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Introduction

In June 2013, the Supreme Court of the United States issued rulings in two cases dealing with issues of same-sex couples' constitutional rights to marry and to have their marriages recognized. In *Hollingsworth v. Perry*, the Court failed to reach the merits of the question whether California's initiative that amended the state constitution to strip same-sex couples of their right to marry violated the Constitution of the United States; instead, the Court dismissed the case because the ballot sponsors attempting to appeal their losses in the federal district court and court of appeals lacked standing under Article III of the U.S. Constitution.[1] In *United States v. Windsor*, the Court held unconstitutional Section 3 of the so-called Defense of Marriage Act (DOMA), which had purported to define "marriage" for federal law purposes as a "union of one man and one woman," requiring the federal government to ignore the marriages many same-sex couples had by then entered in various U.S. states or other countries.[2]

In *Windsor*'s wake we have seen a metaphoric "tidal wave" of litigation[3] in every state that still excludes same-sex couples from marriage, as well as Puerto Rico, brought by same-sex couples seeking the right to marry under the Due Process

* Professor of Law, University of Southern California Gould School of Law. I am grateful to my fellow panelists and the audience at the Indiana Journal of Law and Social Equality Symposium, "Social Equality: 'At Home and Abroad,'" where I presented an earlier version of this Article on a panel on "Equality in Marriage and the Family," and to Steve Greene, for their helpful comments and questions, as well as to Melissa Shinto and Kyle Jones for their excellent research assistance.

1. 133 S. Ct. 2652 (2013).
2. 133 S. Ct. 2675 (2013).
3. Bourke v. Beshear, 996 F. Supp. 2d 542, 546 & n.6 (W.D. Ky. 2014).

and/or Equal Protection Clauses of the Constitution. As of Labor Day 2014, the cases that had ruled on preliminary or final relief for same-sex couples seeking to secure the right to marry or to live their lives as a married couple in their home states after marrying elsewhere have unanimously ruled in favor of marriage equality/same-sex couples' access to civil marriage; with but three outliers alongside fifty-seven marriage equality vindications in such cases as of December 8, 2014, almost ninety-five percent of post-*Windsor* cases have supported marriage equality.[4]

Part I of this Article sketches the virtually unbroken string of pro-marriage decisions between *Windsor* and Labor Day 2014 to give a sense of the size and magnitude of this "tidal wave" of precedent. Next, Part II briefly explores some of the reasons that might help account for the flood of litigation and overwhelmingly positive outcomes. Part III tentatively suggests one way this flow of decisions in favor of marriage equality might influence the Supreme Court when it returns to the issue, and then shows one particular aspect of *Windsor*'s wake: the way it has helped lower federal courts nearly unanimously conclude that doctrinal developments after the Supreme Court summarily rejected a same-sex couple's constitutional claims to a right to marry in *Baker v. Nelson* in 1972[5] have rendered that decision no longer dispositive. Although *Baker* would in no event prevent the Supreme Court itself from revisiting the constitutional issues, the ability to declare *Baker* doctrinally undermined has positive repercussions for the social equality and lived reality of same-sex couples across the country in the meantime. Finally, Part IV of the Article addresses some of the ways in which *United States v. Windsor* itself developed

4. *See* Adam Polaski, *Federal Judge in Mississippi Rules Marriage Ban Unconstitutional*, Freedom to Marry (Nov. 25, 2014, 9:08 PM), http://www.freedomtomarry.org/blog/entry/federal-judge-in-mississippi-rules-marriage-ban-unconstitutional ("[The November 25, 2014, federal district court ruling holding Mississippi's marriage ban unconstitutional was] the 56th court ruling since June 2013 in favor of the freedom to marry. Just four courts—most notably, the U.S. Court of Appeals for the 6th Circuit—upheld marriage discrimination. Plaintiffs from the 6th Circuit cases, out of Kentucky, Michigan, Ohio and Tennessee, are now seeking review from that out-of-step ruling from the United States Supreme Court. The plaintiffs in a case out of Louisiana, where a federal judge upheld marriage discrimination in September, are also seeking Supreme Court review."); *see also Marriage Rulings in the Courts*, Freedom to Marry http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last updated Dec. 8, 2014) ("There have been 57 victories for the freedom to marry since June 2013, when the U.S. Supreme Court struck down the core of the so-called Defense of Marriage Act in *Windsor v. United States*. Thirty-six pro-marriage rulings have been issued in federal court, sixteen have been issued in state court, and five have been issued by a federal appellate court. . . . In four cases, judges have upheld laws denying the freedom to marry to same-sex couples: The U.S. Court of Appeals for the 6th Circuit upheld bans in KY, MI, OH and TN; federal judges have upheld discrimination in Louisiana and Puerto Rico; and a Tennessee state court case denied respect for a couple's marriage for the purpose of the marriage's dissolution."). The Tennessee couple was not seeking the right to live together as a married couple. *See infra* text accompanying notes 163–68.

5. 409 U.S. 810 (1972).

constitutional doctrine in ways that advance the cause of constitutional justice and same-sex couples' rights to equal protection and to marry.

I. The Torrent of *Windsor*'s Wake

United States v. Windsor was decided June 26, 2013.[6] Less than a month later, on July 22, an Ohio federal court in *Obergefell v. Kasich*, relying on *Windsor* and the Equal Protection Clause of the Fourteenth Amendment, granted a preliminary injunction requiring the state to recognize the Maryland marriage of an Ohio couple, one of whom was terminally ill.[7] On September 27, a New Jersey court in *Garden State Equality v. Dow* relied on *Windsor* to hold that civil unions failed to provide same-sex couples the full equality required by the state constitution;[8] when New Jersey chose not to appeal, marriage equality became the law in the Garden State. On December 10, a federal court in Illinois in *Lee v. Orr*, following an earlier decision for one couple, relied on *Windsor* and the Equal Protection Clause to grant a temporary restraining order and a preliminary injunction requiring Illinois to let a class of medically critical plaintiffs marry in advance of the July 1 effective date for the new state law allowing same-sex couples to marry.[9] Just over a week later, on December 19, New Mexico's high court relied on *Windsor* to hold in *Griego v. Oliver* that the state constitution's equal protection clause required same-sex couples be allowed to marry.[10] The next day, December 20, a federal court in Utah in *Kitchen v. Herbert* relied on *Windsor* to grant summary judgment on federal equal protection and due process claims, requiring the state to let same-sex couples marry and to recognize their marriages from other jurisdictions[11] and resulting in hundreds of couples marrying there before the U.S. Supreme Court eventually stepped in to stay the judgment pending appeal.[12] Three days later, on December 23, the same federal judge in Ohio who ruled in *Obergefell v. Kasich*, now acting under the case name *Obergefell v. Wymyslo* (*Obergefell II*), granted a declaratory judgment and permanent injunction requiring Ohio to recognize marriages of same-sex couples from other states on death certificates—a conclusion which Judge Timothy Black said "flow[ed] from the *Windsor* decision of the United States Supreme Court."[13]

After the public enjoyed a break for the holidays, on January 14, 2014, a federal court in Oklahoma decided *Bishop v. United States ex rel. Holder*, granting summary judgment in favor of the plaintiffs challenging the state's marriage

6. 133 S. Ct. 2675 (2013).
7. No. 1:13-CV-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013).
8. 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013).
9. No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013).
10. 316 P.3d 865 (N.M. 2013).
11. 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).
12. Herbert v. Kitchen, 134 S. Ct. 893 (2014).
13. 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013).

exclusion laws, citing *Windsor*.[14] Less than a month later, on February 12, a federal court in Kentucky in *Bourke v. Beshear* relied on *Windsor* and granted the plaintiff couple a final judgment requiring the state to recognize valid marriages of same-sex couples from other jurisdictions as a matter of federal equal protection law.[15] The next day, a second federal court gave the country a Valentine's present: On February 13 a Virginia federal court granted the plaintiffs summary judgment in *Bostic v. Rainey*,[16] a marriage case joined by Prop 8-challenging attorneys Ted Olson and David Boies. It ruled, again relying on *Windsor*, that the Constitution requires Virginia to let same-sex couples marry and to recognize their marriages from other jurisdictions.[17] A week-and-a-half later, on February 21, a federal court in Illinois granted unopposed final summary judgment in *Lee v. Orr II* requiring the state to allow marriage for all gay and lesbian couples in Cook County immediately, not July 1 when the state legislature's new law opening civil marriage to same-sex couples was to go into effect.[18] Less than a week later, on February 26, a federal court in Texas in *De Leon v. Perry* relied on *Windsor* to grant the plaintiffs a preliminary injunction requiring the state to allow same-sex couples to marry and to recognize such marriages from other jurisdictions.[19] Less than two-and-a-half weeks after that, on March 14, a federal court in Tennessee in *Tanco v. Haslam* invoked *Windsor* in granting a preliminary injunction requiring interstate recognition of validly contracted marriages of three same-sex couples.[20] The week after that, on March 21, a federal court in Michigan ruled in *DeBoer v. Snyder*, citing *Windsor*, and granting the plaintiffs a permanent injunction requiring marriage (and it seems, recognition of marriages from other jurisdictions)[21] following a trial that eviscerated the junk science of Mark Regnerus.[22]

Three weeks plus a weekend later, on April 14, the same judge of the U.S. District Court for the Southern District of Ohio who ruled in the *Obergefell* litigation relied on *Windsor* and granted permanent injunctive relief in *Henry v. Himes* against *any* enforcement of Ohio's laws refusing to recognize valid marriages of same-sex couples contracted elsewhere, concluding that the state's marriage recognition

14. 962 F. Supp. 2d 1252, 1258, 1279, 1288, 1294, 1296 (N.D. Okla. 2014), *aff'd and stay granted sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014).
15. 996 F. Supp. 2d 542, 548−50 & n.14, 557−58 (W.D. Ky. 2014).
16. 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).
17. *Id.* at 475−76, 483−84.
18. Lee v. Orr (*Lee v. Orr II*), No. 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014).
19. 975 F. Supp. 2d 632, 639−40, 655, 659, 662 (W.D. Tex. 2014).
20. 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *stay denied sub nom.* Jesty v. Haslam, No. 3:13-CV-01159, 2014 WL 1117069 (M.D. Tenn. Mar. 20, 2014).
21. 973 F. Supp. 2d 757 (E.D. Mich. 2014).
22. *Id.* at 765−66 ("The Court finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration.").

ban "is facially unconstitutional and unenforceable in any context whatsoever."[23] Four days after that, relying on *Windsor* for both standing and its merits analysis, a federal court in Indiana granted a temporary restraining order requiring the state to recognize an out-of-state marriage of a lesbian couple, one of whom was diagnosed with terminal cancer, in *Baskin v. Bogan*.[24] The court extended this to a preliminary injunction on May 8, relying on *Windsor* and post-*Windsor* district court decisions to find a likelihood of success.[25] Five days later, a federal magistrate judge held Idaho's marriage exclusion laws unconstitutional in *Latta v. Otter*, again relying on *Windsor*.[26] Less than a week later, a different federal trial judge in Utah relied on *Windsor* in *Evans v. Utah* and preliminarily enjoined the state from denying recognition to those same-sex couples married lawfully between *Kitchen v. Herbert* and the Supreme Court's issuance of a stay of that judgment.[27] The same day as *Evans*, a federal district court in *Geiger v. Kitzhaber* relied on *Windsor* and held Oregon's marriage exclusions unconstitutional.[28] The next day, a federal district court relied on *Windsor* in ruling in *Whitewood v. Wolf* that Pennsylvania's marriage exclusions were unconstitutional.[29]

Two-and-a-half weeks later, on June 6, in a different *Wolf* case, *Wolf v. Walker*, a federal court invoked *Windsor* and held Wisconsin's marriage exclusions unconstitutional.[30] Less than three weeks later the federal court in *Baskin v. Bogan* extended the preliminary injunction against Indiana's marriage exclusions to a permanent injunction.[31] The same day, the U.S. Court of Appeals for the Tenth Circuit affirmed *Kitchen v. Herbert* by a two-to-one vote, with the majority relying on *Windsor*.[32] Six days later, on July 1, the federal court that ruled in *Bourke v. Beshear* extended its holding from interstate recognition to the right to enter into marriage in Kentucky, holding in the poetically named *Love v. Beshear* that the state's marriage exclusion violated the Equal Protection Clause of the U.S. Constitution.[33]

Less than three weeks later, on July 18, the same U.S. Court of Appeals for the Tenth Circuit panel majority that struck down Utah's marriage exclusions continued

23. 14 F. Supp. 3d 1036, 1044 (S.D. Ohio 2014). The court did allow the parties to brief whether or not this injunction should be stayed pending appeal, *id.* at 1062 n.27, and on April 16 granted such a stay of the facial invalidation but not of the injunctive relief as applied to the specific plaintiff couples. Henry v. Himes, No. 1:14-CV-129, 2014 WL 1512541 (S.D. Ohio Apr. 16, 2014).
24. 12 F. Supp. 3d 1137 (S.D. Ind. 2014).
25. Baskin v. Bogan, 983 F. Supp. 2d 1021, 1026−27 (S.D. Ind. 2014).
26. 19 F. Supp. 3d 1054, 1059−60, 1075−77, 1080, 1082, 1084−87 (D. Idaho 2014).
27. 21 F. Supp. 3d 1192, 1196−98, 1202−03, 1214−15 (D. Utah 2014).
28. 994 F. Supp. 2d 1128, 1138−39, 1147−48 (D. Or. 2014).
29. 992 F. Supp. 2d 410, 421, 424−26, 431 (M.D. Pa. 2014).
30. 986 F. Supp. 2d 982, 986−87, 990−91, 1010, 1015, 1017−18, 1023−24 (W.D. Wis. 2014).
31. 12 F. Supp. 3d 1144, 1164−65 (S.D. Ind. 2014).
32. 755 F.3d 1193, 1199, 1213−16, 1226, 1228 (10th Cir. 2014).
33. 989 F. Supp. 2d 536 (W.D. Ky. 2014).

the summer loving, holding Oklahoma's marriage exclusions unconstitutional in *Bishop v. Smith*.[34] Ten days later, the U.S. Court of Appeals for the Fourth Circuit became the second federal appeals court to hold state marriage exclusions unconstitutional, relying on *Windsor* and ruling two-to-one in *Bostic v. Schaefer* that Virginia's exclusion of same-sex couples from civil marriage, like its earlier exclusion of different-race couples, violated the fundamental right to marry protected by the U.S. Constitution.[35] Three-and-a-half-weeks later, in the final marriage ruling before Labor Day 2014, a federal district court also invoked *Windsor* and granted same-sex couples a preliminary injunction against enforcement of Florida's marriage exclusions.[36]

II. Explanations for *Windsor*'s Wake

Why are we seeing what the Kentucky decision of *Bourke v. Beshear* called "a virtual tidal wave of . . . judicial judgments in other states [that] have repealed, invalidated, or otherwise abrogated state laws restricting same-sex couples' access to marriage and marriage recognition"?[37] Why are we seeing so much litigation and such uniformly positive results? The answers are probably overdetermined.

The post-*Windsor* precedential landscape may seem more striking due to the seeming rapidity with which it has been shaped by the lower courts—dozens of rulings with victories for marriage equality within fourteen months after *Windsor*. Some of this speed is genuine. Cincinnati couple James Obergefell and John Arthur flew to Maryland to marry on July 11 and secured a temporary restraining order on July 22;[38] on September 26 an Ohio funeral director joined the suit as a plaintiff to broaden the scope of the litigation and eventual relief.[39] The plaintiffs in the Illinois, Kentucky, Virginia, Tennessee, New Mexico, and Utah cases described above all filed their suits no earlier than the U.S. Supreme Court's arguments in the marriage cases in March 2013. Other cases, however, preceded the Supreme Court's consideration of *Windsor*. The original complaint in the Michigan case was filed in 2012;[40] the New Jersey case in 2011;[41] and the Oklahoma suit in 2004.[42]

34. 760 F.3d 1070 (10th Cir. 2014).
35. 760 F.3d 352, 377−79 (4th Cir. 2014).
36. Brenner v. Scott, 999 F. Supp. 2d 1278, 1281, 1293 (N.D. Fla. 2014).
37. 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014).
38. Obergefell v. Kasich, No. 1:13–cv–501, 2013 WL 3814262, at *2, *7 (S.D. Ohio July 22, 2013).
39. *See* Second Amended Complaint for Temporary Restraining Order and Declaratory and Injunctive Relief, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (No. 13-cv-501) (filed Sept. 26, 2013).
40. Complaint for Declaratory and Injunctive Relief, Deboer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 2:12-cv-10285) (filed Jan. 23, 2012).
41. Complaint, Garden State Equality v. Dow, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (No. ML-001729-11) (filed June 29, 2011).
42. Complaint, Bishop v. Oklahoma, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (No. 4:04-cv-848) (filed Nov. 3, 2004).

Windsor may thus be seen as an accelerator for these cases.

Although some of this litigation pre-dated *Windsor*, why are we seeing *so much* now—at least eighty-six cases in Puerto Rico and every state that did not allow same-sex couples to marry?[43] The motivations of same-sex couples offer a partial explanation. Many same-sex couples want to marry. They want to secure the legal protections for their relationship, and for the children that many of them are raising, that marriage affords. Like Indiana marriage plaintiffs Lane Stumler and Michael Drury, they are sick of being treated as second-class citizens by governments that are supposed to serve us all:

> Stumler, 66, said he is now motivated to stand up for his rights after seeing gay rights openly discussed each day in the media debating "my worth as a human being or trying to decide [if] the DNA I was born [with] disqualifies me from being equal to everyone else." Drury said public opinion has evolved to be more accepting of same-sex couples, and he is ready for Indiana leaders to catch up.[44]

They are sick of waiting, and they believe that justice delayed is justice denied. For example, as one news story reported:

> [Another Indiana marriage plaintiff Jo Ann] Dale said U.S. vs. Windsor has caused a lot of confusion for same-sex couples trying to understand what their rights are, and it's made some in Indiana impatient with the state's stand against gay marriage. "Right now is the time," she said. "Let's clear it up. Let's get it straightened out. Let's make sure it is the same understanding everywhere."[45]

Part of the wave of marriage equality litigation can be explained as the concerted effort of national advocacy organizations, loosely comparable to the campaign against segregation waged by the NAACP.[46] In the words of the ACLU of Florida:

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43. Pending Marriage Equality Cases, Lambda Legal (2014), http://www.lambdalegal.org/sites/default/files/pending_marriage_equality_cases_as_of_12-18.pdf (scorecard as of Dec. 18, 2014).

44. Gary Popp, *Southern Indiana Couples Want Equal Rights in Same-Sex Suit*, News & Trib. (Mar. 7, 2014), http://www.newsandtribune.com/news/clark_county/p-m-update-southern-indiana-couples-want-equal-rights-in/article_daef5e28-5444-51c9-823f-ce-2ab961bd97.html.

45. *Id.*

46. *Cf., e.g.*, Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 Wm. & Mary J. Women & L. 5, 8–12 (2000) (describing NAACP campaign to overturn segregation).

> Following our victory last June in the Windsor case at the Supreme Court, which largely ended federal marriage discrimination . . . the ACLU has been organizing legislative and ballot initiatives and also building lawsuits across the country–so far in Pennsylvania, Virginia, North Carolina, and Oregon–to ensure that the case that reaches the Supreme Court next leads to the nationwide solution we are all working so hard for.[47]

And the advocacy organizations have understandably filed suits in many states that offer same-sex couples *no* relationship recognition following the seemingly baffled responses of several Justices at oral argument in the Prop 8 case *Perry* to suggestions that it rule narrowly that it is unconstitutional for states to offer same-sex couples everything but the official status of "marriage." Justice Kennedy, for example, when Ted Olson asked the Court to invalidate all marriage bans, suggested:

> The rationale of the Ninth Circuit was much more narrow. It basically said that California, which has been more generous, more open to protecting same-sex couples than almost any State in the Union, just didn't go far enough, and it's being penalized for not going far enough. That's a very odd rationale on which to sustain this opinion.[48]

Justices Alito, Roberts, Ginsburg, Breyer, and Sotomayor all expressed similar sentiments. I believe this line of questioning reflected confusion between conditions sufficient for a marriage regime's unconstitutionality and conditions *necessary* for unconstitutionality. That is, those challenging California's Proposition 8 were not arguing that it was *necessary* to the unconstitutionality of a state's relationship recognition laws that they offer same-sex couples all the same legal consequences but withhold the designation "marriage." Rather, they were arguing that the existence of a parallel domestic partnership status under state law showed that the state had no functional justification for denying same-sex couples access to civil marriage and so *sufficed* to make California's marriage exclusion unconstitutional. Be that as it may, the reactions of the Justices make sensible the targeting of states that do *nothing* for same-sex couples and their families for constitutional challenges after *Perry* and *Windsor*.

47. John M. Becker, *Six Couples Sue to Overturn Florida Marriage Ban*, Bilerico Project (Jan. 21, 2014), http://www.bilerico.com/2014/01/six_couples_sue_to_overturn_florida_marriage_ban.php.
48. Transcript of Oral Argument at 42−43, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

Moreover, the successes in *Windsor*'s wake are themselves breeding further litigation: "Courts throughout the country are recognizing that this is an issue of basic dignity and fundamental fairness," explained an attorney in one challenge to Florida's marriage exclusion.[49] In the words of the ACLU of Florida: "We are hopeful that the court hearing this case will agree with courts across the country that the Constitution requires that same-sex couples be permitted to marry."[50] An attorney for Indiana plaintiffs explained to the press: "We are asking the Indiana federal court to recognize what every other court in the country has recognized" since *Windsor*.[51]

III. The Impacts of *Windsor*: The Supreme Court, the Dynamic Meaning of *Windsor*, and the Insignificance of *Baker v. Nelson*

This Part addresses two aspects of the possible impact of *United States v. Windsor*. First, it briefly broaches the possibility that the meaning of *Windsor* will be determined in a dynamic process in which the spreading consensus on *Windsor*'s implications for state marriage exclusions will influence courts'—or at least the Supreme Court's—future understanding of *Windsor*. Second, this Part in more detail evaluates lower courts' near-unanimous conclusion that the Supreme Court's summary 1972 decision in *Baker v. Nelson*, rejecting due process and equal protection challenges to state laws excluding same-sex couples from civil marriage, has been swept away by subsequent doctrinal developments. Although not every facet of the lower courts' reasoning on this point is persuasive, most of the argument is sound, and these courts have been right not to let *Baker* preclude them from doing justice under the Constitution to the real people who have turned to them for vindication of their rights.

A. The Potential Relevance of Windsor *to its Ultimate Meaning*

Part of the reason I presented the extent of marriage equality precedent after *United States v. Windsor* in some detail in Part I above is that it is plausible that this dramatic consensus among the lower courts might influence the federal courts of appeals and even the U.S. Supreme Court in their resolution of the constitutionality or unconstitutionality of state marriage exclusions in *Windsor*'s wake. When the Supreme Court decides a case without a majority opinion,[52] black letter doctrine

49. Equal. Fla. Inst. & Nat'l Ctr. for Lesbian Rights, Six Same-Sex Couples and Equality Florida Institute File Lawsuit Seeking the Freedom to Marry in Florida (2014), http://eqfl.org/sites/default/files/images/pr012114.pdf.

50. Becker, *supra* note 47.

51. Popp, *supra* note 44.

52. *Windsor* was decided by a majority opinion, but the analogical relevance of the discussion above will be made explicit.

from *Marks v. United States* is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds."[53] This means that the position of a plurality of Justices need not state the holding; a single Justice concurring in the judgment states the holding if her or his position is narrower. Yet the *Marks* inquiry is not as straightforward as that formulation might suggest, for the Court has never defined what makes reasoning narrow or the narrowest; "[c]onsequently, for decades, commentators and judges alike have vocally lamented the opacity of this instruction."[54]

Scholarship by Justin Marceau from the University of Denver, however, has argued that when the Supreme Court decides cases without a majority opinion, thus leaving the actual holding of the case up to contestation under *Marks*, the Supreme Court in future decisions tends to read such cases as holding in accordance with a plurality opinion if the lower courts have converged on that position. "If lower courts settle on the holding of a Supreme Court plurality, then the Court is likely to embrace that as the law of the land."[55] Thus, in Professor Marceau's view, "the *Marks* rule is less a device for divining clear precedent and more profitably viewed as an invitation for a referendum among the lower courts on the statutory or constitutional question at issue."[56]

Windsor was not a plurality decision, but in not resolving the constitutionality of state marriage bans[57] or refusals to give interstate recognition to same-sex couples' marriages, and in delivering a doctrinally opaque opinion,[58] *Windsor* may function like a plurality decision. The meaning of *Windsor* and of the constitutional guarantees of equality and liberty on which it rests need to be resolved.[59] A consensus in the lower courts about *Windsor* could stiffen the resolve of some Justices to follow the Supreme Court's logic where it leads, as even Justice Scalia recognized in his *Windsor* dissent[60]—which was cited, incidentally, by the district courts in

53. 430 U.S. 188, 193 (1977).

54. Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 Conn. L. Rev. 933, 936 (2013).

55. *Id.* at 965.

56. *Id.* at 938.

57. At least one version of this question was at issue in *Hollingsworth v. Perry*, though the Court ducked it by holding that the petitioners lacked standing to appeal from the trial court's judgment in *Perry*. *See* 133 S. Ct. 2652 (2013).

58. *E.g.*, Marc R. Poirier, *"Whiffs of Federalism" in* United States v. Windsor*: Power, Localism, and Kulturkampf*, 85 U. Colo. L. Rev. 935, 941 (2014) ("In *Windsor*, Justice Kennedy exercises considerable caution, refraining from articulating either a clear federalism rule or a clear equal protection or substantive due process liberty rule that would resolve the marriage equality question once and for all.").

59. *Cf.* David B. Cruz, "*Amorphous Federalism" and the Supreme Court's Marriage Cases*, 47 Loy. L.A. L. Rev. 393, 441 (2014) ("[T]he meaning of *Windsor* for questions of interstate recognition will unfold with experience and time.").

60. [T]he view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. . . . [T]he real rationale of today's opin-

the Ohio,[61] Utah,[62] Oklahoma,[63] Kentucky,[64] Virginia,[65] Pennsylvania,[66] and Wisconsin[67] cases, as well as by the U.S. Court of Appeals for the Fourth Circuit in the Virginia case.[68]

B. Flushing Baker v. Nelson *as an Obstacle to Marriage Equality*

The proliferation of LGBT equality litigation could also be, in some measure, prompted by the development of constitutional doctrine in *Windsor*, although *Windsor* offered little to no *explicit* new constitutional equality law doctrine.[69] The development of doctrine, however, is important, not just in trying to understand the phenomenon sweeping the courts of the nation in *Windsor*'s wake but also as a matter of constitutional doctrine.

Prior to the Supreme Court's decision in *United States v. Windsor*,[70] lower courts had reached differing conclusions concerning whether the Supreme Court's 1972 summary decision in *Baker v. Nelson*[71] required lower courts to dismiss challenges to state marriage exclusions.[72] Following *Windsor*, however, the federal

ion . . . is that DOMA is motivated by "'bare . . . desire to harm'" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. . . . As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

United States v. Windsor, 133 S. Ct. 2675, 2709−10 (2013) (Scalia, J., dissenting) (citation omitted).

61. Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973−74 & n.1 (S.D. Ohio 2013); Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013).

62. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

63. Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1278 (N.D. Okla. 2013), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014).

64. Bourke v. Beshear, 996 F. Supp. 2d 542, 548, 550 n.14 (W.D. Ky. 2014).

65. Bostic v. Raney, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

66. Whitewood v. Wolf, 992 F. Supp. 2d 410, 425−26 (M.D. Pa. 2014).

67. Wolf v. Walker, 986 F. Supp. 2d 982, 987, 996−97, 1010, 1017 (W.D. Wis. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

68. *Bostic*, 760 F.3d at 380.

69. I put to one side the way in which *Windsor* articulated new doctrine regarding standing to appeal. *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

70. *Id.*

71. 409 U.S. 810 (1972).

72. *Compare, e.g.*, Windsor v. United States, 699 F.3d 169, 178−79 (2d Cir. 2012) ("Even if *Baker* might have had resonance for Windsor's case in 1971, it does not today. . . . In the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence."), *and* Hernandez v. Robles, 855 N.E.2d 1, 9, 17 n.4 (N.Y. 2006) (rejecting the claim that *Baker* bars New York courts from hearing the parallel claim under the parallel constitutional provision), *with* Massachusetts v. U.S. Dep't of Health & Human Servs., 682

courts, to reach the issue, have nearly unanimously held that *Baker* is no obstacle to adjudicating such challenges.[73] While I believe the best understanding of doctrine

F.3d 1, 8 (1st Cir. 2012) ("*Baker* is precedent binding on us unless repudiated by subsequent Supreme Court precedent."), Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 870−71 (8th Cir. 2006) (noting but not relying on *Baker*, which the court cited in its conclusion only after having conducted equal protection analysis of state constitutional amendment), McConnell v. United States, 188 F. App'x 540 (8th Cir. 2006) (per curiam) (in suit by *Baker* plaintiffs seeking federal tax refund due to their supposed marriage, using merits determination in *Baker* as part of the basis, along with McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) (per curiam), for issue preclusion against plaintiffs), *Nooner*, 547 F.2d at 56 (holding *Baker* plaintiffs "collaterally estopped from relitigating" their claim to be married to receive extra veteran's educational benefits due to supposed spouse), Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1070 (D. Haw. 2012) ("Plaintiffs' claims [challenging state marriage exclusion] are foreclosed by the Supreme Court's summary dismissal for want of a substantial federal question in *Baker*."), *vacated as moot*, Nos. 12-16995, 12-16998, 2014 WL 5088199 (9th Cir. Oct. 10, 2014) (citing Hawaii Marriage Equality Act of 2013 as rendering decision moot), Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1002–03 (D. Nev. 2012) ("[T]he present equal protection claim is precluded by *Baker* insofar as the claim does not rely on the *Romer* line of cases . . ."), Wilson v. Ake, 354 F. Supp. 2d 1298, 1304−05 (M.D. Fla. 2005) (holding *Baker* binding as to nonexistence of "fundamental right to enter into a same-sex marriage" and so dismissing claims that federal non-recognition of marriage of lawfully married same-sex couple pursuant to Defense of Marriage Act violates the Constitution, though curiously proceeding to analyze and reject plaintiffs' claim on their merits), Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (deeming *Baker* "controlling" in federal immigration case involving putative marriage of same-sex couple in Colorado, though failing even to note "subsequent doctrinal developments" exception), Morrison v. Sadler, 821 N.E.2d 15, 20 (Ind. Ct. App. 2005) (using *Baker* as persuasive merits precedent as to U.S. Constitution in case involving solely claims of right to marry under state constitution and descriptively/predictively opining that "[t]he five justices of the *Lawrence* [*v. Texas*] majority, as well as Justice O'Connor in her concurring opinion, do not appear to be prepared to extend the logic of their reasoning to the recognition of same-sex marriage"), Hernandez v. Robles, 805 N.Y.S.2d 354, 368, 369 n.2 (App. Div. 2005) (Catterson, J., concurring) (opposing majority which reached merits and asserting that plaintiffs' equal protection challenge to marriage exclusion "is foreclosed by" *Baker* due to supposed equivalence of state and federal constitutional rights, relegating treatment of subsequent doctrinal developments to one shallow sentence in footnote about *Lawrence v. Texas*), *aff'd*, 855 N.E.2d 1, 9, 17 n.4 (N.Y. 2006), *and In re* Cooper, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990) (concluding in case brought by surviving member of unmarried same-sex couple seeking an incident of marriage that "persons of the same sex have no constitutional rights to enter into a marriage with each other," citing *Baker* as precedent but not even noting "subsequent doctrinal developments" rule), *aff'd*, 592 N.Y.S.2d 797 (App. Div. 1993) (using *Baker* as precedent supporting application of rational basis review to case where surviving member of unmarried same-sex couple sought an incident of marriage without stating that plaintiff's constitutional claim in fact depended on a constitutional right to marry).

73. *See* Mark Strasser, *When a* Baker *Summary Dismissal Becomes Stale: On Same-Sex Marriage Bans and Federal Constitutional Guarantees*, 17 J. Gender Race & Just. 137, 162 (2014) ("[S]ince *Baker* was decided, significant developments in equal protection and due process jurisprudence make it difficult to understand how courts can plausibly claim the deci-

and the precedents is that *Baker* was not dispositive even before *Windsor*, this seems to be an area where *Windsor* has left a wake of legal repercussions.

sion binding."). One federal court adhered to *Baker* in a pro se prison inmate's case without addressing whether subsequent doctrinal developments have rendered *Baker* no longer binding. S*ee* Merritt v. Attorney Gen., No. 13-00215-BAJ-SCR, 2013 WL 6044329, at *2 (M.D. La. Nov. 14, 2013) (citing *Baker* for proposition that "the Constitution does not require States to permit same-sex marriages" without even acknowledging existence of subsequent doctrinal developments exception to binding force of summary rulings such as *Baker*). One state trial court claimed to have rejected the subsequent doctrinal developments contention, but in a logically weak argument that suggested he was leaving that issue to higher courts to resolve. *See* Borman v. Pyles-Borman, No. 2014-CV-36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014).

A federal district court in Puerto Rico held that *Baker* was binding and precluded litigation over the constitutionality of state laws excluding same-sex couples from civil marriage in *Conde-Vidal v. Garcia-Padilla*, No. 14-cv-1253, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), yet it seemed to rely on precedents about adherence to Supreme Court decisions with opinions, *id.* at *5 (quoting Rodriguez v. de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989), and Agostini v. Felton, 521 U.S. 203, 237 (1997)), to reject the Supreme Court's subsequent doctrinal developments principle, *Conde-Vidal*, 2014 WL 5361987, at *9 ("Lower courts, then, do not have the option of departing from disfavored precedent under a nebulous 'doctrinal developments' test."). *Conde-Vidal* also misread *Windsor* as either having no bearing on the issue before the district court or actually supporting Puerto Rico: "*If anything*, *Windsor* . . . reaffirms the States' authority over marriage, buttressing *Baker*'s conclusion that marriage is simply not a federal question." *Id.* at *8 (emphasis added). Aside from its offering *no* argument that a federal territory such as Puerto Rico should have the same legislative authority and independence as a state, whose existence is constitutionally guaranteed, the court here failed even to note that *Windsor* was hardly a simple ode to state choice in marriage laws. Instead, as courts treating *Windsor* as a subsequent doctrinal development have noted, *Windsor* repeatedly insisted that state exercises of authority over marriage must comport with constitutional restrictions. *Windsor*, 133 S. Ct. at 2680, 2691, 2692.

And a panel of the U.S. Court of Appeals for the Sixth Circuit apparently held in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), that *Baker* was binding on lower courts and barred the court from ruling for the plaintiffs. Like the Puerto Rico District Court, Judge Jeffrey Sutton's majority opinion in *DeBoer* "ignores the Supreme Court's reasoning about dignity and equality in *U.S. v. Windsor*[,] . . . treating the opinion as if it were only about federalism. He then uses Supreme Court pronouncements about decisions *on the merits* as an excuse to impose new rules for lower courts to handle *summary dispositions* (orders issued with no opinion or other explanation). Given that little feat of what some might term judicial activism, it's a bit cheeky of him to insinuate that all of the many judges who have ruled in favor of marriage equality have behaved lawlessly, 'aggressively . . . assum[ing] authority to overrule *Baker* [them]selves.'" David B. Cruz, *Sixth Circuit Marriage Decision Shuns Constitutional Law, Reprints Election Results*, CruzLines (Nov. 8, 2014), http://cruz-lines.blogspot.com/2014/11/ sixth-circuit-marriage-decision-shuns.html. Also, if he really thought his *Baker* analysis correct, then what follows in his opinion would be twenty-five pages of dicta. David B. Cruz, *25 Pages of Dicta, or What the Supreme Court Could Say to the Sixth Circuit*, CruzLines (Nov. 7, 2014), http://cruz-lines.blogspot.com/2014/11/25-pages-of-dicta-or-what-supreme-court.html.

Ultimately, the Supreme Court will almost certainly be the court to rule definitively upon whether the Constitution forbids states from excluding same-sex couples from civil marriage and refusing to recognize the marriages they have entered in an increasing number of states or countries. For the Court, a more than four-decades-old summary disposition is likely to pose no obstacle to consideration of those constitutional questions on the merits. And, if Justice Ginsburg's assessment is correct, the Court will do so soon, ruling no later than the end of June 2016.[74] Nonetheless, whether lower courts are bound by *Baker* is a vitally important question.

Although broad judicial invalidations of many states' marriage bans have been stayed to allow defenders to seek Supreme Court review, in a number of cases courts have ruled that individuals who have terminal illnesses may marry without delay.[75] Every day that same-sex couples are denied the right to marry or recognition of their marriage, they and their families suffer injuries, but the potential for grievous, irreparable injury where one is terminally ill is not a mere contingency—anyone could have a fatal accident and be robbed of all opportunity to marry—but a near certainty.

In *Baker*, a same-sex couple challenged Minnesota's refusal to let them marry on grounds that it violated their constitutional rights under the Fourteenth Amendment, including their fundamental right to marry and their right to equal protection of the laws.[76] The Minnesota Supreme Court rejected the claims, and the U.S. Supreme Court dismissed the couple's appeal on the ground that it did not present a substantial federal question.[77] Such a summary dismissal counts as a decision on the merits,[78] binding on lower courts as to "the precise issues presented [to] and necessarily decided by" the Court in concluding that a case presented no substantial federal question.[79]

Accordingly, a question that has frequently arisen in the post-*Windsor* wave of litigation seeking to vindicate same-sex couples' constitutional rights to marry and to equal protection is whether *Baker v. Nelson* is dispositive of the constitutionality of state marriage exclusions. Defenders of such measures claim that *Baker* compels lower courts to uphold state laws barring same-sex couples from marrying.[80]

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74. Mark Sherman, *Justice Ginsburg: Supreme Court Won't 'Duck' Gay Marriage*, Seattle Times (July 31, 2014), http://seattletimes.com/html/nationworld/2024212965_ginsburgduck-xml.html.

75. *See supra* text accompanying notes 7, 9.

76. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

77. Baker v. Nelson, 409 U.S. 810 (1972).

78. *E.g.*, Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979).

79. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

80. *See, e.g.*, Defendant-Intervenors' Motion for Summary Judgment at 13, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292); Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of* Loving*: Reflections on the "*Loving *Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 137–43 (2007); Chad Muir, Note, Perry v. Schwarzenegger*:*

Yet the Supreme Court has articulated an important exception to the binding nature of summary dispositions like that in *Baker v. Nelson*: the Supreme Court has specified in *Hicks v. Miranda* that a summary dismissal is no longer binding "when doctrinal developments indicate otherwise."[81] Some litigants defending state marriage exclusions, such as Utah, have argued that the subsequent doctrinal developments exception articulated in *Hicks* has been overruled by the Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[82] *Rodriguez de Quijas* stated, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[83] The *Kitchen* majority distinguished *Rodriguez de Quijas* on the ground that it was addressing the treatment to be given to Supreme Court opinions on the merits, and thus did not "overrul[e] the doctrinal developments rule as to summary dispositions."[84]

Judge Kelly dissented from this conclusion in *Kitchen*, contending "that is just another way of stating that a summary disposition is not a merits disposition, which is patently incorrect."[85] Had the majority judge made that equivalency claim, it would indeed be patently incorrect as a matter of established doctrine. But the majority did not say that. What Judge Kelly's objection overlooks is that the *Kitchen* majority did not distinguish summary decisions from *Rodriguez de Quijas* on the ground that summary affirmances are not "merits *disposition[s]*"[86] but on the ground that they are not "*opinions* on the merits."[87] Because the Court aspires to give *reasons* for its constitutional judgments,[88] summary decisions offer no reasons,

A Judicial Attack on Traditional Marriage, 22 U. Fla. J.L. & Pub. Pol'y 145, 167 (2011) ("[D]istrict court was bound by *Baker* and therefore should have granted the defendants' motion for summary judgment . . . .").

81. Hicks v. Miranda, 422 U.S. 332, 344 (1975). *Hicks* does also endorse the proposition that "the lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." *Id.* at 344−45 (internal quotation marks and alterations omitted). Presumably the Court "informs" lower courts they are no longer bound to a conclusion that a constitutional claim is insubstantial via decisions that "indicate" this. *Id.*

82. *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1253 n.2 (10th Cir. 2014) (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)).

83. *Rodriguez de Quijas*, 490 U.S. at 484.

84. *Kitchen*, 755 F.3d at 1232, 1253 n.2 (citing *Rodriguez de Quijas*, 490 U.S. at 484).

85. *Id.* at 1232 (Kelly, J., dissenting).

86. *Id.* (Kelly, J., dissenting) (emphasis added).

87. *Id.* at 1253 n.2 (emphasis added).

88. *Cf.* Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 Hous. L. Rev. 1395, 1402 (2000) ("The Court is expected not only to determine the victor in the specific lawsuit before it, but also to provide standards to guide lower courts in disposing of similar controversies that may arise in the future."). Admittedly, "a substantial number of cases are resolved [without a statement of reasons from any of the Justices], either because the Court disposes of them summarily or (much more rarely) because the Court divides equally on an issue." *Id.* at 1396.

Rodriguez de Quijas did not say that it was overruling *Hicks*'s subsequent doctrinal developments rule, and *Rodriguez de Quijas*'s pronunciamento and the regime it contemplates have been cogently criticized as unsound,[89] the *Kitchen* majority's distinction appears proper and the *Hicks* rule intact.

While the subsequent doctrinal developments rule thus remains, the Supreme Court has given little express guidance on how strongly doctrinal developments must "indicate" that a summary dismissal is no longer binding. But it should not be the case that the doctrinal developments sufficient to indicate that such a dismissal is no longer binding need be strong enough to dictate a decision upholding the right claimed in the case dismissed before lower courts can address the merits of similar disputes.

To be specific in this context: the plaintiffs in *Baker v. Nelson* had argued that Minnesota's exclusion of them from civil marriage violated their rights to equal protection and due process protected by the Fourteenth Amendment, and the Minnesota Supreme Court rejected these claims.[90] The Supreme Court dismissed their appeal in 1972, ruling without opinion that it did not present a substantial federal question.[91] Unless subsequent developments in the Supreme Court's equal protection and due process jurisprudence indicate otherwise, the propositions necessarily decided by the Supreme Court in *Baker* remain binding on state and lower federal courts, which would then have to rule against marriage plaintiffs presenting indistinguishable legal issues.

But we should not think that lower courts can escape *Baker* through the subsequent doctrinal developments exception only if later Supreme Court decisions inexorably compel the conclusion that state marriage exclusions actually do violate same-sex couples' equal protection or due process rights. Unlike most merits dismissals, summary dismissals contain no legal reasoning, but merely a conclusion. The conclusion in *Baker v. Nelson* was not simply that Minnesota's marriage exclusion did not violate the plaintiffs' rights, but the broader conclusion that the plaintiffs' claim that Minnesota did violate their rights *did not even raise a constitutional question of substance*. Accordingly, for an unreasoned summary dismissal to be adjudged no longer binding, it should be enough that subsequent doctrinal developments "indicate" that the types of claims at issue do, under those later developed doctrines, *present a substantial federal question*.[92] It should not be necessary for the subsequent developments to go further and establish unequivocally that the plaintiffs should now win on the merits of their federal constitutional claim. This is particularly true since the Supreme Court has ruled that summary

89. *See, e.g.*, C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39 (1990); *cf.* Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 Nev. L.J. 608, 617 (2002) ("[T]he Supreme Court has elided the distinction between jurisdiction and the merits when the substantiality of a federal question is at issue.").

90. Baker v. Nelson, 185 N.W.2d 185 (Minn. 1971).

91. Baker v. Nelson, 409 U.S. 810 (1972).

92. Goosby v. Osser, 409 U.S. 512, 518 (1973) ("[P]revious Supreme Court decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.").

affirmances are "not of the same precedential value as would be an opinion of this Court treating the question on the merits."[93]

And this appears to be the understanding of most courts confronted with post-*Windsor* challenges to state marriage exclusions. For example, U.S. District Judge Robert J. Shelby analyzed *Baker v. Nelson* in the challenge to Utah's marriage exclusions, *Kitchen v. Herbert*, and concluded "that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law."[94] U.S. District Judge Terence C. Kern concluded in the Oklahoma litigation *Bishop v. United States ex rel. Holder* that "[i]t seems clear that what was once deemed an 'unsubstantial' question in 1972 would now be deemed 'substantial' based on intervening developments in Supreme Court law."[95] As the U.S. Court of Appeals for the Fourth Circuit summarized the rule when it affirmed the decision holding Virginia's marriage exclusion laws unconstitutional, "[s]ummary dismissals lose their binding force when 'doctrinal developments' illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case."[96] And in holding that it was legitimate for it to reach the merits of the challenge to Utah's marriage exclusions, which it affirmed were unconstitutional, the U.S. Court of Appeals for the Tenth Circuit concluded that, "[a]lthough reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial."[97]

Regardless of the precise strength of the "indications" from post-*Baker v. Nelson* Supreme Court decisions, there is an especially strong case that at least *Baker*'s equal protection holding is no longer binding.[98] At the time the Court decided *Baker*, it had been less than a year since the Court had first found that a law that discriminated against women violated the Equal Protection Clause;[99] the Court

93. Edelman v. Jordan, 415 U.S. 651, 671 (1974).

94. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

95. Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1276 (N.D. Okla. 2014), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014).

96. Bostic v. Schaefer, 760 F.3d 352, 373 (4th Cir. 2014).

97. Kitchen v. Herbert, 755 F.3d 1193, 1208 (10th Cir. 2014).

98. *See* Robert E. Rains, *The Legal Status of Same-Sex Married Couples in Pennsylvania After the U.S. Supreme Court Decision in the DOMA Case*, 85 Pa. B.A. Q. 1, 13 (2014) ("Clearly, *Romer, Lawrence*, and especially *Windsor* constitute enormous doctrinal developments for the rights of gays and lesbians in the United States since *Baker* was decided."). By saying this I by no means intend to imply that doctrinal developments have left insubstantial the question whether state marriage exclusions violate the fundamental right to marry of same-sex couples.

99. Baker v. Nelson, 409 U.S. 810 (1972), was decided on October 10, 1972, while Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional an Idaho estate administrator law categorically preferring men over women of equally close relationship to decedents), was decided on November 22, 1971.

did not explicitly adopt intermediate scrutiny for laws that (as laws barring same-sex couples from marrying do) discriminate on the basis of sex until 1976;[100] the Court did not apply the Equal Protection Clause to prohibit a law that discriminated on the basis of sexual orientation (as virtually all courts have concluded laws excluding same-sex couples from marriage do) until two decades later with *Romer v. Evans* in 1996;[101] and a number of commentators have taken *Romer* to apply more than minimal rational basis review.[102]

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100. Craig v. Boren, 429 U.S. 190 (1976). This is relevant because marriage exclusions do categorize on the basis of sex, an argument with much academic support, *see, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 214 (1994); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J.L. & Gender 461, 505 (2007) (concluding that "the facial discrimination implicit in the sex-based classifications in state marriage laws is clear"), though limited through recently increasing judicial acceptance, *compare, e.g.*, Latta v. Otter, 771 F.3d 456, 479−96 (9th Cir. 2014) (Berzon, J., concurring) (accepting sex discrimination argument), Jernigan v. Crane, No. 4:13-cv-00410 KGB, 2014 WL 6685391, at *23−24 (E.D. Ark. Nov. 25, 2014) (same), Lawson v. Kelly, No. 14-0622-CV-W-ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) (same), Rosenbrahn v. Daugaard, No. 4:14-CV-04081-KES, 2014 WL 6386903, at *10 (D.S.D. Nov. 14, 2014) (same), Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (concluding Utah marriage exclusion discriminated on basis of sex), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014), Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (accepting sex discrimination argument), *and* Baker v. State, 744 A.2d 864, 904−06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) ("[T]his is a straightforward case of sex discrimination."), *with* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1139−40 (D. Or. 2014) (rejecting sex discrimination argument in dicta in case where court held Oregon's marriage exclusion unconstitutionally discriminated on basis of sexual orientation), Wolf v. Walker, 986 F. Supp. 2d 982, 1008 (W.D. Wis. 2014) (citing cases for proposition that "the sex discrimination theory has been rejected by most courts to consider it, even those ruling in favor of the plaintiffs on other grounds" but not finding it necessary to reach the issue), *In re* Marriage Cases, 183 P.3d 384, 436−39 (Cal. 2008) (rejecting sex discrimination argument in dicta where a court held California marriage exclusion unconstitutional under strict scrutiny applicable under state equal protection guarantee), *and* Hernandez v. Robles, 855 N.E.2d 1, 10−12 (N.Y. 2006) (rejecting sex discrimination argument). Justice Kennedy, at least, finds the question of whether the exclusion of same-sex couples from marriage is, constitutionally speaking, sex discrimination, to be "a difficult question that [he has] been trying to wrestle with." Transcript of Oral Argument at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

101. 517 U.S. 620 (1996).

102. *See, e.g.*, Caren G. Dubnoff, Romer v. Evans*: A Legal and Political Analysis*, 15 Law & Ineq. 275, 296 (1997) ("[T]he Court [in *Romer*] perceived no need to utilize its traditional two-tiered analytic framework nor did it need to explicitly invoke either strict scrutiny or a rational basis test. Instead, the Court implicitly drew elements from each."); Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 93 (1997) ("The Court's opinion [in *Romer*] implicitly invokes a defect in the political process that contaminates, at least to some extent, *all* laws that discriminate against gays. That contamination, however, implies that gays ought to be a 'suspect class,' and that laws discriminating against gays should be presumptively unconstitutional."); Nancy C. Marcus, *Deeply Rooted*

The first lower court decision to engage with *Baker* after the Supreme Court decided *Windsor* was U.S. District Judge Robert Shelby's opinion holding Utah's marriage exclusions unconstitutional in *Kitchen v. Herbert*.[103] Although Judge Shelby could have relied solely on arguments like the foregoing, which he made,[104] he chose also to take guidance from—or perhaps seek cover beneath—*Windsor*, which he treated as a "significant doctrinal development."[105] The precise development is not spelled out in his *Baker* analysis, but he takes apparent comfort from the fact that some Supreme Court Justices, including dissenters Roberts and Scalia, foresaw post-*Windsor* marriage litigation challenging state exclusions,[106] coupled with the Supreme Court's reliance on standing doctrine to dismiss the appeal in *Hollingsworth v. Perry*[107] rather than dismissing it on the strength of *Baker* for not presenting a substantial federal question.[108]

The latter argument is not strong. If, as the Court held in *Perry*, the proponents who were trying to defend California's marriage ban lacked Article III standing, the Court would lack jurisdiction over their appeal. Thus, the Court would not have the constitutional authority to render judgment on the merits of that case.[109] Since a ruling that a case does not present a substantial federal question is, as noted

Principles of Equal Liberty, Not "Argle-Bargle": The Inevitability of Marriage Equality After Windsor, 23 Tul. J.L. & Sexuality 17, 35 (2014) ("The Court in *Romer* engaged in a less deferential form of rational basis review . . . ."); Timothy M. Tymkovich, John Daniel Dailey & Paul Fraley, *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 Colo. L. Rev. 287, 333 (1997); Peter J. Smith, Note, *The Demise of Three-Tiered Review: Has the Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. Contemp. L. 475, 476 (1997) ("*Romer v. Evans* reflected an enhanced version of the rational basis inquiry . . . ."). *But see, e.g.*, Larry Alexander, *Sometimes Better Boring and Correct:* Romer v. Evans *as an Exercise of Ordinary Equal Protection Analysis*, 68 U. Colo. L. Rev. 335 (1997); Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 Ky. L.J. 885, 891, 895 (2001) ("[*Romer v. Evans*] did not apply heightened scrutiny to classifications based on sexual orientation. . . . One of the paradoxes of the Court's decision in *Romer* is the contrast between the simplicity of what we understand as the normal rational basis test and the complications of the Court's deployment of it in the opinion. . . . *Romer*'s reasoning is multidimensional, not linear, in the way that it alters the logic of equal protection analysis.").

103. 961 F. Supp. 2d 1181 (D. Utah 2013).
104. *Id.* at 1194−95.
105. *Id.* at 1195.
106. *Id.*
107. 133 S. Ct. 2652 (2013).
108. *Kitchen*, 961 F. Supp. 2d at 1195.
109. *Cf.* Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 315 (1902) ("[T]he unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing . . . . [T]he better practice is to cause our decree to respond to the question which arises first in order for decision, that is, the motion to dismiss [for lack of jurisdiction due to want of a substantial federal question].").

above, a ruling on the merits,[110] the Supreme Court arguably had no power to issue a *Baker*-based dismissal in *Perry*, even if *Baker* were still good law. Moreover, the reasoning of the Court of Appeals for the Ninth Circuit in the *Perry* case relied on the fact that same-sex couples in California enjoyed a right to marry under the California Constitution prior to Proposition 8 taking that right away and enshrining that deprivation in the state constitution.[111] This differs from the situation in *Baker v. Nelson*, where same-sex couples were simply excluded from marriage by state statutory law.[112] Thus, even were *Baker* binding, it would not necessarily establish the constitutionality of California's Proposition 8, and the Supreme Court's failure to invoke *Baker* as the basis for dismissing *Perry* by itself need not signify that *Baker* no longer requires courts to uphold a straightforward exclusion of same-sex couples from civil marriage.[113]

Similarly, in *Bishop v. United States ex rel. Holder*, the next post-*Windsor* opinion to consider *Baker*, Judge Terence C. Kern of the Northern District of Oklahoma held that "*Baker v. Nelson* is not binding precedent."[114] After providing a persuasive account of the doctrinal developments that supported this conclusion,[115] including *Windsor* itself, due to its constitutional reasoning that the federal government's discrimination against married same-sex couples "demean[ed]" them,[116] Judge Kern reasoned much as Judge Shelby had about *Windsor*'s import: "If *Baker* is binding, lower courts would have no reason to apply or distinguish *Windsor*, and all this judicial hand-wringing [in the Roberts and Scalia dissents] over how lower courts should apply *Windsor* would be superfluous."[117]

Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia followed suit in *McGee v. Cole*.[118] Ruling on a summary judgment motion in a case challenging that state's marriage exclusions, he too

110. *See supra* text accompanying notes 78–79.

111. Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012), *vacated and remanded sub nom*. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

112. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (denial of marriage license pursuant to Minnesota state statute), *appeal dismissed*, 409 U.S. 810 (1972).

113. Moreover, *Baker v. Nelson* involved an appeal as of right from the Minnesota Supreme Court to the U.S. Supreme Court. Due to statutory changes, such appeals as of right are now quite rare. In *Perry*, in contrast, the Court had exercised its discretion over its jurisdiction to grant certiorari to hear the case. *Cf.* Francisco Ed. Lim, *Determining the Reach and Content of Summary Decisions*, 8 Rev. Litig. 165, 166–67 (1989) (distinguishing appellate jurisdiction from certiorari jurisdiction with respect to precedential value). This difference also may counsel against attributing much significance to the Court's not invoking *Baker* to dispose of *Perry*.

114. 962 F. Supp. 2d 1252, 1274 (N.D. Okla. 2014).

115. *See id.* at 1276 (addressing Craig v. Boren, 429 U.S. 190 (1976), Romer v. Evans, 517 U.S. 620 (1996), and Lawrence v. Texas, 539 U.S. 558 (2003)).

116. *Id.* (quoting United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)).

117. *Id.* at 1277.

118. 993 F. Supp. 2d 639 (S.D. W. Va. 2014).

concluded that "*Baker* is nonbinding" on the basis of doctrinal developments.[119] Judge Chambers recounted the analysis from the Second Circuit in its *Windsor* decision (prior to the Supreme Court's ruling),[120] but went on to recount and rely upon *Kitchen*'s and *Bishop*'s "persuasive" reasoning about how *Windsor* demonstrated the Justices' expectations that lower courts would reason about state marriage bans based on *Windsor* (rather than *Baker*).[121] *McGee* also dismissed contrary lower court decisions about *Baker* both as substantively incorrect and as distinguishable precisely because they were rendered before the additional "doctrinal development" of *Windsor*.[122]

With no new analysis of its own, the U.S. District Court for the Eastern District of Virginia concluded (before granting the plaintiffs' motion for summary judgment) in *Bostic v. Rainey* that "doctrinal developments in the question of who among our citizens are permitted to exercise the right to marry have foreclosed the previously precedential nature of the summary dismissal in *Baker*."[123] Judge Arenda L. Wright Allen relied in *Bostic* on the analyses in the Second Circuit *Windsor* decision and the *Kitchen*, *Bishop*, and *McGee* decisions.[124]

Likewise, *De Leon v. Perry*, the next pro-marriage equality decision to consider *Baker v. Nelson*, also ruled that "*Baker* is not controlling."[125] The U.S. District Court for the Western District of Texas considered the same sort of doctrinal developments addressed above, including the Supreme Court's decision in *Windsor*,[126] made the same dubious "failure to dismiss for want of substantial federal question" argument *Kitchen* made about *Hollingsworth v. Perry*,[127] and expressly aligned itself with *Bostic*, *Bishop*, and *Kitchen*.[128]

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119. *Id.* at 650.
120. *Id.*
121. *Id.* at 651.
122. *See id.* ("Both cases preceded the Supreme Court's decision in Windsor [sic], a decision which, as explained above, showed additional doctrinal development in relevant jurisprudence. The Court disagrees with the analysis of doctrinal developments conducted in those two cases and accordingly finds that *Baker* is not binding on the current case and does not justify abstention here.").
123. 970 F. Supp. 2d 456, 470 (E.D. Va. 2014).
124. *Id.* at 469−70 & n.7.
125. 975 F. Supp. 2d 632, 648 (W.D. Tex. 2014).
126. *See id.* at 647−48.
127. *Id.* at 648−49.
128. *Id. De Leon v. Perry* stated that *Bourke v. Beshear* also "reject[ed] the argument that *Baker* still has precedential value and bars courts from addressing the issue of same-sex marriage." *Id.* (citing Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014)). The district court in *Bourke*, however, did not analyze whether *Baker* was no longer controlling due to doctrinal developments after that decision. Rather, *Bourke* distinguished *Baker* as involving the constitutionality of a state refusal to issue a same-sex couple a marriage license, whereas the *Bourke* plaintiffs were lawfully married in other states and asking Kentucky to recognize and treat them as married. *Bourke*, 996 F. Supp. 2d at 543, 549 & n.13.

DeBoer v. Snyder continued the clear trend by rejecting the defendants' *Baker* argument in a footnote that extensively quoted and expressly adopted *Kitchen*'s analysis, including *Kitchen*'s reliance on *Windsor*.[129] The court in *Latta v. Otter* pointed to the same doctrinal developments these cases have noted, again including *Windsor* itself; in *Latta*, U.S. Chief Magistrate Judge Candy Wagahoff Dale stated that "the Court dramatically changed tone [in *Windsor*] with regard to laws that withhold marriage benefits from same-sex couples."[130] In addition to recycling the *Hollingsworth v. Perry* argument, *Latta* considered significant both *Windsor*'s equal protection reasoning and its affirmance of the Second Circuit panel decision that had held *Baker* no longer controlling.[131] And after remarking upon the unanimity to that point of lower court rejections of *Baker* after the Supreme Court's *Windsor* decision, the district court concluded that "*Baker* is not controlling and does not bar review of Plaintiffs' claims."[132] U.S. District Judge John E. Jones III fell in line on May 20, 2014, rejecting the defendants' *Baker* argument before holding Pennsylvania's marriage ban unconstitutional in *Whitewood v. Wolf*.[133] He too included the Supreme Court's decision in *Windsor* as part of a "sea change" in the Supreme Court's equal protection and substantive due process doctrine.[134]

Senior (former Chief) District Judge Barbara B. Crabb conducted an extensive analysis of *Windsor*'s relevance to the *Baker* issue in her opinion holding Wisconsin's marriage law unconstitutional in *Wolf v. Walker* on June 6, 2014.[135] After explaining why "[i]t would be an understatement to say that the Supreme Court's jurisprudence on issues similar to those raised in *Baker* has developed substantially since 1972[,]" Judge Crabb turned to *Windsor*.[136] She observed that *Baker*'s bindingness was hotly contested, with the "no longer binding" camp prevailing in *Windsor* in the Second Circuit and the marriage exclusionists[137] renewing their arguments before the Supreme Court.[138] Judge Crabb noted that

129. 973 F. Supp. 2d 757, 773 n.6 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014). The district court in *Geiger v. Kitzhaber* likewise dispatched *Baker* in a footnote, quoting *Kitchen*'s conclusion on this point and merely citing *DeBoer*, *Bishop*, *De Leon*, and *Bostic*. 994 F. Supp. 2d 1128, 1133 n.1 (D. Or. 2014).

130. 19 F. Supp. 3d 1054, 1066−67 (D. Idaho 2014).

131. *Id.* at 1067−68.

132. *Id.*

133. 992 F. Supp. 2d 410, 419, 431 (M.D. Pa. 2014). Judge Jones had earlier rejected the *Baker* argument when he rejected the defendants' motion to dismiss. Whitewood v. Wolf, No. 1:13-cv-01861-JEJ, at 6 (M.D. Pa. Nov. 15, 2013). His May 20, 2014, opinion reiterated his arguments from his November 15, 2013, order. *Whitewood*, 992 F. Supp. 2d at 419.

134. *Whitewood*, 992 F. Supp. 2d at 420.

135. 986 F. Supp. 2d 982 (W.D. Wis. 2014).

136. *Id.* at 990.

137. David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997, 1078 (2002) (defining "marriage exclusionists" as "those people who would continue to exclude same-sex couples" from civil marriage).

138. *Wolf*, 986 F. Supp. 2d at 990.

Justice Ginsburg cut off counsel in *Hollingsworth v. Perry* when he tried to address *Baker* at oral argument.[139] (Though this may well bear on the predictive question of whether a majority of the Justices would conclude that state marriage bans, including California's Proposition 8 at issue in *Perry*, are constitutional, a single Justice's views about doctrinal developments[140] would not themselves seem to be a "doctrinal development" in the sense relevant to the vitality vel non of a summary dismissal.) *Windsor* itself did not address *Baker*, and for Judge Crabb, "[t]he Court's silence is telling."[141] In her view, "the Court's failure to even acknowledge *Baker* as relevant in a case involving a restriction on marriage between same-sex persons supports a view that the Court sees *Baker* as a dead letter."[142] And, like the *Kitchen* and *Bishop* courts, Judge Crabb also apparently deemed it relevant that the *Windsor* dissenters' advice to lower court judges did not even bother to suggest that *Baker* could provide a basis for ruling against marriage equality plaintiffs.[143]

In the *Kitchen* litigation against Utah's marriage exclusions, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's constitutional rulings one day shy of a year after the Supreme Court's decision in *Windsor*.[144] Like virtually all courts to examine *Baker* in the wake of *Windsor*, the court of appeals concluded emphatically that "it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial."[145] The court of appeals agreed with the district court that *Baker* had been superseded by subsequent doctrinal developments, but it relied on "[t]wo landmark decisions by the Supreme Court," *Lawrence v. Texas* and *United States v. Windsor*.[146] The disposition in *Windsor* allowed the court of appeals in *Kitchen* to distinguish the views of "several courts" that before *Windsor* found *Baker* binding from the

139. *Id.*

140. *Id.* (citing Transcript of Oral Argument at 12, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (Ginsburg, J.) ("Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.")).

141. *Id.*

142. *Id.* at 990−91.

143. *Id.* at 991. Senior District Judge John G. Heyburn II cited *Wolf* and echoed many of its arguments about *Windsor* in his opinion holding unconstitutional Kentucky's laws barring same-sex couples from marrying. Love v. Beshear, 989 F. Supp. 2d 536, 541−42 (W.D. Ky. 2014) (concluding that "a virtual tidal wave of pertinent doctrinal developments has swept across the constitutional landscape" and making *Wolf*'s argument about *Windsor*'s silence regarding *Baker*).

144. Kitchen v. Herbert, 755 F.3d 1193, 1229−30 (10th Cir. 2013).

145. *Id.* at 1208. The same panel of judges on the same court reached the same decision in *Bishop v. Smith*, treating the litigation against Oklahoma's marriage exclusions "largely controlled by our decision in *Kitchen*." 760 F.3d 1070, 1079 (10th Cir. 2014).

146. *Kitchen*, 755 F.3d at 1205−08 (citing 539 U.S. 558 (2003), 133 S. Ct. 2675 (2013)).

views of "nearly every federal court to have considered the issue" after *Windsor*.[147] Recognizing that *Windsor* addressed the constitutionality of a *federal* marriage exclusion, as distinguished from the state marriage exclusions at issue in *Kitchen*, the court of appeals properly noted that "the Court's description of the issue [in *Windsor*] indicates that its holding was not solely based on the scope of federal versus state powers."[148] The court of appeals concluded that "the similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case cannot be ignored"; some of the plaintiffs sought recognition of their valid marriages from marriage equality states, as Edie Windsor had from the federal government, and all of the plaintiffs argued, in *Windsor*ian terms, "that the state's differential treatment of them as compared to opposite-sex couples demeans and undermines their relationships and their personal autonomy."[149] Thus, *Baker*'s holding that marriage equality plaintiffs present no substantial federal question was no longer good law after *Windsor*.[150]

The same day that the Court of Appeals for the Tenth Circuit ruled in *Kitchen*, Chief Judge Richard L. Young of the Southern District of Indiana also held in *Baskin v. Bogan* that *Baker v. Nelson* was stripped of its binding character by subsequent doctrinal developments.[151] After retreading ground covered by prior opinions,[152] Chief Judge Young confidently concluded that "in the last year even more has changed in the Supreme Court's jurisprudence shedding any doubt regarding the effect of *Baker*."[153] Besides questionably relying on *Hollingsworth v. Perry*'s dismissal of the appeal for want of standing rather than for want of a substantial federal question,[154] the court referred to the substantive, dignity- and equality-based reasoning of *United States v. Windsor*.[155]

147. *Id.* at 1205−06. The court of appeals noted at the close of a string cite that the sole case at that time to have ruled differently on *Baker* after *Windsor* failed to consider whether doctrinal developments had deprived *Baker* of precedential force. *Id.* (citing Merritt v. Attorney Gen., No. 13–00215–BAJ–SCR, 2013 WL 6044329, at *2 (M.D. La. Nov. 13, 2013)).

148. *Id*. at 1206.

149. *Id.* at 1207−08.

150. Judge Kelly in dissent purportedly rejected the conclusion that subsequent doctrinal developments had deprived *Baker v. Nelson* of binding force. *See id.* at 1230−33 (Kelly, J., dissenting). Somewhat inconsistently, however, Judge Kelly went on to address the merits of the plaintiffs' constitutional claims, ostensibly "[b]ecause [he] ha[d] not persuaded the panel." *Id.* at 1233−40. Presumably the point of this was to show that if he were to find himself free to reach the merits of the plaintiffs' claims, though he is not, he would reject them.

151. 12 F. Supp. 3d 1144, 1154−55 (S.D. Ind. 2014).

152. *See id.* at 1153−56 (addressing Lawrence v. Texas, 539 U.S. 558, 582 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996); Hicks v. Miranda, 422 U.S. 332, 344–45 (1975); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972)).

153. *Id.* at 1154.

154. *Id.* at 1155.

155. *See id.* at 1154−55 (citing United States v. Windsor, 133 S. Ct. 2675, 2693−94 (2013) (*Windsor* reasoned DOMA's non-recognition of couples validly married by a state "de-