U.S. population now lives in jurisdictions where

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1. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

2. In 2013, for the first time a slight majority of Americans supported the legality of same-sex marriage. In *Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable'*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (June 6, 2013), <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/> [hereinafter PEW POLL] (finding 51% support and 42% opposition); Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP POLITICS (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx> [hereinafter GALLUP POLL] (finding 53% support and 45% opposition).

3. *Windsor*, 133 S. Ct. 2675.

4. *Perry*, 133 S. Ct. 2652.

5. See U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004).

women and men may marry or have their out-of-state marriages recognized regardless of sexual orientation—and after *Windsor*, receive federal as well as state benefits associated with marriage.<sup>6</sup>

The Court's invalidation of DOMA, and the very fact that the outcome was widely anticipated, marked an extraordinary evolution in constitutional law, as interpreted by the Court and understood by the American people. *Windsor*'s discussion of the merits began by emphasizing the rapid and recent changes in how states and the public have approached the issue.<sup>7</sup> When Congress enacted DOMA in 1996, every state limited marriage to a man and a woman and many Americans had not seriously contemplated that it could be otherwise.

Justice Antonin Scalia alluded to that change, with the intent of discrediting its legitimate role in constitutional interpretation, during the March 2013 oral arguments when he pressed marriage-equality advocate Theodore Olson to answer the question: "When did it become unconstitutional to exclude homosexual couples from marriage?"<sup>8</sup> This question foreshadowed the two principal grounds on which *Windsor* is constitutionally significant: first, for what it said about the substantive constitutional protections that apply to sexual orientation discrimination, and second, for the interpretive methodology the Court used to reach its conclusions. *Windsor*'s four opinions—one for the five-Justice majority and three for the four dissenting Justices—disagreed about precisely what the Court concluded, which may caution restraint in speculating about the case's future import.<sup>9</sup> This Essay hazards the prediction that 2013 will be regarded as a momentous year in the history of two distinct legal/political movements that first gained momentum in the 1980s: most obviously, strengthening the movement to combat sexual orientation discrimination and repression; and, more generally and less noted, weakening the movement to promote "originalism" in constitutional interpretation and American politics.

Paradoxically, in breaking new ground and interpreting the Fifth Amendment expansively to reflect the American people's changed understandings, the *Windsor* Court adhered to a traditional interpretive approach and implicitly rejected efforts, begun in earnest during the Reagan Administration, to substitute a form of originalism that would yield radically different interpretations across a great range of issues. Behind Justice Scalia's question at oral argument was a form of originalism, for which he has emerged as the best-known advocate, that seeks to interpret the Constitution with reference only to the text and the original meaning of the text at the time of the provision's adoption, understood at a very specific level of meaning. In holding that DOMA violated "basic due process and equal protection principles," the Court instead relied heavily upon "the community's . . . evolving understanding of the meaning of equality."<sup>10</sup> *Windsor* thus reflects not only constitutional change in the direction of more expansive judicial protection of

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6. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (figure as of December 15, 2013, the date this Essay went to press).

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

8. Transcript of Oral Argument at 38, *Perry*, 133 S. Ct. 2652 (No. 12-144).

9. *See Windsor*, 133 S. Ct. at 2682 (Kennedy, J.), 2696 (Roberts, C.J., dissenting), 2697 (Scalia, J., dissenting), 2711 (Alito, J., dissenting).

10. *Windsor*, 133 S. Ct. at 2693.

equal protection and due process, but also fidelity to a mainstream approach to interpreting the Constitution that considers a range of sources and methods and allows for the consideration of evolving social norms and constitutional understandings.

The exchange between Justice Scalia and Mr. Olson (who it is worth noting had served as a high-ranking official in the Reagan and George W. Bush administrations) conveys the essential difference in the competing approaches:

JUSTICE SCALIA: [W]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? . . .

MR. OLSON: When—may I answer this in the form of a rhetorical question? When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools[?]

JUSTICE SCALIA: It's an easy question, I think, for that one. At—at the time that the Equal Protection Clause was adopted. . . .

. . .

MR. OLSON: There's no specific date in time. This is an evolutionary cycle.<sup>11</sup>

The Court of course had not yet ruled on the constitutionality of state discrimination and as of the writing of this Essay, still has not. Indeed, it was so determined to avoid the issue in *Perry* that it may have reached the wrong conclusion on standing. In *Windsor*, the Court held DOMA unconstitutional on grounds tied to its particular facts: DOMA's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."<sup>12</sup> Justice Scalia's *Windsor* dissent makes a strong case, however, that a holding that it is "unconstitutional to exclude homosexual couples from marriage" is just a matter of time, and perhaps not much time.<sup>13</sup>

In this Essay, I accept Justice Scalia's invitation to focus on dates and consider how his question might best be answered with reference to relevant dates in the United States' constitutional history. This frame helps explain my expectation and my hope that the Court's decisions of 2013 will prove vital for the future of not only the substantive constitutional protections against marriage discrimination but also how the Court and "We the People" interpret the Constitution across a range of issues—and that those decisions will hasten the end of a narrow form of originalism that would be devastating to both "the liberty of the individual" and "the demands of organized society."<sup>14</sup> Beyond *Windsor*, I would point to the Court's decision issued a day earlier in *Shelby County* holding unconstitutional a core provision of the Federal Voting Rights Act. Justice Scalia joined a bare five-

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11. Transcript of Oral Argument at 38–39, *Perry*, 133 S. Ct. 2652 (No. 12-144).

12. *Windsor*, 133 S. Ct. at 2696.

13. *Id.* at 2709–11 (Scalia, J., dissenting).

14. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

Justice majority opinion despite its plain inconsistency with his professed originalist approach—to the detriment of racial equality and democracy.<sup>15</sup> Countless articles and books, of course, have been written about each of the dates and issues I briefly address. My observations will by necessity be selective and will include a few of a personal nature, based on my legal work over the last quarter century as well as by virtue of simply having lived through a time of remarkable social and legal change.<sup>16</sup>

An important initial note about terminology: a political and legal movement during the 1980s adopted the label “originalism” in opposition to what it characterized as “activist,” pro-rights, anti-federalism rulings of the Warren and the Burger Courts. How best to use the term today, however, is sharply and interestingly contested among those who endorse a more mainstream interpretive approach: some are content to cede the term while others seek to redefine it and talk in terms of “originalisms,” plural, including to emphasize that they too care about original meaning. For example, Professor Jack Balkin has called for “living originalism,”<sup>17</sup> Justice Ruth Bader Ginsburg has asserted, “I count myself as an originalist too,”<sup>18</sup> and then-Supreme Court nominee Elena Kagan has declared, “we are all originalists.”<sup>19</sup> Diversity exists, too, on the ideological right, seen, for example, in self-described originalist defenses of *Brown v. Board of Education*<sup>20</sup> and the Court’s extension of constitutional protections against sex discrimination.<sup>21</sup> Justice Scalia has described himself as a “faint-hearted originalist”<sup>22</sup> and “an originalist and a textualist, not a nut,”<sup>23</sup> and he in fact at times has acknowledged

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15. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

16. Before joining the faculty at the Indiana University Maurer School of Law in 1998, I served as law clerk to Richard D. Cudahy on the U.S. Court of Appeals for the Seventh Circuit (1986–87), staff counsel fellow at the ACLU Reproductive Freedom Project (1987–88), legal director of NARAL Pro-Choice America (1988–93), and deputy assistant attorney general (1993–96) and acting assistant attorney general (1997–98) for the Office of Legal Counsel at the U.S. Department of Justice.

17. Compare JACK M. BALKIN, *LIVING ORIGINALISM* (2011), with DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

18. Ariane de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABCNEWS (Nov. 18, 2011, 1:15 PM), <http://abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality/>.

19. *Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

20. 347 U.S. 483 (1954).

21. See e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

22. “I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). In a 2013 interview, Justice Scalia repudiated that statement. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 7, 2013, at 1, available at <http://nymag.com/news/features/antonin-scalia-2013-10/>.

23. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (April 28,

the legitimacy of other interpretive sources such as precedent and the varying consequences of competing interpretations. Among the Justices, it is Justice Clarence Thomas who comes closest to principled adherence to a narrow form of originalism.<sup>24</sup>

Although I appreciate the desire among moderates and progressives not to cede the term, as well as the diversity of originalisms on the right, I feel it equally vital to recognize that, to the extent we are all originalists, we also all are living constitutionalists.<sup>25</sup> This Essay principally addresses the popularly recognized 1980s form of originalism represented most prominently among the Justices by Justice Scalia, in academia by Robert Bork, and in politics and government by President Reagan's Attorney General Edwin Meese.<sup>26</sup> That narrow and rigid originalism, which achieved its apex in 1986 with *Bowers v. Hardwick's* upholding of a Georgia criminal ban on sodomy,<sup>27</sup> is utterly irreconcilable with *Windsor* and *Shelby County*. Those June 2013 decisions, I believe, may signal originalism's demise.

#### *1791 and 1868: Adoption of the Fifth and Fourteenth Amendments*

A constitutional provision's meaning at the time of its adoption is a longstanding component of mainstream constitutional analysis. Justice Scalia's exchange with Mr. Olson, however, insists upon the year of adoption as a complete response, and the only legitimate one to his question. Hence his suggestion of the years of adoption of the Fifth and the Fourteenth Amendments: 1791 and 1868. Seeking thus to limit constitutional meaning to text and specific meaning at the time of ratification is the hallmark of the modern originalism movement.

For an originalist, analysis of the constitutionality of DOMA or any discriminatory federal law is complicated by the fact that the Fifth Amendment, the source of relevant constraints on Congress, does not include an Equal Protection Clause (unlike the state-constraining Fourteenth Amendment). Both contain Due Process clauses.<sup>28</sup> Justice Scalia asked his question in *Perry* where the California law was at issue, so he appropriately referenced 1868 and "when the Equal Protection Clause was adopted" in response to Mr. Olson's rhetorical questions

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2008, 7:32 AM), <http://www.npr.org/templates/story/story.php?storyId=89986017>.

24. See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010) (Justice Scalia "acquiesced" in "substantive due process" doctrine to invalidate state gun control measures). Many have noted the differences between Justice Scalia and Justice Thomas. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 7 (2006) ("This leaves Justice Thomas as the only justice who seems at all bound by originalist conclusions with which he may disagree.").

25. See Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1178–81 (2013) (reviewing SETH STERN & STEPHEN WERMEIL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010)).

26. See *infra* text accompanying notes 69–85 (1986–87: *Bowers* and Bork). To underscore the complexity of using the term, even Antonin Scalia, Robert Bork, and Edwin Meese differed somewhat in their approaches to originalism.

27. See 478 U.S. 186 (1986).

28. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V; "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

about racial segregation and bans on interracial marriage. For DOMA, however, the directly relevant text is the 1791 Due Process Clause.

It does not take a constitutional historian to appreciate that the specific original meanings of due process/liberty and equal protection in both 1791 and 1868 do not support constitutional protection against sexual orientation discrimination in marriage laws, state or federal. In *Windsor*, the Court flatly rejected Justice Scalia's originalism and went decidedly with Mr. Olson's "evolutionary" approach. Whether characterized as "living constitutionalism,"<sup>29</sup> "living originalism,"<sup>30</sup> or simply constitutional interpretation, the roots of *Windsor* in this respect can be traced to another early year, 1819, when the Court issued a decision widely viewed as foundational, *McCulloch v. Maryland*.<sup>31</sup> Chief Justice John Marshall there described the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."<sup>32</sup> The Court in *McCulloch* was interpreting the scope of congressional powers, but its reasoning for a flexible, evolving approach properly informs constitutional interpretation more generally:

To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.<sup>33</sup>

In another often-quoted passage, the Court further admonished, "[W]e must never forget, that it is a *constitution* we are expounding."<sup>34</sup> *McCulloch* remains a canonical decision, the foundation of the Court's interpretive approach, which Justice Breyer has characterized as including "traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences."<sup>35</sup>

#### 1954: Brown

The central role Justice Anthony Kennedy would play on matters of sexual orientation discrimination became apparent at least a decade before *Windsor* when

29. See STRAUSS, *supra* note 17.

30. See BALKIN, *supra* note 17.

31. 17 U.S. (4 Wheat.) 316 (1819).

32. *Id.* at 415 (emphasis omitted).

33. *Id.*

34. *Id.* at 407 (emphasis in original).

35. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 74 (2010); see also H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 205, 208 (2002) (Our nation's "shared constitutional first principles" include: "In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution.") (emphasis omitted).

his 2003 opinion for the Court in *Lawrence v. Texas* directed attention to the year 1954, and the Court's unanimous decision in *Brown v. Board of Education*,<sup>36</sup> as a critical point in evolving constitutional understandings.<sup>37</sup> One of originalism's greatest challenges has been the difficulty in squaring a court-ordered end to racial segregation of public schools with the specific meaning of the Fourteenth Amendment at its 1868 adoption, when Northern as well as Southern states maintained racially segregated schools and Congress itself segregated the schools in the District of Columbia.<sup>38</sup> Mr. Olson's rhetorical question—"When did it become unconstitutional to assign children to separate schools?"—evokes the fact that the Framers clearly did not intend that the Fourteenth Amendment's Equal Protection Clause would prohibit racial segregation. That understanding came in 1954 with *Brown*'s rejection of a narrow, rigid originalism: "[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when [*Plessy*] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>39</sup>

Arguably even more difficult on originalist grounds was *Brown*'s companion case *Bolling v. Sharpe*,<sup>40</sup> which held that the segregation of the District of Columbia schools was inconsistent with the "liberty" protected under the Due Process Clause of the Fifth Amendment—adopted in 1791, a time when enslaving persons of African American descent was widely regarded as consistent with this guarantee of "liberty." The Court acknowledged that the absence of an Equal Protection Clause made the issue "somewhat different," but disposed of the case in six short paragraphs.<sup>41</sup> The *Bolling* Court found that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."<sup>42</sup> The Court merged consideration of the two concepts as well as the standards of review that are familiar today, to the end that due process protects against at least some forms of discrimination that, when committed by states, are approached as a matter of equal protection. The Court cited what we today call strict scrutiny reserved for suspect classifications and fundamental liberties but then found that segregation was "not reasonably related to any proper governmental objective,"<sup>43</sup> the familiar standard of rational basis review. The Court offered little else on the precise effect the Fourteenth Amendment has on interpreting its predecessor amendment, except to note: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated

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36. 347 U.S. 483 (1954).

37. 539 U.S. 558, 571–72 (2003) ("[W]e think that our laws and traditions in the past half century are of most relevance . . .").

38. See 2 RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 801–04 (1st ed. 1975).

39. *Brown*, 347 U.S. at 492–93; see also *id.* at 489 (finding the evidence of intent "inconclusive").

40. 347 U.S. 497 (1954).

41. *Id.*

42. *Id.* at 499.

43. *Id.* at 499–500 ("Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.").



public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>44</sup> *Bolling* would become a key precedent for *Windsor*’s treatment of the discrimination claim brought under the Fifth Amendment’s Due Process Clause.<sup>45</sup>

*1965/1967: Griswold and Loving*

When Mr. Olson raised the closest precedent for marriage equality for gays and lesbians with his rhetorical response to Justice Scalia—“When did it become unconstitutional to prohibit interracial marriages?”—he knew well that the Court did not end state criminalization of interracial marriage until the startlingly late date of 1967, in *Loving v. Virginia*.<sup>46</sup> Even in the 1960s, the issue was a live one: counsel for Mildred and Richard Loving explained at oral argument that sixteen states banned interracial marriage, recently down from seventeen following Maryland’s repeal and failed repeal efforts in Oklahoma and Missouri.<sup>47</sup> Of interest with regard to the issue of the timing of the Court’s resolution of controversial constitutional questions, the *Loving* Court stressed it had never before addressed the issue,<sup>48</sup> even though it had dodged a challenge to that very Virginia statute a decade earlier when the Virginia Supreme Court upheld it.<sup>49</sup> Moreover, as the *Loving* Court noted, in 1883 it had faced a closely related question and upheld Alabama’s conviction and two-year sentence of an interracial couple for living together while unmarried.<sup>50</sup>

The State of Virginia’s defense centered on arguing that the statute punished whites and African Americans equally and thus did not discriminate on the basis of race, and, relatedly, that the Framers of the Fourteenth Amendment did not intend to prohibit such a use of race.<sup>51</sup> Mildred and Richard Loving both had been sentenced to a year in prison for marrying a person of a different race. The Court unanimously held that the ban plainly used race for the purpose of promoting “White Supremacy” in violation of equal protection of the laws.<sup>52</sup> The Court held

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44. *Id.* at 500.

45. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“[DOMA] violates basic due process and equal protection principles applicable to the Federal Government. *See* U.S. CONST., Amdt. 5; *Bolling v. Sharpe*, 347 U.S. 497 . . . (1954).”).

46. 388 U.S. 1 (1967).

47. Transcript of Oral Argument, *Loving*, 388 U.S. 1 (No. 12-144), available at [http://www.oyez.org/cases/1960-1969/1966/1966\\_395](http://www.oyez.org/cases/1960-1969/1966/1966_395).

48. *See Loving*, 388 U.S. at 2 (“This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”).

49. *See Naim v. Naim*, 197 Va. 80 (1955), *vacated*, 350 U.S. 891 (1955), *remanded to*, 197 Va. 734 (1956), *motion to recall denied*, 350 U.S. 985 (1956).

50. *Loving*, 388 U.S. at 10 (citing *Pace v. Alabama*, 106 U.S. 583 (1883)). Alabama was the last state in the nation to have on its books a criminal ban on interracial marriage. *Alabama Considers Lifting Interracial Marriage Ban*, CNN.COM (Mar. 12, 1999, 1:32 PM), <http://www.cnn.com/US/9903/12/interracial.marriage/>.

51. *See Loving*, 388 U.S. at 7–8.

52. *Id.*

further that the law deprived the Lovings of liberty in violation of due process by denying them “the freedom to marry,” and cited for support *Skinner v. Oklahoma*, a 1942 case recognizing constitutional protection against forcible sterilization.<sup>53</sup>

Government prohibitions on same-sex marriage and sexual intimacy similarly are challenged today on both equal protection and liberty/due process grounds. But given the pervasive past discrimination against homosexuality and the unsettled status of even interracial marriage in the mid-1960s, there was no chance the Court would have recognized those parallels at that time and protected “the freedom to marry” someone of the same sex. Among the overwhelming historical evidence are statements to the effect that homosexuality is not constitutionally protected in various opinions in the 1965 case *Griswold v. Connecticut*, which upheld the constitutional right of married couples to use contraception, and a 1961 dissent in *Poe v. Ullman* in which Justice Harlan dissented from the Court’s dismissal of a challenge to the same Connecticut ban on contraception.<sup>54</sup> In all, five of the seven Justices in the *Griswold* majority joined opinions that distinguished the state’s authority to ban homosexuality or illicit relationships.

Justice Harlan’s *Griswold* concurrence has withstood the test of time and, together with his *Poe* dissent (which he incorporated by reference), describes still-followed standards for interpreting the “liberty” protected substantively by the guarantee of due process.<sup>55</sup> Although Justice Harlan distinguished rights associated with homosexuality, his interpretive approach plainly left open the possibility that a future Court could reach a different conclusion. Citing *McCulloch*, he wrote of the importance of “approaching the text . . . not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but

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53. *Id.* at 12 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”). The Court also wrote of the two protections together. *Compare* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[D]iscrimination may be so unjustifiable as to be violative of due process.”), *with Loving*, 388 U.S. at 12 (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).

54. *See* *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring) (specifically referencing homosexuality, Justice Goldberg quoted Justice Harlan’s *Poe* dissent, stating: “It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.”); *id.* at 505 (White, J., concurring) (stating that state policies against “promiscuous or illicit sexual relationships” are a “legitimate legislative goal”); *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (“The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”).

55. *See* *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (explaining his reasoning by reference to the “reasons stated at length in my dissenting opinion in *Poe v. Ullman*”); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49 (1992) (citing Justice Harlan’s dissent in *Poe* and subsequent concurrence in *Griswold*).

meaningful terms the principles of government.”<sup>56</sup> Constitutional interpretation must strike a balance between “the liberty of the individual” and “the demands of organized society” and have “regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”<sup>57</sup> *Loving* and *Griswold* thus are central to understanding the process by which discrimination against same-sex marriage has come to be understood as unconstitutional, in terms of the substantive protections of equal protection and liberty and the connections between the two, the appropriate interpretive methodology and role of original meaning, and the Court’s practice of delaying resolution of controversial issues until it decides the time is right.

1973: *Roe and Frontiero*

Justice Scalia is correct that the original meaning of the Fifth and Fourteenth Amendments, construed narrowly consistent with his approach to originalism, did not encompass protection against sex discrimination or governmental control of personal decisions about sexuality and childbearing.<sup>58</sup> In 1873, the pervasive unequal treatment of women included a Court decision upholding an Illinois law that excluded women from the practice of law, with Justice Bradley now infamously concurring to declare that “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”<sup>59</sup> As recently as 1961, the Court cited women’s special role as mothers to uphold a state exclusion of women from mandatory jury service.<sup>60</sup>

In the early 1970s the Court began to protect women from laws that limited their opportunities to what in 1868 commonly was viewed as women’s “natural” role. In 1973 Justice William Brennan’s landmark plurality for four Justices in *Frontiero v. Richardson* made the case that sex discrimination should trigger heightened judicial scrutiny. Four additional Justices found that the federal law, which gave men higher presumed benefits on the assumption they typically are heads of households,

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56. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819)).

57. *Id.* at 542.

58. See Nina Totenberg, *Interviewing Scalia: Verbal Wrestling Match with a Master*, NPR (July 25, 2012, 6:23 PM), <http://www.npr.org/blogs/itsallpolitics/2012/07/25/157384080/interviewing-scalia-verbal-wrestling-match-with-a-master>; see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

59. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873). This is a useful point to remind of the diversities of originalism. It was in response to a law professor’s originalist argument that women were not protected under the Equal Protection Clause that Justice Ginsburg, a chief advocate in the 1970s for constitutional protection against sex discrimination, declared: “I have a different originalist view. I count myself as an originalist too, but in a quite different way from the professor.” de Vogue, *supra* note 18.

60. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (“[A] woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State . . . to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”).

did not survive even mere rational basis review.<sup>61</sup> That same year, a seven-Justice majority held that the right to liberty substantively protected the right of women to be free from governmental interference with the decision whether to terminate a pregnancy, such that abortion restrictions would trigger strict judicial scrutiny.<sup>62</sup>

These protections for women would prove significant for the equality and liberty of gays and lesbians, but the Court and the country certainly were not ready to make those connections at the time. In 1972 the Court dismissed, on what was supposed to be a mandatory appeal, a constitutional challenge to a Minnesota statute that limited marriage to heterosexual couples; Justice Scalia referenced the case in his rhetorical questioning of Mr. Olson, suggesting as a possible date, “some time after *Baker*, where we said it didn’t even raise a substantial Federal question?”<sup>63</sup> Nor was the Court ready to recognize restrictions on women’s reproductive liberty as a form of sex discrimination.<sup>64</sup> Later criticism of the *Roe* Court for being inadequately sensitive to that connection tends to lack adequate grounding in historical reality, just as does criticism that *Roe* actually set back reproductive rights by getting too far ahead of public opinion.<sup>65</sup> Indeed, throughout the 1970s, many equality advocates argued *against* the possible connections between discrimination on the basis of sex, on the one hand, and restrictions on abortion or homosexuality, on the other, due to fear of harming efforts to ratify the Equal Rights Amendment, which *opponents* argued would legalize homosexuality and protect access to abortion.<sup>66</sup>

Even forty years later, sex discrimination challenges to abortion or sexual orientation restrictions, although to my mind theoretically strong, generally have not prevailed. In my experience working in reproductive rights advocacy, the terms of political and legal advocacy are greatly affected by public opinion, even as advocates struggle to undo popular prejudices. In 1973 (and even today), “women’s rights” and “women’s liberty” were far less popular concepts than the “right to privacy” or leaving the abortion decision to women in consultation with their physicians, husbands, and clergy—as opposed to giving that private decision to politicians. Justices increasingly have noted the equality implications of abortion restrictions, but the Court still has not directly made the doctrinal connection to equal protection.<sup>67</sup>

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61. *Frontiero v. Richardson*, 411 U.S. 677, 691–92 (1973); *see also* *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (adopting intermediate scrutiny rather than strict scrutiny as the form of heightened scrutiny appropriate for sex discrimination).

62. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

63. Transcript of Oral Argument at 38, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (No. 12-144) (discussing *Baker v. Nelson*, 409 U.S. 810 (1972)).

64. *See* *Geduldig v. Aiello*, 417 U.S. 484 (1974) (describing discrimination on the basis of pregnancy as not sex discrimination, but discrimination between pregnant and non-pregnant persons).

65. *Roe*’s companion case, *Doe v. Bolton*, involved restrictions short of criminal bans and thus makes this even less plausible. 410 U.S. 179 (1973). *See* Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

66. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

67. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

Most recently, in 2007, Justice Ginsburg's four-Justice dissent in *Gonzales v. Carhart* chastised the five-Justice majority for using reasoning in upholding abortion restrictions that "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."<sup>68</sup>

*1986–87: Bowers and Bork*

Many readers may have personal markers from which to consider Justice Scalia's intriguing question and the social and constitutional change of the last quarter century. I graduated from law school in 1986, the year the Court held by a five-to-four vote in *Bowers v. Hardwick* that the Constitution did not protect against laws that made it a crime for consenting adults of the same sex to be physically intimate in the privacy of their own homes.<sup>69</sup> A few months later, Justice Scalia joined the Court (with a confirmation vote of ninety-eight to zero) to succeed William Rehnquist, who was appointed Chief Justice. The next year brought the retirement of Justice Lewis Powell, a necessary fifth vote in *Bowers* as well as in cases affirming *Roe v. Wade* and protecting against sex discrimination.<sup>70</sup> President Reagan nominated Robert Bork of the U.S. Court of Appeals for the D.C. Circuit.

These events will be familiar to many. My attention was particularly keen because I was completing a one-year fellowship at the American Civil Liberties Union and most seriously considering two jobs: legal director of a reproductive rights organization at a time *Roe* seemed in jeopardy, and staff attorney at the ACLU's then-fledgling LGBT project when combatting criminal sodomy laws and employment and AIDS-related discrimination topped the agenda (and certainly not marriage equality). I vividly recall that, of the two, LGBT issues seemed far more controversial and difficult to foresee success. *Roe*, although in immediate jeopardy in the Court, enjoyed strong and consistent support among the American public. In the years since, the legal and political standing of the two sets of issues, which are closely aligned in many doctrinal and theoretical respects, have dramatically flipped in ways very few would have predicted.<sup>71</sup> My personal response to "when did it become unconstitutional to exclude homosexual couples from marriage" is that the evolution has been astounding since I was admitted to the bar, twenty-six years ago, and events around the time of my bar admission were central to that progress.

The *Bowers* Court upheld the application to "consensual homosexual sodomy" (declining to address heterosexual sodomy) of a Georgia law that imposed criminal penalties of one to *twenty years* of imprisonment for engaging in oral or anal sex.<sup>72</sup> Michael Hardwick was arrested for having consensual oral sex in his own bedroom with a man. In a remarkably short opinion that relied heavily on specific original meaning, the Court cited all of the sodomy bans on the books of all thirteen states

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68. 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

69. See 478 U.S. 186 (1986).

70. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Thornburgh*, 476 U.S. 747.

71. My decision was made easy when Nan Hunter, then-director of the ACLU LGBT project, offered the excellent advice that I should take the legal director position—and did not offer me the other.

72. *Bowers*, 478 U.S. 186.

when they ratified the Bill of Rights and the bans in place in all but five of the then-thirty-seven states at the time of the Fourteenth Amendment's ratification.<sup>73</sup> The Court went beyond narrow originalism concerns and also noted that twenty-four states continued to ban private consensual sodomy in 1986.<sup>74</sup> Beyond that, the Court said little and was remarkably dismissive of what it called a "facetious" claim.<sup>75</sup> It declared that none of the liberties it previously had found within the fundamental right to privacy "bears any resemblance" to Hardwick's claim and that "[i]t is obvious to us" that a fundamental right of homosexuals to engage in consensual sodomy is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."<sup>76</sup> Justice Powell, who later expressed regret for casting a decisive fifth vote, authored a concurrence that signaled ambivalence by suggesting that the law might violate the Eighth Amendment, an argument not presented to the Court.<sup>77</sup>

When in 1987 President Reagan nominated Judge Bork to succeed Justice Powell, Bork was originalism's intellectual leader. He also had authored an influential opinion, which *Bowers* cited, that held against a claim of sexual orientation discrimination.<sup>78</sup> Attorney General Edwin Meese, appointed in 1985, became originalism's chief public advocate, leading the Reagan administration's pursuit of extensive constitutional change: in favor of an approach to federalism that would enhance state sovereignty and diminish congressional power and in opposition to the pro-rights "activism" of the Warren Court and continued under Justice William Brennan's leadership. Chief Justice Rehnquist was the Court's leader in this regard. Meese's principal contribution was to make Judge Bork's form of originalism the centerpiece of that agenda, even where it actually did not fit (as in affirmative action and congressional authority), through public advocacy, lengthy Department of Justice reports, government litigation, and judicial appointments.<sup>79</sup> To give just one example, a Department of Justice report directing government litigators to feature originalism selected *Bowers* as a model of originalism and listed as "inconsistent" with originalism and thus illegitimate (among many others): *Skinner v. Oklahoma's* protection against forced sterilization, *Griswold v. Connecticut's* protection of the right of a married couple to use contraception, *Loving v. Virginia's* recognition of a right to marry, and *Roe v. Wade's* protection of the right to decide whether to have an abortion.<sup>80</sup> The report

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73. *Id.* at 192–93 & nn.5–7.

74. *Id.* at 193–94.

75. *Id.* at 194.

76. *Id.* at 190, 192, 194.

77. *See id.* at 197 (Powell, J., concurring); *see also* Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, at A1 (quoting Justice Powell as saying that he "probably made a mistake in [*Bowers*]").

78. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

79. For extensive discussion (with citations) of the leadership provided to the 1980s originalism movement by Judge Bork, Chief Justice Rehnquist, and Attorney General Meese, *see* Johnsen, *supra* note 25, at 1167–81; Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 385–406 (2003).

80. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON

described the protection of women from discrimination under heightened judicial scrutiny as “tenuous at best” and the recognition of any additional classes protected under equal protection analysis as illegitimate.<sup>81</sup>

The Reagan Administration relied heavily upon Judge Bork’s writings.<sup>82</sup> The Senate refused to confirm Judge Bork, on a vote of fifty-eight to forty-two, largely for the views expressed in those same writings, prominent among them a 1971 article in the *Indiana Law Journal*.<sup>83</sup> All of the issues discussed to this point in this chronology were the subject of the Senate’s intense questioning of Judge Bork in confirmation hearings that gripped the nation, particularly his views against *Griswold* and constitutional protection for a right of privacy.<sup>84</sup> President Reagan ultimately nominated, and the Senate confirmed, Anthony Kennedy to Justice Powell’s seat, an event that would prove of great consequence for the direction of the Court. In 2008, long-time *New York Times* Supreme Court reporter Linda Greenhouse, reflecting on a thirty-year illustrious career covering the Court, astutely captured the core difference between Robert Bork and Anthony Kennedy: “Judge Bork’s constitutional vision, anchored in the past, was tested and found wanting, in contrast to the later declaration by Judge Anthony M. Kennedy, the successful nominee, that the Constitution’s framers had ‘made a covenant with the future.’”<sup>85</sup>

#### 1992: Casey

Noteworthy among the many consequential cases in which Robert Bork likely would have voted differently than Justice Kennedy is the 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>86</sup> The events of this period remain vivid to me: at the time I served as the legal director of a reproductive rights organization that had just helped lead opposition to the nomination of Clarence Thomas to replace retiring Justice Thurgood Marshall, in part because it seemed virtually certain he would provide the fifth vote to overrule *Roe*.<sup>87</sup> In *Casey*, Justice Thomas voted as expected and joined Justice Scalia and *Roe*’s two original dissenters, William Rehnquist and Byron White.<sup>88</sup> But Justice Kennedy’s vote

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CONSTITUTIONAL LITIGATION 78–83 (1988) [hereinafter GUIDELINES] (listing by issue examples of Supreme Court opinions the Reagan Administration believed were “consistent” with originalism and those that were wrongly decided).

81. *Id.* at 78.

82. *See, e.g., id.* at 3.

83. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

84. *See generally* MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT* (1992).

85. Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at WK1.

86. 505 U.S. 833 (1992).

87. *Cf. Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (Justice Kennedy joined a four-Justice plurality that applied only rational basis review to uphold abortion restrictions). The nomination ended in Thomas’s confirmation by a vote of fifty-two to forty-eight, the narrowest margin in the Supreme Court’s history. 102 CONG. REC. 26354 (1991) (Senate confirmation of Justice Thomas).

88. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in the judgment in part and

surprised all sides: he coauthored an extraordinary “joint” opinion with Justices Sandra Day O’Connor and David Souter that was joined by a total of five Justices in parts that reaffirmed “*Roe*’s essential holding.”<sup>89</sup>

The five Justices in the *Casey* majority parted ways on some particulars vital to women’s reproductive liberty,<sup>90</sup> but they found remarkable agreement on the issues most directly relevant to Justice Scalia’s question about the timing of protections related to sexual orientation. The *Casey* joint opinion relied heavily on Justice Harlan’s *Poe/Griswold* approach to fundamental rights—which the Court in *Bowers* had ignored entirely.<sup>91</sup> It reaffirmed application of that approach to the right to use contraception not only for married couples, but also, as the Court had subsequently held, for unmarried individuals and minors, stating “[w]e have no doubt as to the correctness of those decisions.”<sup>92</sup> The Court also forcefully rejected Justice Scalia’s narrow originalist approach as “inconsistent with our law.”<sup>93</sup>

The *Casey* Court further emphasized the importance of constitutional change in its extended discussion of *stare decisis*. In discussing *Brown*’s overruling of *Plessy*, the Court emphasized the constitutional relevance of society’s evolving *understanding* of facts: “Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.”<sup>94</sup> The Court declared that “*Plessy* was wrong the day it was decided” but explained, in language *Windsor* would echo, why the Court could not appreciate that at the time: “[*Brown* is] comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive.”<sup>95</sup>

#### 1996: DOMA and Romer

When Congress passed DOMA in 1996 by overwhelming margins and President Bill Clinton signed it into law, I was a deputy assistant attorney general in the U.S. Department of Justice’s Office of Legal Counsel (OLC), which advises the President on constitutional and other legal (as opposed to policy) questions. I recall significant time spent during my five years at OLC on several legal issues related to sexual orientation, in part driven by President Clinton’s strong opposition to sexual orientation discrimination, including the “Don’t Ask, Don’t Tell” policy, the Employment Non-Discrimination Act, legislation to protect against hate crimes committed because of the victim’s sexual orientation, legislation that required the

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dissenting in part).

89. *Id.* at 843, 846.

90. Chief Justice Rehnquist’s dissent in fact charged that the joint opinion “retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of the case.” *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citation omitted).

91. *Id.* at 847–50.

92. *Id.* at 852.

93. *Id.* at 847 (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”).

94. *Id.* at 863.

95. *Id.*



military to discharge HIV-positive individuals, and the provision of the Colorado Constitution at issue in *Romer v. Evans*.<sup>96</sup> These issues raised complex legal questions, but DOMA did not.

Then-head of OLC (and my direct boss) Walter Dellinger recently noted that the Department of Justice's statement at the time was "carefully worded to avoid opining that the Justice Department *itself* believed DOMA was constitutional"<sup>97</sup> and instead stated: "The Department of Justice believes that the Defense of Marriage Act would be sustained as constitutional if challenged in court . . ."<sup>98</sup> This statement clearly was an accurate assessment at the time. The Court would not overrule *Bowers v. Hardwick* for another six years, and if a state could send a gay couple to prison for up to twenty years for their relationship, the federal government certainly did not have to afford the benefits associated with marriage to the couple—particularly at a time no state allowed same-sex couples to marry. Even among those who thought DOMA terrible policy and *Bowers* wrongly decided, few could have imagined that in seventeen years the Court would strike it down or that most Americans would oppose it.<sup>99</sup>

In 1996 Gallup for the first time polled the American public on the question of same-sex marriage: 27% favored legal recognition of same-sex marriages and 68% stated opposition.<sup>100</sup> That same year, the Court decided *Romer v. Evans* on relatively narrow equal protection grounds that would prove important precedent for *Windsor*. The Court held that a Colorado constitutional provision that prohibited local governments from enacting measures to protect against sexual orientation discrimination failed even rational basis review.<sup>101</sup>

### 2003: Lawrence

By 2003 public opinion had begun to change, with 32% supportive of recognition of same-sex marriage and 59% opposed,<sup>102</sup> and that year the LGBT

96. 517 U.S. 620 (1996); see *The Clinton-Gore Administration: A Record of Progress for Gay and Lesbian Americans*, WELCOME TO THE WHITE HOUSE, <http://clinton2.nara.gov/WH/Accomplishments/ac399.html> (archival version of the Clinton Administration White House website).

97. Walter Dellinger, *Supreme Court 2013: The Year in Review*, SLATE (June 23, 2013, 10:28 PM) (emphasis in original), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/doma\\_and\\_the\\_voting\\_rights\\_act\\_the\\_supreme\\_court\\_can\\_strike\\_down\\_one\\_and.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/doma_and_the_voting_rights_act_the_supreme_court_can_strike_down_one_and.html).

98. *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1996) (letter from Andrew Fois, Assistant Att'y Gen.).

99. See, e.g., Linda Greenhouse, *Current Conditions*, N.Y. TIMES (June 26, 2013, 6:57 PM) [http://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/?_r=0) ("When Congress enacted DOMA . . . it was hardly thinkable that the Supreme Court . . . would strike the statute down less than two decades later.").

100. GALLUP POLL, *supra* note 2.

101. The Colorado provision, enacted by statewide initiative, prohibited measures to protect "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 624.

102. Gallup did not ask the question in 2003, but Pew obtained this result to a similar question. PEW POLL, *supra* note 2.

movement achieved a tremendous victory with the Court's overruling of *Bowers*. Professor Jack Balkin posted the following hypothetical response to Justice Scalia's question, under the title "Supreme Court Arguments We'd Like to See":

JUSTICE SCALIA: You—you've led me right into a question I was going to ask. . . . I'm curious, when -when did—when did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? . . .

MR. OLSON: Well, according to your dissent in *Lawrence v. Texas*, the Court decided that issue in 2003.<sup>103</sup>

*Lawrence's* five-to-four overruling of *Bowers* and invalidation of consensual sodomy prohibitions—with an additional vote from Justice O'Connor for the outcome, on more limited grounds—dramatically changed DOMA's prospects.<sup>104</sup>

In striking down criminal prohibitions on consensual sodomy under a due process analysis, Justice Kennedy wrote eloquently about the harms such laws inflict on dignity, liberty, and equality. More generally, and of enormous consequence for marriage equality, the Court strongly rejected Justice Scalia's originalism as an appropriate methodology and relied instead on the approach of the *Casey* joint opinion:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>105</sup>

The Court, however, expressly reserved the issue of marriage, writing that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>106</sup> Justice Scalia responded: "Do not believe it."<sup>107</sup> Accusing the Court of deception, he wrote, "[t]he Court today pretends . . . that we need not fear judicial imposition of homosexual marriage . . ."<sup>108</sup> Justice Scalia interpreted the Court's opinion as definitely (and wrongly) deciding the issue: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."<sup>109</sup>

103. Jack Balkin, *Supreme Court Arguments We'd Like to See*, BALKINIZATION (Mar. 26, 2013, 8:30 PM), <http://balkin.blogspot.com/2013/03/supreme-court-arguments-wed-like-to-see.html>.

104. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

105. *Id.* at 578–79.

106. *Id.* at 578.

107. *Id.* at 604 (Scalia, J., dissenting).

108. *Id.*

109. *Id.* at 605.

## 2013: Windsor and Shelby County

As of the writing of this Essay in 2013, the Court still has not held that it is “unconstitutional to exclude homosexual couples from marriage.” *Windsor* reached only the federal government’s discrimination against marriages that states have chosen to recognize. The federal government’s deviation from its traditional recognition of state marriages raised suspicions, confirmed by the Court, of a lack of legitimate purpose. In a dissent that strongly echoed his *Lawrence* dissent, Justice Scalia accused the Court of intentionally “fooling . . . readers” about the import of its decision.<sup>110</sup> He ridiculed the Court for “jaw-dropping” and “rootless and shifting”<sup>111</sup> reasoning, and “legalistic argle-bargle”<sup>112</sup> that he speculated the Court had designed “to support its pretense” that it left “the second, state-law shoe to be dropped later,”<sup>113</sup> which he predicted “will of a certitude”<sup>114</sup> happen. An imagined response along Professor Balkin’s lines thus now might add: “And, Justice Scalia, according to your *Windsor* dissent, the Court eliminated any remaining doubt in 2013.”

To conclude this chronology, I consider 2013’s significance both in strengthening the marriage equality movement (along the lines Justice Scalia predicts but deplors) and in diminishing the 1980s originalism movement (perhaps something Justice Scalia fears, which may help explain the bitter tone of his *Lawrence* and *Windsor* dissents). Regarding future marriage equality claims, the four dissenters were not all with Justice Scalia: all expressed strong views that DOMA is constitutional, but contrary to Justice Scalia (joined only by Justice Thomas in the merits discussion), Chief Justice Roberts and Justice Alito emphasized the limited nature of the Court’s holding and the influence of federalism concerns that would not be present in a state law challenge.<sup>115</sup> Their analysis seems designed to encourage litigants and lower courts (and perhaps a future changed Court) to distinguish *Windsor*, while Justice Scalia’s dissent surely will be cited in support of challenges to state discrimination.<sup>116</sup>

Chief Justice Roberts and Justice Alito are technically correct about the limited and restrained nature of *Windsor*’s holding, but Justice Scalia seems accurate in forecasting how the current Court would vote. A portion of his dissent cleverly quoted the Court’s opinion at length, omitting words that limited the reasoning to

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110. United States v. Windsor, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting).

111. *Id.* at 2698, 2705.

112. *Id.* at 2709.

113. *Id.* at 2705.

114. *Id.* at 2710.

115. See *id.* at 2696 (Roberts, J., dissenting), 2711 (Alito, J., dissenting).

116. See *id.* at 2697 (Scalia, J., dissenting). Justice Scalia nonetheless encouraged lower courts to “take the Court at its word and distinguish away.” *Id.* at 2709. The day of the decision, Professor Laurence Tribe provided an insightful analysis of the contradictions and “troublesome cynicism” in Justice Scalia’s dissent and the “delicate blend of principle and politics” behind the Supreme Court’s decision. Larry Tribe, *DOMA, Prop 8, and Justice Scalia’s Intemperate Dissent*, SCOTUSBLOG (June 26, 2013, 2:24 PM), <http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/>.

the federal context.<sup>117</sup> He opined that the ease with which the passages are transposable is deliberate, intended to facilitate that last step toward full marriage equality.<sup>118</sup> Justice Scalia further charged the Court with, in effect, calling DOMA's supporters "monsters," "enemies of the human race," "enem[ies] of human decency," and people with "hateful hearts."<sup>119</sup>

The Court does not come close to meriting such charges, nor is anything underhanded about ruling modestly about only the federal law at issue. A broader ruling that reached the appropriate standard of review for sexual orientation discrimination would have provided clearer direction, but the Court instead unsurprisingly applied the enhanced form of rational basis review from *Moreno*, *Cleburne*, and *Romer*, as well as the early sex discrimination cases, where the Court saw reason for suspicion and "careful consideration" including of the actual purpose behind the discrimination.<sup>120</sup> The *Windsor* majority took great care to explain the process of evolution in Americans' views on marriage, for example, describing "the beginnings of a new perspective, a new insight."<sup>121</sup> The point is not that DOMA's purpose reveals bad people who are enemies of human decency, but that people of good will and thoughtful consideration can evolve in their understandings of human dignity and equality—as we as a nation have in our understanding of why *Plessy* was wrong and why it was illegitimate (though understandable) for the government to privilege men based on a presumption they are the family breadwinners. Someone who once failed to recognize women's "pedestal" as a cage is no "monster" with a "hateful heart"—but today we do recognize the cage.<sup>122</sup>

Barring a change in the composition of the Court by the replacement of one of the five in the *Windsor* majority—and I would predict even then—the Court almost certainly will hold it "unconstitutional to exclude homosexual couples from marriage" and likely soon. Closely related, I predict that 2013 will accelerate the demise of the 1980s school of originalism. The *Windsor* majority adheres to and strengthens traditional interpretive methods that allow doctrinal evolution in response to social changes, as revealed in *Lawrence*, *Casey*, *Griswold*, *Loving*, and *Brown*. Indeed, those earlier cases may suggest that Scalia/Bork/Meese originalism was all but dead even before *Windsor*; the now-discredited 1986 *Bowers* opinion stands as its modern high-water mark.

Focusing on the decline of 1980s originalism as a legal doctrine, however, would miss its significance as a political movement and organizing device that

117. *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

118. *Id.* at 2710.

119. *Id.* at 2707–11.

120. The Court twice quoted *Romer*'s call for "careful consideration" of "discriminations of an unusual character." *Id.* at 2692–93 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

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

122. For example, even as Justice Brennan wrote his landmark *Frontiero* plurality opinion, he initially refused to hire female law clerks and expressed the view he would not be able to serve on the Court if a woman ever were appointed. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); STERN & WERMIEL, *supra* note 25, at 386–77.

continues today, especially within the Republican Party, as evidenced in judicial confirmation hearings and the Tea Party movement.<sup>123</sup> It is in combatting 1980s originalism as an organizing and rhetorical device used to delegitimize progressive constitutionalism that 2013 may prove particularly consequential. The ultimate achievement of marriage equality throughout the nation now appears a matter of time, in large part because younger Americans are by far the most supportive. Indeed, 72% of Americans, and 59% of even those opposed to allowing same-sex marriage, describe an end to marriage discrimination as “inevitable.”<sup>124</sup> And marriage equality as a constitutional matter is simply irreconcilable with any rigidly narrow form of originalism, perhaps even more inescapably than was the case with *Brown*, *Loving*, *Frontiero*, *Griswold*, and *Roe*, both as a methodological matter and, as important, in ways apparent to an American public that has lived through and increasingly embraces constitutional change at dramatic odds with the Framers’ original expectations and narrow original meanings.<sup>125</sup> As more and more Americans see the same-sex marriages of their family, friends, and neighbors treated under the law with equal dignity, as Walter Dellinger has observed, “at work” will be “the enormous effect” of what Professor Charles Black, writing of race, described as the “normative power of the actual.”<sup>126</sup>

The year 2013 may also prove significant in the demise of 1980s originalism because of a decision the Court issued the day before *Windsor* and *Perry*. At the same time Justice Kennedy led the Court to advance equality for gays and lesbians, he joined the *dissenting* Justices in *Windsor* to form a majority to invalidate a core provision of the federal Voting Rights Act, to the detriment of racial equality in political participation.<sup>127</sup> A thorough discussion of *Shelby County* is beyond the scope of this Essay, but worthy of note, in addition to the strikingly different outcomes for race and sexual orientation, is the fact Justices Scalia and Thomas abandoned originalism and joined an opinion that focused instead on the changed conditions for racial minorities in the years since Congress first passed the Act.<sup>128</sup> The Court concluded that the improved political standing of racial minorities meant that Congress’s intrusions on state sovereignty no longer were justified— notwithstanding that the section of the Fifteenth Amendment at issue by its plain and original meaning conferred on Congress the authority both to intrude upon state sovereignty to protect equality in voting and, equally fundamental, to make any necessary judgments about what current conditions require. Justice Ginsburg’s

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123. From the outset and increasingly over time, originalism has proven far more powerful as political matter. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 546, 554 (2006) (“Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement.”).

124. PEW POLL, *supra* note 2.

125. Professor Bill Marshall has powerfully demonstrated the utter failure of rigid originalism to explain several landmark cases. William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 *OHIO ST. L.J.* 1251 (2011).

126. Dellinger, *supra* note 97.

127. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

128. See *id.*

dissent detailed the arguments from the constitutional text and original meaning, as well as other considerations that dictated judicial deference to Congress.<sup>129</sup> The majority did not directly dispute that rational basis review was the appropriate standard, but it in fact applied a heightened form of rational basis review and in the end inappropriately substituted its judgment for that of Congress.<sup>130</sup>

*Shelby County*, of course, is far from the first time Justice Scalia has abandoned originalism. His concurrence in *Adarand* similarly held unconstitutional a federal provision designed to benefit racial minorities.<sup>131</sup> Although both opinions deviated from the originalism generally promoted by the Reagan/Meese agenda, they both fulfilled objectives endorsed in that agenda—specifically, the expansion of state sovereignty, the diminishment of congressional authority to enact legislation to protect the rights of racial minorities, and an end to affirmative action.<sup>132</sup>

The failure of originalism's principal adherents on the Court to employ it in *Shelby County* should undermine any future efforts to limit the constitutional guarantees of liberty and equal protection to the specific meanings, understandings, and prejudices of 1791 and 1868. Those specific meanings and prejudices, as 1980s originalism would have reflected them, plainly would have precluded the meaningful constitutional protections the Court has afforded the equal dignity and liberty of women and gays and lesbians, back at least half a century to *Griswold*'s recognition of married women's right to use contraception to avoid and control the timing of motherhood. With *Windsor* and *Shelby County*, June 2013 marks what should prove to be a decisive rejection of narrow originalism and a reaffirmation of our nation's longstanding constitutional commitment to respecting evolving social understandings of what constitutes equal protection and liberty for those we once marginalized and stereotyped through the force of law. Conversations about originalisms, plural, and the ways in which we all may be originalists and living constitutionalists will endure, as they should. Notwithstanding continued major disagreements on a host of particulars, we seem finally to have progressed beyond the originalism of *Bowers v. Hardwick*, in favor of a lasting embrace of a remarkably successful, adaptable, and inclusive Constitution, in Chief Justice Marshall's words, "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."<sup>133</sup>

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129. *Id.* at 2632 (Ginsburg, J., dissenting). One "success" of 1980s originalism may be the heightened attention of judges, scholars, and advocates to originalism, including in an effort to hold Justices Scalia and Thomas accountable.

130. *See id.* (majority opinion).

131. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *see also* *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013). Linda Greenhouse thoughtfully and cogently analyzed the role "current conditions" played in the Court's decisions in *Shelby County*, *Fisher*, and *Windsor*. *See* Greenhouse, *supra* note 82.

132. *See* Johnsen, *supra* note 79, at 389–92 (discussing GUIDELINES, *supra* note 77); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987).

133. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

*Conclusion*

I conclude this Essay with another chronology, this one of a personal nature. The day after the Court decided *Windsor*, my sister Jennifer Johnsen celebrated her fourth wedding anniversary, and she posted the following on her Facebook page to explain the legal trajectory of her relationship with my sister-in-law Dawn Guarriello<sup>134</sup>:

We have more anniversaries than most couples, which I know is confusing! Here's the breakdown for those of you who asked:

9/6/86 — started dating

8/10/96 — commitment ceremony (we thought there was a good chance we'd never be able to get married)

6/27/09 — state marriage (in CT because NY wouldn't perform them but recognized out-of-state same-sex marriages)

9/6/09 — NY wedding with family and friends (we recycled our original anniversary)

And now finally on 6/26/13 we have a legally fully recognized marriage<sup>135</sup>

As I read this post, I was struck of course by the injustice and personal cost, and also by the connections between the personal and the legal. Jennifer and Dawn have been together for twenty-seven years, since 1986, coincidentally the year the Court held in *Bowers* that they could constitutionally be *imprisoned* for their relationship. Ten years later, they despaired of ever being able to marry and held a small, necessarily unofficial commitment ceremony in my parents' backyard. That was 1996, the year Congress enacted DOMA. They married four years ago, in 2009, when their home state of New York refused to perform their marriage but would recognize an out-of-state marriage. In 2011, New York became the eighth state to end marriage discrimination. In 2013, the Court held DOMA unconstitutional and their relationship finally is afforded equal legal status.

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134. I thank Jennifer and Dawn for allowing me to share their story, and I dedicate this Essay to them and to the memory of my father, Donald Johnsen. My father's willingness to work seemingly endless hours at second and third jobs enabled his four children to attain educational and life advantages he did not enjoy. His loving heart, open mind, and deep patriotism all helped drive his ever-evolving views on race, gender, and sexual orientation, shared in countless patient conversations. His personal journey and efforts, echoed in similar stories in so many American families, strengthen in me an enduring optimism for our country's continued progress toward our constitutional commitments to equality and justice.

135. Facebook Post by Jennifer Johnsen, FACEBOOK (June 27, 2013) (on file with the author).

As of 2013, almost sixty-two percent of Americans live in states that will not allow individuals of the same sex to marry, including my state of Indiana, where the legislature has passed a proposed amendment to write that discrimination into the state constitution, as most states already have. Legislative action in 2014 will determine whether the proposed amendment goes to the public in a ballot question. “When did it become unconstitutional to exclude homosexuals from marriage?” The process toward “a more perfect union” continues.<sup>136</sup>

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136. “We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl.