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## **ESSAY**

### *UNITED STATES V. WINDSOR* AND THE ROLE OF STATE LAW IN DEFINING RIGHTS CLAIMS

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WRITING in 1953, Henry Hart and Herbert Wechsler famously said that “[f]ederal law is generally interstitial in its nature . . . . Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.”<sup>1</sup> Federal law, in other words, is not a complete system. It does not purport to—and, given the limited and enumerated nature of Congress’s powers—*could not* purport to create or describe a complete catalog of rights and duties for our society. Even in areas where Congress has power to act, the difficulty of enacting federal law often means that federal authority remains unexercised. The result is that, by federal disability or federal inaction, our law leaves open a wide range of questions to be answered by the states.

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<sup>1</sup> Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 459 (6th ed. 2009). The quoted text is carried over from the 1953 first edition. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 435 (1953).

The Supreme Court's recent decision in *United States v. Windsor*<sup>2</sup> is best understood from this Legal Process perspective. *Windsor* struck down Section 3 of the federal Defense of Marriage Act ("DOMA"), which defined marriage as exclusively between a man and a woman for purposes of federal law.<sup>3</sup> Much early commentary, including Professor Neomi Rao's essay in these pages,<sup>4</sup> has found Justice Kennedy's opinion for the Court to be "muddled" and unclear as to its actual rationale. But the trouble with *Windsor* is not that the opinion is muddled or vague; the rationale is actually quite evident on the face of Justice Kennedy's opinion.<sup>5</sup> The trouble is simply that it is not the rationale that many observers expected or wanted.

The Court had three obvious alternatives in *Windsor*. One approach, articulated by the plaintiff in the case and by the Obama Administration in its letter explaining why it would not defend DOMA's constitutionality, was to recognize sexual orientation as a suspect classification under the Equal Protection Clause; this would have required DOMA to pass some level of heightened scrutiny, which it most likely would have failed.<sup>6</sup> A second route to heightened scrutiny—one at least suggested by *Lawrence v. Texas*<sup>7</sup>—would have run through substantive due process, recognizing same-sex couples' right to marry as fundamental much like their ability to

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<sup>2</sup> 133 S. Ct. 2675 (2013).

<sup>3</sup> Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)).

<sup>4</sup> Neomi Rao, The Trouble with Dignity and Rights of Recognition, 99 Va. L. Rev. Online 29, 31 (2013), [http://www.virginialawreview.org/content/pdfs/99/Online/Rao .pdf](http://www.virginialawreview.org/content/pdfs/99/Online/Rao.pdf); see also Sanford Levinson, A Brief Comment on Justice Kennedy's Opinion in Windsor, Balkinization (June 26, 2013, 11:50 PM), <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> (noting "the intellectual awkwardness of [Kennedy's] opinion" and comparing it to "a camel (i.e., a horse designed by a committee)"); Jeffrey Rosen & Michael McConnell, Debating the Court's Gay Marriage Decisions, The New Republic (June 26, 2013), <http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate> ("[T]he DOMA decision is a logical mish-mash, portending more litigation and more instability.").

<sup>5</sup> For a more extended exegesis of that rationale than I can undertake here, see Ernest A. Young & Erin C. Blondel, Federalism, Liberty, and Equality in *United States v. Windsor*, 2012-2013 Cato Sup. Ct. Rev. (forthcoming Sept. 2013).

<sup>6</sup> See Brief on the Merits for Respondent Edith Schlain Windsor at 17, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Press Release, Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (arguing for heightened equal protection scrutiny).

<sup>7</sup> 539 U.S. 558, 578 (2003).

engage in sexual relations.<sup>8</sup> A third alternative, pressed hard in dissents by Justices Scalia and Alito,<sup>9</sup> would have rejected heightened judicial scrutiny and left the legality and recognition of same-sex marriage entirely to the political process.

Professor Rao seems to believe that these were the *only* three choices. As she reads it, the majority opinion's "use of dignity identifies a novel constitutional right to recognition unconnected to any substantive right."<sup>10</sup> The problem, if I understand her argument correctly, is that the Court did *not* create a fundamental right to same-sex marriage similar, for instance, to the fundamental right to an abortion recognized in *Roe v. Wade*.<sup>11</sup> "Unlike *Windsor*," she writes, "most equality decisions focus on universal rights and freedoms."<sup>12</sup> I am not sure, however, why one would insist that heightened constitutional scrutiny must always turn on the existence of some substantive right. Equal protection claims, after all, typically focus on the classification drawn by the government—not on the "substantive right" that the classification implicates. It is true that the equal protection cases Rao cites—*Brown v. Board of Education*<sup>13</sup> and *Loving v. Virginia*<sup>14</sup>—stressed the importance of education and marriage, respectively. But the critical fact in both cases was that the government was discriminating on the basis of *race*, and other cases make clear that racial classifications trigger strict scrutiny whether or not there is some other "substantive right" in the picture. If a municipality says that only white people can water their lawns on prime-numbered Thursdays, that is subject to strict scrutiny, too, even if the "substantive" right to do so is trivial.

By insisting that the Supreme Court justify strict scrutiny by recognizing a substantive right to same-sex marriage, then, Professor

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<sup>8</sup> Technically speaking, equal protection arguments directed toward the federal government must also rely on substantive due process, since the Equal Protection Clause by its terms applies only to the states. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954). But the Court has nonetheless maintained a distinct "equal protection" jurisprudence in cases involving federal discrimination just as it does in cases challenging state laws. See, e.g., *Adarand Constructor's, Inc. v. Peña*, 515 U.S. 200, 217 (1995).

<sup>9</sup> See *Windsor*, 133 S. Ct. at 2706–07 (Scalia, J., dissenting); *id.* at 2718–19 (Alito, J., dissenting).

<sup>10</sup> Rao, *supra* note 4, at 30.

<sup>11</sup> 410 U.S. 113 (1973).

<sup>12</sup> Rao, *supra* note 4, at 32.

<sup>13</sup> 347 U.S. 483, 490 (1954).

<sup>14</sup> 388 U.S. 1, 12 (1967).

Rao logically rules out even Edith Windsor's straightforward equal protection argument described above. That would certainly be a novel conclusion, and I doubt it could be defended. But this difficulty in Rao's argument highlights the reality that arguments for "recognition" are not nearly as unusual in constitutional law as she suggests. A number of constitutional provisions—including, but not limited to, the Equal Protection Clause—are agnostic about underlying "substantive" rights but require that, once the government extends those rights to some persons or groups, they must extend them to other similarly-situated persons. The Privileges and Immunities Clause of Article IV,<sup>15</sup> for example, creates no substantive rights, but it requires any given state to "recognize" out-of-staters as equally entitled to the privileges and immunities that it does choose to create. The Due Process and Takings Clauses<sup>16</sup> do not themselves create any property rights, but they require governments to "recognize" the property rights that are created by not depriving people of those rights without fair procedures and just compensation.<sup>17</sup> And the Full Faith and Credit Clause requires states to recognize the "public [a]cts, [r]ecords, and judicial [p]roceedings of every other [s]tate."<sup>18</sup> Given the well-understood importance of these provisions, it is curious to hear Rao assert that "recognition is not a freedom or right in any meaningful sense."<sup>19</sup>

These examples all have a common theme, of course. The respective constitutional provisions require governments to recognize rights that they have already created, or that other governments have created, as a matter of positive law. Professor Rao might well want to distinguish them from *Windsor* on the basis that *Windsor* required "recognition" of a free-floating dignity interest without any

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<sup>15</sup> U.S. Const. art. IV, § 2, cl. 1.

<sup>16</sup> U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

<sup>17</sup> This is true, moreover, even when the depriving government is not the one that created the property right in the first place.

<sup>18</sup> U.S. Const. art. IV, § 1; see also *id.* § 2, cl. 2 (requiring states to recognize other states' criminal proceedings by extraditing fugitives); *id.* § 2, cl. 3 (requiring states to recognize other states' slavery laws by repatriating fugitive slaves). It would not be too much to say that the first two sections of Article IV are all about recognition.

<sup>19</sup> Rao, *supra* note 4, at 34; see also *id.* at 33–34 ("Recognition by our communities and even our political institutions may be an important human need, but it has not previously been treated as a constitutional right.").

similar grounding.<sup>20</sup> This answer, however, would fundamentally misread Justice Kennedy's opinion for the Court. At literally every turn, that opinion emphasized the fact that *state law* had recognized the validity of Edith Windsor's marriage. "[T]he State's decision to give this class of persons the right to marry," Kennedy wrote, "conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community."<sup>21</sup> The right for which Edith Windsor sought recognition, in other words, was just as grounded in positive law as any property right asserted in a Takings case.

The Equal Protection Clause operates differently than the Takings Clause, of course, and it will help to pin down exactly how New York's recognition of Mrs. Windsor's marriage propelled her equality claim. Most important, state law defined the frame in which DOMA's classification had to be judged. Every equal protection plaintiff must establish that the government has discriminated between similarly-situated persons,<sup>22</sup> but that question has been nearly intractable in the same-sex marriage debate. Proponents say that that the marital relationship is independent of who is getting married; opponents insist that "marriage" is uniquely a relationship between a man and a woman. It has been, and will continue to be, difficult for courts to resolve this question as a matter of legal interpretation, without recourse to the judges' moral priors.

The beauty of Justice Kennedy's opinion in *Windsor* is that it was able to resolve this difficult issue without resort to judicial fiat. Instead, the Court relied on New York's own resolution of that question, which was ultimately—and appropriately—a political one. Hence, state law defined the class of similarly situated persons for

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<sup>20</sup> See *id.* at 31 ("*Windsor* protects only the dignity of having your personal relationships recognized by the federal government.").

<sup>21</sup> *Windsor*, 133 S. Ct. at 2692; see also Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, Volokh Conspiracy (June 26, 2013, 4:52 PM), <http://www.volokh.com/2013/06/26/federalism-marries-liberty-in-the-doma-decision> (emphasizing this aspect of *Windsor*).

<sup>22</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.").

purposes of Windsor's equal protection claim.<sup>23</sup> As Justice Kennedy explained,

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.<sup>24</sup>

There is much more than "a whiff of federalism here," as Professor Rao puts it.<sup>25</sup> Rather, as Professors Hart and Wechsler pointed out long ago,<sup>26</sup> the federal equal protection claim operates against an indispensable backdrop of state law. Far from being untethered to any substantive right, Justice Kennedy's "right of recognition" is firmly grounded in a substantive right created under the law of New York.

This argument also answers Professor Rao's criticism that "recognition rights, standing alone, require picking one groups' claim over another."<sup>27</sup> It is not clear that this is true even on Rao's own terms; I fail to understand, for example, why my claim for recognition of *my* marriage is normatively equivalent to someone else's claim that *my* marriage should *not* be recognized (as opposed to their claim that *their* marriage *should* be).<sup>28</sup> But putting that objection aside, the crucial point is that in *Windsor*, the choice among competing claims was made by the state of New York—not the U.S. Supreme Court. What the Court said was simply that once New York

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<sup>23</sup> See *Windsor*, 133 S. Ct. at 2694 ("DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.").

<sup>24</sup> *Id.* at 2695–96.

<sup>25</sup> Rao, *supra* note 4, at 37.

<sup>26</sup> See *supra* text accompanying note 1.

<sup>27</sup> Rao, *supra* note 4, at 34.

<sup>28</sup> It will not do to say, as Professor Rao does, that the same-sex marriage opponent's claim is a claim for recognition of their heterosexual marriage as the *only* kind. That is just a play on words; I can always frame a desire to meddle in someone else's affairs as a desire that my preferences be recognized as the one true way. One can imagine claims for recognition that are, in fact, mutually exclusive; for instance, I might claim the land on which my house sits under traditional American principles of property law, while a Native American tribe might press for recognition of their ancestral rights to the land. But same-sex marriage is not that kind of situation.

had made its choice, Congress could not validly set that choice aside by enacting DOMA.

One might still object that the Court *did* have to choose between New York's resolution of these competing claims about marriage and the quite different resolution of those claims by Congress in DOMA.<sup>29</sup> And it is worth remembering that the "interstitial" conception of federal law articulated by Professors Hart and Wechsler assumed that state law would "govern *unless changed by legislation*."<sup>30</sup> DOMA, of course, was an effort to do precisely that—at least where federal programs, benefits, and obligations are concerned. *Windsor* did not rule out the possibility that, at least in some instances, Congress may refuse to recognize state-sanctioned marriages—although it made clear that generally federal law must take state marriage law as it finds it. The Court cited the immigration anti-fraud statute, for instance, which treats otherwise-married persons as unmarried if their marriage "was entered into for the purpose of procuring an alien's admission as an immigrant."<sup>31</sup> But DOMA "has a far greater reach" and "is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect."<sup>32</sup> The problem was thus twofold: DOMA did not fit any particular federal statutory program or interest, and it directly interfered with New York's exercise of its own sovereign authority to define family relationships.<sup>33</sup>

A close reading of Justice Kennedy's opinion indicates that DOMA's intrusion on state prerogatives affected the equal protection analysis in two more specific ways. It seems to have ratcheted up the level of scrutiny somewhat; in particular, the Court analyzed only the interests actually reflected in the legislative record rather than formulating hypothetical interests where necessary to save the

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<sup>29</sup> I take it that Professor Rao would *not* object on this ground, since she writes that "*Windsor* could have been decided along federalism lines, recognizing the limited nature of federal power with respect to definitions on marriage." Rao, *supra* note 4, at 36.

<sup>30</sup> Hart & Wechsler, *supra* note 1, at 459 (emphasis added).

<sup>31</sup> 8 U.S.C. § 1186a(b)(1)(A)(i) (2006 ed. and Supp. V), *cited in Windsor*, 133 S. Ct. at 2690.

<sup>32</sup> *Windsor*, 133 S. Ct. at 2690; see also *id.* at 2694 ("DOMA frustrates [New York's] objective [to eliminate inequality] through a system-wide enactment with no identified connection to any particular area of federal law.").

<sup>33</sup> See generally Young & Blondel, *supra* note 5, at 141–42.

statute.<sup>34</sup> And the Court also rejected Congress's primary interest—to preserve the traditional definition of marriage—as an interest that the national government simply does not have.<sup>35</sup> Again, Congress's usurpation of the states' role was a pervasive factor throughout the Court's equal protection analysis.<sup>36</sup> It is difficult to find instances in which the Court mentioned “dignity” without also stressing the role of the state.<sup>37</sup>

Contrary to the emerging narrative, then, the federalism arguments in *Windsor* amounted to much more than just “some blather about traditional state sovereignty and marriage.”<sup>38</sup> No one should be surprised by this, because the structural element in *Windsor* emerges from something basic about the nature of rights. While it is true that we sometimes think of rights as universal, existing apart from particular societies and their institutions, this is hardly the only or even the most plausible view. The classical conservative position, for example, sees rights as inevitably tied to the institutional context and traditions of a particular society.<sup>39</sup> Similarly, as Professor Anna Stilz has recently demonstrated, the Kantian tradition likewise sees the state as playing a crucial role in defining individual human rights.<sup>40</sup> As she explains,

Kant and Rousseau thought that the value of equal freedom could only be realized through the state. The reason they thought equal

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<sup>34</sup> See *Windsor*, 133 S. Ct. at 2693 (focusing on the purpose reflected in “[t]he history of DOMA’s enactment and its own text”).

<sup>35</sup> See *id.* at 2693, 2695 (rejecting “the congressional purpose to influence or interfere with state sovereign choices about who may be married” as an improper purpose).

<sup>36</sup> See Young & Blondel, *supra* note 5, at 133.

<sup>37</sup> See, e.g., *Windsor*, 133 S. Ct. at 2693 (observing that “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute”); *id.* at 2694 (insisting that “plac[ing] same-sex couples . . . in a second-tier marriage . . . demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify” (citation omitted)).

<sup>38</sup> Levinson, *supra* note 4.

<sup>39</sup> See, e.g., Edmund Burke, *Reflections on the Revolution in France* 51 (Frank M. Turner, ed., Yale Univ. Press 2003) (1790) (“Government is not made in virtue of natural rights, which may and do exist in total independence of it . . . . But as the liberties and the restrictions vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule . . . .”); see also Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 642–59 (1994) (discussing Burke’s philosophy).

<sup>40</sup> Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* 27–56 (2009).



freedom required this kind of mediation was that prior to the establishment of the state, the value of equal freedom is *indeterminate* with respect to certain key questions.<sup>41</sup>

Because abstract principles of equal freedom are “underspecified, and therefore cannot be directly applied,” we require a state to specify those principles’ meanings in concrete situations through democratic processes.<sup>42</sup>

This need is excruciatingly apparent in the debate over same-sex marriage. As I have already argued, it is not easy to resolve the appropriate limits of a right to marriage by appeal to general constitutional principles, and people of good will may likewise disagree about how general principles of justice map on to this issue. As the dissenters suggested in *Windsor*, a democratic resolution of the question may be the best we can do. In Professor Stilz’s terms, democratic deliberation by the state fleshes out the otherwise-indeterminate contours of the marriage right. But if democratic deliberation is to play this role, in a federal system like ours it becomes crucial to determine *which level* of government should resolve the question. In the absence of some Platonic meaning of “marriage,” should that right’s indeterminate contours be resolved by a state community, or a national one?

*Windsor* did not hold that this question conclusively belongs to the states, and it is likely that future courts will have to confront the question whether the Fourteenth Amendment precludes a state from adopting a definition of marriage that excludes same-sex couples. That will be a hard case. What the Court did say, however, is that under our constitutional scheme the contours of marriage are questions for the states in the first instance, and that Congress needs a particularly good reason to interfere with a state’s resolution of such questions. The right of “recognition” in *Windsor*, then, was not some untethered judicial creation, but rather an entitlement to federal recognition of state law rights created in the democratic exercise of the states’ reserved powers. That right is utterly familiar—and fundamental.

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<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.* at 40, 57–60.