
LECTURE

WINDSOR'S MAD GENIUS: THE INTERLOCKING GEARS OF RIGHTS AND STRUCTURE

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INTRODUCTION

This paper offers a new take on *Windsor v. the United States*,¹ a case on everyone's mind as this issue goes to print given the Supreme Court's recent grant of certiorari in the same-sex marriage cases.² Be warned, though. Academics usually come to bury opinions, not to praise them, so I'm stepping

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¹ 133 S. Ct. 2675 (2013).

² *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571) (granting certiorari in four cases consolidated for appeal).

out of role by saying something nice about a Supreme Court opinion. But I think there's a bit of mad genius in *Windsor* and that academics have been too quick to dismiss its insights.

While *Windsor* flouts just about everything we teach our students about constitutional law, it is right to do so. Its author, Justice Kennedy, blurs the lines between federalism, liberty, and equality, and he blurs the lines between structure and rights. The genius of the opinion is that it recognizes that rights and structure are like two interlocking gears, moving the grand constitutional project of integration forward. While the doctrine isn't built to recognizing that reality, that's the doctrine's problem, not *Windsor's*.

Part I describes the opinion and catalogs the many doctrinal and rhetorical puzzles embedded in it. Part II discusses the core but neglected truth at the heart of the opinion—the fact that rights and structure work together to move debates forward, with federalism compensating for the shortcomings of the First Amendment. Part III argues that *Windsor* is best understood as an effort to “clear the channels of political change” and allow proponents of marriage equality to take full advantage of the discursive benefits of structure.

I. WINDSOR'S MANY MYSTERIES

Most scholars were happy about the result in the *Windsor* but looked askance at its reasoning³—the academic equivalent of loving the sinner but hating the sin. Because *Windsor* struck down the part of the Defense of Marriage Act (“DOMA”)⁴ that withheld federal recognition from state-recognized same-sex marriages, it is yet-another step in the path toward marriage equality and thus to be celebrated. But Justice Kennedy's reasoning left much to be desired according to those who wrote in the opinion's wake. That's because Justice Kennedy invoked both rights and structure to justify the Court's decision. He spoke of same-sex marriage as a question implicating both equality and liberty, the twin values of the Fifth and Fourteenth Amendments.⁵ And yet he also cast the decision as vindicating the principles of federalism. By pairing rights and structure in this fashion, Justice Kennedy elicited a collective groan from the academy.

For those of you who haven't read the opinion, let me walk you through it. The lead-in of the merits analysis places it squarely in the federalism camp by framing the case as a conflict between state and federal regulatory authority.⁶

³ See *infra* sources cited in note 25.

⁴ Pub. L. No. 10-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

⁵ Because this case involved a challenge to a federal statute, Fourteenth Amendment arguments were run through the Fifth Amendment. Indeed, the Court states that “the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Windsor*, 133 S. Ct. at 2695.

⁶ *Id.* at 2689-92 (discussing the states' traditional role in defining marriage and its relationship to DOMA); *id.* at 2692 (stating that New York's “actions were without doubt a

There's a lot of federalism in the opinion as well. Indeed, Kennedy mentions state sovereignty and states' authority over marriage no fewer than eleven times.

Just when you start thinking that you've got a federalism opinion on your hands, however, Justice Kennedy switches gears. DOMA, he writes, is constitutionally vulnerable "quite apart from the principles of federalism."⁷

Enter the Fifth and Fourteenth Amendments. Kennedy notes that the states have conferred "a dignity and status of immense import" on same-sex couples and thereby "enhanced the recognition, dignity, and protection of the class in their own community."⁸ All of Justice Kennedy's favorite themes begin to emerge, as he quotes his own opinion in *Lawrence*⁹ and waxes eloquent about the "dignity of that [marital] bond" and New York's "legal acknowledgment of the intimate relationship between two people."¹⁰ Aha, you start to think, it's a liberty decision—Justice Kennedy's favorite flavor of constitutional analysis.

But wait, there's more, as they say in infomercials. Because equality talk also creeps into the opinion.¹¹ Federal law, Kennedy writes, is "designed to injure the same class the State seeks to protect."¹² Take a moment and turn this passage over in your head:

This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.¹³

It's equal protection, right? Indeed, as Boston University's Linda McClain has astutely pointed out,¹⁴ it sounds a lot like *Romer v. Evans*.¹⁵ In *Romer*, you may remember, Justice Kennedy struck down an amendment to the Colorado state constitution that required that equality guarantees for gays and lesbians be passed at the state level. By asserting that the breadth and narrowness of the

proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended.").

⁷ *Id.* at 2692.

⁸ *Id.*; see also *id.* (finding that DOMA, by denying federal recognition of these marriages, "requires [the] Court to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment").

⁹ *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

¹⁰ *Id.*

¹¹ See, e.g., *id.* at 2689 (describing same-sex couples enjoying "a status of equality with all other married persons").

¹² *Id.*

¹³ *Id.* at 2693.

¹⁴ See Linda McClain, *From Romer v. Evans to United States v. Windsor*, 20 DUKE J. GENDER L. & POL'Y 351, 353 (2013) (terming *Romer* "the template" for *Windsor*); see also Marc R. Poirier, "Whiffs of Federalism" in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 978 (2014) (making a similar point).

¹⁵ 517 U.S. 620 (1996).

Colorado amendment combined to make it irrational, he managed to condemn the state initiative as discriminatory even without designating the LGBT community as a protected class. So, too, by condemning the breadth and narrowness of DOMA,¹⁶ Justice Kennedy manages to invalidate it without designating gays and lesbians as a protected class. Moreover, the injury in both cases was similar. In *Romer*, it was the decision to move the power to protect gays and lesbians up from the local to the state level, thus preventing Boulder and like-minded cities from passing equality laws.¹⁷ In *Windsor*, it was the decision to move the power to decide what constituted marriage under federal law from the state to federal level, thus preventing New York and likeminded states from conferring federal marriage benefits on same-sex couples.

Kennedy blurs the lines between rights and structure even more in *Windsor*, and it's this part of the opinion that causes academics' heads to explode. He goes so far as to equate federal interference with state marriage laws (technically, a federalism question) with discrimination against gays and lesbians (technically, an equality question).¹⁸ Indeed, almost every time he describes the rights deprivation at issue in *Windsor*, he refers to DOMA taking away a right or status that the states have conferred.¹⁹ "The state's power in defining the marital relation is of central relevance," he writes, "quite apart from principles of federalism."²⁰ But the fact that the states have conferred this status or right matters not at all for the Fifth/Fourteenth Amendment claim, be it liberty or equality, since both claims depend solely on whether *federal* law confers the right, not state law.²¹

¹⁶ See, e.g., *Windsor*, 133 S. Ct. at 2690, 2694, 2695.

¹⁷ That makes very little sense as a structural matter, as Justice Scalia doggedly pointed out in his *Romer* dissent. *Romer v. Evans*, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting). After all, *any* decision to move a decision from the local to the state—almost any law passed at the state level—ends up harming some locally concentrated group by making it harder for them to achieve their goals at the local level. And yet Justice Kennedy wouldn't commit to the idea—which undergirded decisions like *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*, 551 U.S. 701 (2007), and *Hunter v. Erickson*, 393 U.S. 385 (1969)—that this move was only suspect when it involved a protected class. Instead, Justice Kennedy's opinion in *Romer* extended the reasoning of these cases to what was at least nominally a nonsuspect class without explaining how or why cases that don't involve protected classes—like state-wide smoking bans or statewide anti-nepotism rules—were constitutional.

¹⁸ *Windsor*, 133 S. Ct. at 2693-94.

¹⁹ See, e.g., *id.* at 2689, 2692-96; see also Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. 29, 43 (2013) ("At literally every turn, [*Windsor*] emphasized the fact that *state law* had recognized the validity of Edith Windsor's marriage.").

²⁰ *Windsor*, 133 S. Ct. at 2692.

²¹ Randy Barnett pointed out the novelty of this move in the immediate wake of the opinion. Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (Jun. 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism->

Perhaps most importantly, Justice Kennedy leaves open the possibility that the national government could override state marriage laws that *discriminate* against same-sex couples.²² You can see why commentators were up in arms. If DOMA is about the Fifth and Fourteenth Amendments—be it the equality or liberty strand—then it's not just DOMA that falls; it's any state marriage law discriminating against same-sex couples.²³ If DOMA loses on federalism grounds, however, it's because sovereignty shields this traditional area of state concern from federal interference. That, in turn, means that the national supremacy trump card can't be played in the marriage debate and that state bans on same-sex marriage must stand.

Kennedy, however, refuses to follow the logic of either doctrinal line. He insists DOMA falls on both grounds while saying nothing about the constitutionality of discriminatory state laws or the fate of equality-forcing national mandates. To the contrary, the opinion reads as if there is not *yet* a Fourteenth Amendment right to same-sex marriage but there will be one sooner rather than later.

So note *Windsor's* many mysteries. It's not just that the opinion blends—seemingly willy-nilly—liberty, equality, and federalism analysis while refusing to follow the logic of *any* of those doctrinal lines. It's not just that the opinion reads as if a federal right to same-sex marriage doesn't exist now but might well exist later. *Windsor's* mysteries seep down into the grain of the opinion, inflecting the text itself. It's strange, for instance, that *Windsor* repeatedly—even doggedly—describes the equality and liberty interest here as one recognized by the state.²⁴ The traditional rights/structure divide doesn't accommodate such a distinction. As I noted above, if same-sex couples enjoy a right to marry under the U.S. Constitution, it matters not at all if the right has been recognized by the state of New York. The last part of Kennedy's phrasing is pure surplus, and yet he repeats it again and again. That textual pairing—a right recognized by the state—is just as strange if *Windsor* is a federalism case. New York's decision to recognize same-sex marriage would be protected whether the state were recognizing a constitutional right or just making policy.

marries-liberty-in-the-doma-decision/, archived at <http://perma.cc/WLW4-AD6X>. See also Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 260-61, 277-78 (2014).

²² See *Windsor*, 133 S. Ct. at 2691 (insisting that “[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons” (citing *Loving v. Virginia*, 388 U.S. 1 (1967))).

²³ The general rule is that the rights protected by the Fourteenth Amendment are enforced equally against the states and federal government. But there are exceptions to this rule, as Brian Soucek's essay on “noncongruent equal protection” elegantly argues. Soucek links *Windsor* to the Court's alienage discrimination cases, which apply different levels of scrutiny to the interests offered by the state and federal governments when they defend their laws. Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155 (2014).

²⁴ *Supra* note 19 and accompanying text.

So, too, while I separated out the three stands of the opinion for clarity's sake, in fact Justice Kennedy intertwines them throughout the opinion. Even the doctrinal test used to invalidate DOMA is a mystery—the problem, we are told, is that DOMA is both narrow and broad. It's not clear why that's a magic combination under *any* account of the harm.

These mysteries pose a real challenge to anyone attempting to explain *Windsor*. Any satisfying account of the opinion must explain them, which is precisely what I hope to do in the next Part.

II. *WINDSOR'S* HIDDEN LOGIC: THE INTERLOCKING GEARS OF RIGHTS AND STRUCTURE

Given the deep tensions between *Windsor* and conventional doctrine, you won't be surprised to learn that in the immediate wake of the opinion, commentators dismissed Kennedy as muddle-headed²⁵ and began fighting over whether *Windsor* was “really” an equality opinion or liberty opinion or a federalism opinion.²⁶ What I've found so dispiriting about much, but not all,²⁷

²⁵ See Young, *supra* note 19, at 40 (“Much of the early commentary . . . has found Justice Kennedy's opinion to be ‘muddled’ and unclear as to its actual rationale”); *id.* at n.4 (collecting sources); see also Richard S. Myers, *The Implications of Justice Kennedy's Opinion in United States v. Windsor*, 6 ELON L. REV. 323, 323 (2014) (“Justice Kennedy's opinion in *Windsor* is a disaster in terms of judicial craftsmanship.”); Gerard Bradley, *Great Expectations*, SCOTUSBLOG (June 26, 2013, 6:23 PM), <http://www.scotusblog.com/2013/06/great-expectations/>, archived at <http://perma.cc/HQB9-6UYP> (claiming that the *Windsor* majority opinion is “simply incoherent”); Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in Windsor*, BALKINIZATION (June 26, 2013, 11:50 PM), <http://balkin.blogspot.ca/2013/06/a-brief-comment-on-justice-kennedys.html>, archived at <http://perma.cc/XDS8-SQNT> (dismissing portions of the opinion as “blather”). One need only look to the rhetoric of Justice Kennedy's own brethren to have a sense of how the opinion has been received in some circles. See, e.g., *Windsor*, 133 S. Ct. at 2707, 2709 (Scalia, J., dissenting) (suggesting the opinion involved “amorphous federalism” and made “federalism noises”); *id.* at 2720 (Alito, J., dissenting) (describing the “whiffs of federalism” in the opinion). For an effort to suggest that *Windsor's* obscurity is a virtue rather than a vice, see Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17 (2013) (casting *Windsor's* vagueness as a form of doctrinal etiquette).

²⁶ For an incomplete sampling, compare Neomi Rao, *Windsor and the Problem with Rights of Recognition*, VOLOKH CONSPIRACY (Sept. 25, 2013, 5:25 PM), <http://www.volokh.com/2013/09/25/windsor-problem-rights-recognition/>, archived at <http://perma.cc/4EY8-SWA3> (arguing that *Windsor* turns on dignity, not federalism), with H. Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219 (2013) (stating that *Windsor* is a fundamental rights and equality opinion, not a federalism opinion), and Deborah Hellman, *Scalia Is Right: Justice Kennedy's Opinion in Windsor Doesn't Rest on Federalism*, BALKINIZATION (June 27, 2013, 5:29 PM), <http://balkin.blogspot.ca/2013/06/normal-0-false-false-false-en-us-x-none.html>, archived at <http://perma.cc/5U8K-5WNR> (“Respect for federalism does not play any role in justifying the decision.”), and Cass R. Sunstein, *Gay-Marriage Ruling Safeguards Human Dignity*,

of the academic commentary on *Windsor* is the rigid insistence on an either/or approach—that something is either federalism or liberty, either federalism or equality. That view is entirely consistent with law professors' intellectual habits—their preference for clarity, consistency, and conceptual categories. It's also consistent with one of their intellectual blind spots—their dogged insistence that “federalism” is an obstacle to debate and integration.²⁸ Because

BLOOMBERG, June 26, 2013, <http://www.bloomberg.com/news/2013-06-26/gay-marriage-ruling-safeguards-human-dignity.html>, archived at <http://perma.cc/94J8-FP7L> (arguing that the Court's decision is based on dignity, not federalism), and Helen J. Knowles, Taking Justice Kennedy Seriously: Why *Windsor* Was Decided “Quite Apart from Principles of Federalism” 31-32 (Dec. 17, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2319487> (*Windsor* is an “equal liberty” opinion, not a federalism opinion), and Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013, 3:49 PM), <http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/>, archived at <http://perma.cc/U7T7-KHEN> (arguing that *Windsor* is a federalism opinion and will not lead to the invalidate of state bans on same-sex marriage), and Dale Carpenter, *Windsor Productions: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (casting *Windsor* as part of the Court's equal protection jurisprudence).

²⁷ See, e.g., Neil S. Siegel, *Federalism as a Way Station*, 6 J. LEG. ANALYSIS 87 (2014); Poirier, *supra* note 14, at 941; Rick Pildes, *Why Justice Kennedy's DOMA Opinion Has the Unique Structure It Has*, BALKINIZATION <http://balkin.blogspot.com/2013/06/why-justice-kennedys-doma-opinion-has.html> (June 26, 2013, 1:34 PM), archived at <http://perma.cc/L7FN-QQTG>; Young, *supra* note 19; Mark Strasser, *Windsor, Federalism and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1, 4 (2013); Linda Greenhouse, *Current Conditions*, N.Y. TIMES: OPINIONATOR (June 26, 2013, 6:57 PM), <http://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/>, archived at <http://perma.cc/ZLG3-LMNQ>; Levinson, *supra* note 25; Larry Tribe, *DOMA, Prop 8, and Justice Scalia's Intemperate Dissent*, SCOTUSBLOG (June 26, 2013, 2:24 PM), <http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/>, archived at <http://perma.cc/R965-UJ87>; Barnett, *supra* note 21; Rick Hills, *Windsor and the States' Power to Define Federal Constitutional Rights: Does Kennedy Revive Justice Harlan's Theory of Rights?*, PRAWFSBLAWG (June 26, 2013, 11:51 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/windsor-and-the-states-power-to-define-federal-constitutional-rights.html>, archived at <http://perma.cc/HQB8-4DQY>; Ernest A. Young and Erin C. Blondel, *Federalism, Liberty and Equality in United States v. Windsor*, CATO SUP. CT. REV. 117, 118 (2013). While these authors see *Windsor* as blending liberty, equality, and federalism, they have very different takes on the opinion's inner logic. Some—like Pildes, Greenhouse, Siegel, Barnett, and Levinson—see the mix largely as the product of compromise or at least an effort to temporize. See also sources cited *infra* note 105. Others—like Poirier, Young, Blondel, and Hills—attempt to offer an account of why the doctrine is properly synthesized in this fashion. Young and Blondel's effort is particularly noteworthy given the obvious influence their amicus brief had on Justice Kennedy's opinion. See Brief of Federalism Scholars as Amici Curiae in Support of Respondent, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

²⁸ See, e.g., Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1965-70 (2014).

law professors too often equate “Our Federalism” with our fathers’ federalism, they have missed the crucial truth undergirding *Windsor*, the hidden logic that helps make sense of its many mysteries.

The key to understanding *Windsor* is to recognize that the ends of equality and liberty are served by both rights and structure. It has simply been a mistake to assume that the values associated with the rights side of the Constitution are promoted solely by the rights side of the Constitution. And yet that mistake is made by virtually all constitutional law theorists; it’s even baked into our constitutional textbooks.²⁹ Those who write about the First and Fourteenth Amendments are almost exclusively interested in dialogue and equality, and those who write about structure are almost exclusively interested in the distribution of power. Both groups have overlooked what I call the “discursive benefits of structure”³⁰—the ways in which federalism promotes dialogue and, ultimately, integration.³¹ If you don’t understand the ways in which federalism and rights work together to promote change, you can’t understand *Windsor*.

In this respect, the marriage-equality fight is a stand-in for a deep but overlooked constitutional truth. Federalism and rights have long served as interlocking gears moving us forward.³² Kennedy’s opinion might not have been a model of clarity, but at least it recognized that important fact. *Windsor* is neither a rights opinion nor a federalism opinion. It is both. And that is precisely as it should be.

What exactly do I mean when I characterize rights and structure as interlocking gears? After all, we typically don’t associate First Amendment or

²⁹ See Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 536-37 (2013).

³⁰ Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2013).

³¹ See, e.g., Gerken, *supra* note 28; Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6, 44-73 (2010) [hereinafter Gerken, *Federalism All the Way Down*]. By “federalism,” I mean to include state, substate, local, and sublocal institutions, as I think that federalism, properly understood, includes local sites as well. See Gerken, *Federalism All the Way Down*, *supra*, at 21-33. While I focus here on the role states have played in the marriage debate given the focus of Justice Kennedy’s opinion and the academic debate that followed, it’s important to note that local-state contestation has been an important part of the story as well. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (describing San Francisco’s effort to “dissent by deciding” in the same-sex marriage debate); Poirier, *supra* note 14; see also Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387 (2008).

³² Gerken, *supra* note 28. Ernest Young and Erin Blondel also depict federalism and the Fourteenth Amendment as “pervasively intertwined,” but they are describing a doctrinal relationship, one in which state law defines the class and inflects the Court’s assessment of the government interests at stake in an equal protection case. Young & Blondel, *supra* note 27, at 118-19. In their view, state law “operates in a *micro* sense, shaping individual-rights doctrine.” *Id.* at 133; see also Young, *supra* note 19.

Fourteenth Amendment values with federalism. If anything, most people assume that federalism undermines rather than promotes those values. It turns out that most people are wrong.

Take a look at the marriage-equality debate through the lens of the First Amendment (though we could just as easily view it through the lens of the Fourteenth, because the aim of this movement is to instantiate a particular view of equality). Proponents of marriage equality were dissenters for a long time. And they did just what dissenters do when exercising their rights under the First Amendment: they protested, they marched, they wrote editorials and blog posts. All of that was important. But if you think about it, the moment when the ground really shifted in the debate came when Massachusetts and San Francisco began issuing marriage licenses to same-sex couples.³³

There's a reason for that. The First Amendment, for all its glories, is fairly thin gruel nowadays.³⁴ The right to free speech is so deeply ingrained in our political tradition that it is questioned only at the margins. As a result, the marriage equality movement didn't lack opportunities to speak; it lacked a chance to be heard. The most difficult problem for political outliers these days isn't getting their message out; it's getting their message across. The marriage equality movement needed what all dissenters need to get their ideas into the national mix—a chance to push its issue on the agenda and force the majority to engage.

It is very, very hard to do that with speech alone, which is why the First Amendment is not enough these days. I could make that point by discussing a long-standing political science literature on agenda-setting,³⁵ but I can make it more simply here by invoking our iconic image of a dissenter: someone standing on a soapbox. Now ask yourself: what you do when you see someone standing on a soapbox? You walk on by. Radio silence is the tool of the powerful these days—it is always safer to ignore dissenters than to engage with them. That's why the First Amendment is often not enough for those who want to change how we see the world.

³³ Here I mean to describe when the ground shifted *in favor of* same-sex marriage. Hawaii, of course, really jumpstarted the debate when its Supreme Court threatened to make same-sex marriage a reality there. See *Baehr v. Lewin*, 852 P.2d 44 (1993). That decision, of course, ignited the debate that led Congress to pass DOMA in the first place. For an overview, see MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 57-60 (2013).

³⁴ I develop this argument in greater detail in *The Loyal Opposition*, *supra* note 28, from which the next few paragraphs are adapted.

³⁵ FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS*, (2d ed. 2009); ROGER W. COBB & CHARLES D. ELDER, *PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING* (2d ed. 1983); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2010); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1988).

That's where structure comes in. The discursive benefits of structure matter a great deal to social movements. Federalism and localism supply different platforms and different forms of advocacy for would-be dissenters.³⁶ Decentralization thus confers a variety of benefits on democracy's outliers that the First Amendment, standing alone, cannot supply.

One of the reasons why federalism and localism matters for social movements is that decentralization allows for what I call "dissenting by deciding."³⁷ It allows dissenters to put in place a real-life instantiation of their ideas. As a result, they can force the majority to engage with them. When dissenters stop speaking and start doing, the majority *must* act—it must engage—even if all it wants to do is maintain the status quo. Better yet, dissenters are no longer confined to abstract arguments. They can show you something works rather than claiming it works.

The same-sex marriage movement has taken full advantage of the discursive benefits of structure.³⁸ When same-sex marriage became a reality in San Francisco and Massachusetts, the debate changed. To begin, the political center shifted: before that period, lots of progressive pragmatists endorsed civil unions. When same-sex marriage became a reality, civil unions became the *compassionate conservative's* default.³⁹

The debate shifted for the American people as well. The issue was no longer abstract because news agencies were beaming pictures of happy pairs of brides and grooms into our television sets. And while some, like California Governor Schwarzenegger, had offered dour predictions about riots in the street,⁴⁰ what we saw instead was the not-so-riotous Gay Men's Choir serenading brides- and grooms-to-be.⁴¹

Elites also had to shift gears. Political leaders in states that didn't recognize same-sex marriage had to decide whether to recognize marriages blessed by those that did.⁴² That meant that politicians who had been reluctant to join the

³⁶ See Gerken, *supra* note 28, at 1977-82.

³⁷ Gerken, *Dissenting by Deciding*, *supra* note 31.

³⁸ Cf. Young & Blondel, *supra* note 27, at 119 ("Federalism has structured our national conversation about same-sex marriage.").

³⁹ Note for instance that the Compassionate Conservative-in-Chief—George W. Bush—endorsed civil unions in the year after same-sex marriages took place in San Francisco and Massachusetts. Elizabeth Bumiller, *Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 25, 2004, at A21.

⁴⁰ Edward Epstein, *Governor Fears Unrest Unless Same-Sex Marriages Are Halted*, S.F. CHRON. (Feb. 23, 2004, 4:00 PM), <http://www.sfgate.com/politics/article/Governor-fears-unrest-unless-same-sex-marriages-2819189.php>, archived at <http://perma.cc/JN5R-4BM8>.

⁴¹ Maura Dolan & Lee Romney, *S.F. Wedding Planners Are Pursuing a Legal Strategy*, L.A. TIMES, Feb. 22, 2004, at A1, available at <http://articles.latimes.com/2004/feb/22/local/me-marry22/3>, archived at <http://perma.cc/Y5ZM-PYT2>.

⁴² Gerken, *Dissenting by Deciding*, *supra* note 31, at 1764-65.

fray could no longer sit on the sidelines. And the Obama administration had to decide whether to enforce DOMA going forward.

My focus here is the same-sex marriage debate, but you can play this game with almost any topic. What moved immigration to the front page in recent years? Arizona's anti-immigration initiatives. The debate over vote fraud heated up when state legislatures started passing ID laws. The push for universal healthcare got a turbo charge when Massachusetts put Obamacare's predecessor into place. All of these examples involved classic forms of dissent. But they also involved the use of structural arrangements—the gifts federalism confers on dissenters—to move a debate forward and force engagement.

Federalism and localism facilitate national politics and national movements in other ways. For example, decentralization allows dissenters to build their case for change one step at a time. That is precisely what was at stake in *Romer*,⁴³ even if the Court lacked a doctrinal category for acknowledging that fact.⁴⁴ And building the case for change one step at a time is often the *only* way to build the case for change.

The First Amendment, of course, technically lets you enter the so-called “national conversation” from the first moment you begin to speak. You'll be shocked to learn, however, that it's very hard to have a national conversation without having a series of local ones first.⁴⁵ National movements rarely begin as national movements. They start small and grow. Leaders of social movements have long used states and localities as sites for organizing and as testing grounds for their ideas. These local platforms don't just facilitate early mobilization, but also help connect nascent movements to the large and powerful policymaking networks that fuel national politics.⁴⁶ National policy, after all, is a *giant* gear to move. As with a clock, you need movement from lots of small, interlocking gears to move a bigger one. And that's precisely

⁴³ See, e.g., Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 452, 455 (1997).

⁴⁴ That's why I agree with Linda McClain and Marc Poirier that *Windsor* displays deep continuities with *Romer*. See Poirier, *supra* note 14, at 978-79; McClain, *supra* note 14.

⁴⁵ Some of the best work on this subject has been done by Cristina Rodríguez. See Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2013) [hereinafter Rodríguez, *Negotiating Conflict*]; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Cristina Rodríguez, *Federalism and National Consensus* (working paper) (on file with the Boston University Law Review) [hereinafter Rodríguez, *National Consensus*].

⁴⁶ For a description of these networks, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1124-30 (2013); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Heather K. Gerken & Charles Tyler, *The Myth of the Laboratories of Democracy* (2013) (unpublished manuscript) (on file with author).

what we saw in the marriage-equality debate—small movements leading to bigger ones.

There is another important dimension to the discursive aspects of structure—to the benefits conferred not by the First Amendment, but by federalism. I will be a bit pedantic on this point, because I think it's crucially important for deciphering the hidden logic of *Windsor*. What I call "dissenting by deciding"⁴⁷ allows dissenters to take advantage of the other powerful tool that decentralization has provided them: regulatory integration.⁴⁸ Because state and national policymaking have become deeply interconnected, one can't move without tugging the other along. That's obviously true of cooperative federal regimes, where states shape federal law as they implement it. But it's even true of those areas where there are no formally recognized regimes established by statute. Criminal law is a good example.⁴⁹ Federal and state enforcement efforts have become so intertwined that three top criminal law scholars have called it yet another version of "cooperative federalism."⁵⁰ To understand why, just think about how the marijuana legalization debate has unfolded and ask yourself whether it's the national government or the states that control federal drug policy at the end of the day. When states like Colorado and Washington legalized marijuana, they effectively changed federal policy as well because the federal government depends almost entirely on states to enforce its marijuana prohibition. One scholar has gone so far as to suggest that this informal integration effectively gives states the power to nullify federal law.⁵¹ Or take a look at the giant fight over the implementation of the ACA and ask yourself whether the states have a role in shaping national healthcare policy.⁵²

Law professors, with their nationalist focus and penchant for clear jurisdictional lines, often miss not just the existence of regulatory overlap, but its significance to national politics and national policymaking. In our highly

⁴⁷ Gerken, *Dissenting by Deciding*, *supra* note 31.

⁴⁸ Gerken, *Federalism All the Way Down*, *supra* note 31, at 33-40; Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013); Gerken, *supra* note 30.

⁴⁹ Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 116-19 (2014).

⁵⁰ DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 8-12 (2014).

⁵¹ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425 (2009).

⁵² Theodore W. Ruger, *Health Care Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 359 (Nathaniel Persily et al. eds., 2013); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013); Heather Gerken & Ted Ruger, *Real State Power Means Getting in the Obamacare Game*, HARVARD BUS. REVIEW ONLINE (Apr. 2, 2013), <https://hbr.org/2013/04/real-state-power-means-getting/>, archived at <https://perma.cc/CXL9-DJJ4>.

interconnected regime, national law often depends on state policymakers, and state law often depends on national policymakers. States and the national government regulate shoulder to shoulder in a tight policymaking space. Movement by one will be felt by the other, whether they are deliberately giving each other a shove⁵³ or just leaning on one another for support.

Because of this extraordinary level of regulatory integration and overlap, states exercise unexpected sway over national policymaking by virtue of the fact that national policymakers depend on the states to carry it out. Needless to say, this high level of policymaking overlap confers an important advantage on would-be dissenters, one that the First Amendment cannot supply. As I explore below, would-be dissenters are able to change both state and local policy at the same time, something that also has the potential to shift national debates.

Federalism, in short, doesn't just promote the same aims as the First Amendment, but it also compensates for its shortcomings. It offers dissenters different forms of advocacy, different platforms for mobilizing, and different levers of change.⁵⁴ These things matter a great deal if your aim is to alter the status quo.

The converse is true as well. Where federalism fails dissenters, the First Amendment often succeeds. The opportunities for "dissenting by deciding" are catch-as-catch-can, emerging at different times and different places in the governance landscape. The First Amendment is a constant, allowing dissenters to speak and organize whenever they like. So, too, the First Amendment allows dissenters to speak *however* they like. Federalism requires dissenters to pour their ideas into the narrow policymaking space available. It requires them to bargain and politic and strike deals. The First Amendment allows dissenters the luxury of ideological purity, which can only be had outside the policymaking arena.

That's why the First Amendment and federalism work so well in tandem, and why both contribute to a well-functioning democracy. Dissenting speech leads to debate, which leads to organizing, which leads to policymaking, which in turn provides a rallying point for still more debate and organizing and policymaking. Because the push for change moves through governance sites as well as media sites, social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without. The key point to emphasize, however, is that federalism—far from being the enemy of dissent—supplies the policymaking gears that are all but essential for any movement to move forward.

I don't want to be unduly sunny about it. The arc of the universe may bend toward justice,⁵⁵ but the gears of rights and structure can move backwards, not

⁵³ For examples of states giving the federal government a shove, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

⁵⁴ For a more in-depth analysis, see Gerken, *supra* note 28.

⁵⁵ Martin Luther King, *Remaining Awake Through a Great Revolution*, Address at the National Cathedral, Washington D.C. (March 31, 1968), in 114 CONG. REC. 9397 (1968).

just forwards. Retrenchment happens at the state and local levels just as advancement does. My point is simply that federalism and its homely cousin localism have been as important as rights in promoting discourse and integration—the two grand democratic projects that have been so central to the push for marriage equality.

III. EXPLAINING *WINDSOR*'S MYSTERIES: CLEARING THE CHANNELS OF POLITICAL CHANGE

Once you think of rights and structure as interlocking gears, once you recognize one can dissent by *deciding*, once you imagine federal dependence on the states as an advantage for dissenters, the many mysteries of *Windsor* seem less . . . mysterious. What was at stake in *Windsor* was neither structure nor rights, neither the right of the states to bless same-sex marriage nor the right of same-sex couples to seek that blessing. What was at stake in *Windsor* was how the debate over same-sex marriage was going to unfold—specifically, whether states legalizing same-sex marriage would be allowed to tug the federal government along with them. *Windsor*, at bottom, was about “clearing the channels of political change.”⁵⁶

That’s a big claim, and it’s one that hasn’t been made about *Windsor*, so let me unpack it. Here I will offer you a read that I’m not ready to endorse—to the contrary, it runs against much I’ve written about and embodies a variety of risks I would be loathe to embrace.⁵⁷ I nonetheless think that this read supplies the best account of what *Windsor* actually says.

I should also emphasize that I’m not attempting here to offer a psychoanalytic account of Justice Kennedy’s decision. *Windsor* may just be one of those moments when Justice Kennedy turns to the camera and speaks as an observant human being rather than a judge.⁵⁸ Or it may be that *Windsor* is just an effort to kick the can a bit farther down the road, to put off a Supreme

⁵⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980).

⁵⁷ *Infra* note 104.

⁵⁸ In that respect, it reminds me a bit of Justice Kennedy’s concurring opinion in school desegregation cases a few terms ago, where he unexpectedly began channeling Robert Cover. There, Justice Kennedy admitted that “[l]aws arise from a culture and vice versa” and admitted that the distinction between *de jure* and *de facto* discrimination was nothing more than a legal fiction. *Parents Involved*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment). For an analysis, see Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 116-18 (2007). Justice Kennedy has noticed—as have we all—that equality norms are being recast, that liberty is being redefined. Supporters of same-sex marriage, he writes, were “responding ‘to the initiative of those who [sought] a voice in shaping the destiny of their own times.’” *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (alteration in original) (internal citations omitted). So, too, the opinion acknowledges that states have influenced our “evolving understanding of the meaning of equality.” *Id.* at 2693. That’s not doctrinally cogent, but it’s true.

Court decision on same-sex marriage for a while longer.⁵⁹ Whatever was in Justice Kennedy's heart or in the back of his mind when he wrote *Windsor*, this read best fits with what the opinion actually says. This argument, then, is an effort at construction and interpretation, not divination.

A. *Why Windsor Is About Both Rights and Structure*

At the very least, we have a handle on *Windsor*'s central mystery. It should now be clear why federalism played such an important role in an opinion nominally about individual rights—why *Windsor* blends rights and structural analysis in such a seemingly haphazard fashion. As noted in Part I, Kennedy repeatedly describes the right not as liberty or equality full stop, but as a right *recognized by the states*. He writes almost as if the status of these rights under the U.S. Constitution is contingent on their recognition by the states. Indeed, Justice Kennedy repeatedly rebukes DOMA for interfering with the states' efforts to recast liberty and equality rights for same-sex couples.

These arguments and rhetorical flourishes are hard to square with conventional constitutional law, but they make a good deal more sense when you recognize that federalism has long been used as a tool for pursuing dissenting views and remapping our views on equality. *Windsor* might not reflect current doctrine in this respect, but it certainly reflects current realities. Federalism has provided a crucial means for the early proponents of same-sex marriage to give content to the notions of liberty and equality, just as Justice Kennedy himself observed.⁶⁰ By extending liberty and equality norms to the deepest reaches of individuals' lives, advocates of same-sex marriage were—they are—changing what liberty and equality mean in this country. And advocates have been doing as much by appealing to constitutional values as appealing to courts, as much by politicking as litigating. It seems to me that the bulk of this work has been done on the democratic and social front, not the legal one. The courts have been the Johnnies-come-lately to this constitutional change.

Justice Kennedy plainly understood that, as was made clear by the remarkable paean to social change at the beginning of the merits analysis.⁶¹ While that understanding is hard to square with traditional doctrinal categories, it has the distinct advantage of being true.

The Court's opinion, for instance, certainly doesn't fit with conventional notions of state sovereignty. That's just fine with me, as I think the sovereignty account is mostly claptrap. Kennedy is correct to leave open the possibility that one day the Court will play the constitutional supremacy trump card and announce marriage equality as the law of the land.

⁵⁹ For arguments to this effect, see sources cited *infra* note 105. Given that the Supreme Court has just granted certiorari on this question, *supra* note 2, it may well be that this is the Term in which the Court rules on this question.

⁶⁰ *Windsor*, 133 S. Ct. at 2689, 2692-93; see also *supra* note 58.

⁶¹ *Windsor*, 133 S. Ct. at 2689; see also *supra* note 58.

So, too, *Windsor* also doesn't fit with the idea that rights are enduring, part of the brooding omnipresence waiting to be discovered by judges. That, too, is fine with me. Rights are built, not discovered; they are demanded, not bequeathed. *Windsor* is correct to notice that as well.

But while *Windsor* looks like neither a conventional rights nor a conventional structure opinion, it does fit beautifully with the idea that rights and structure serve as interlocking gears moving our democracy forward. Like others,⁶² I think *Windsor* can be read as an effort—albeit a tentative one—to think concretely about the relationship between social change and constitutional change. But I have a quite different take on the fashion in which *Windsor* is doing so. I read *Windsor* not as an effort to accommodate political change, but as an effort to clear the channels of political change. And by “clearing the channels of political change,” I don't just mean that the opinion gives the states more time to “deliberate” on these issues, as some have suggested.⁶³ By getting rid of DOMA, *Windsor* changed the conditions in which deliberation (and all the lobbying and politicking that accompanies it) would occur. That's because *Windsor* ensured that proponents of same-sex marriage would be able to take advantage of the discursive benefits of structure.⁶⁴

⁶² *Infra* note 64 (collecting sources).

⁶³ Larry Tribe does not offer the argument I supply here, but he does suggest in passing that Kennedy wants to leave “the most contentious questions about same-sex marriage for the political process to continue grappling with . . .” Tribe, *supra* note 27. Invoking my work and the work of others on what I've called the “discursive benefits of structure,” Neil Siegel refers in passing to the traditional notion of states as laboratories of democracy—here providing “normative guidance about the constitutional meaning of equality and liberty . . .” Siegel, *supra* note 27, at 120. But he thinks the better reading of *Windsor* is that it “signal[s] a commitment to a certain conception of constitutional rights all the way down” and thus “does not seem best described only in terms of federalism.” *Id.* at 122. Instead, he casts federalism as an effort to temporize—a “way station” designed simply to allow “states and courts to continue deliberating about same-sex marriage” until the Court is ready to step in. *Id.* at 134.

⁶⁴ Or perhaps not full advantage. The provision of DOMA affecting whether states must recognize same-sex marriages from other states still stands, thus preventing state decisions to allow same-sex couples to marry from spilling over into states that do not allow such marriages. As I've written elsewhere, policymaking spillovers can provide an important catalyst for change, as states forced to live under the laws and policies of other states often seek a national referee to resolve such dispute and thereby tee up issues for national debates. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014). A number of commentators have already begun to take up the question of cross-state recognition of same-sex marriages, including the always-thoughtful Will Baude. See, e.g., William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J. L. & LIBERTY 150 (2013); Meg Penrose, *Something to [Lex Loci] Celebrationis?: Federal Marriage Benefits Following United States v. Windsor*, 41 HASTINGS CONST. L. Q. 41 (2013); Mark Strasser, *Windsor, Federalism, and the Future of Marriage Litigation*, 37 HARV. J. L. & GENDER ONLINE 1 (2014).

As every 1L knows, the Court has a variety of strategies for dealing with changes in the facts. But the Court has a harder time figuring out what to do with *social* change, as is made clear by *Casey*'s pained efforts to explain *Brown*'s reversal of *Plessy*⁶⁵ or the Court's struggles over whether it should look backward or forward in determining the contours of substantive due process.⁶⁶ When we rethink the content of our character, it often requires judges to rethink the content of our Constitution, and that's a task for which the courts are ill equipped.

Academics have, of course, stepped into the breach, supplying judges with a variety of theories for thinking about how social change should be folded into constitutional doctrine. The "living constitution," Bruce Ackerman's "constitutional moments,"⁶⁷ Bill Eskridge and John Ferejohn's work on "superstatutes,"⁶⁸ David Strauss' common law constitutionalism,⁶⁹ and a variety of theories on democratic constitutionalism⁷⁰ and the like⁷¹—all offer a

⁶⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 862-63 (1992) (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954)).

⁶⁶ *Compare Lawrence v. Texas*, 539 U.S. 558 (2003), with *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁶⁷ See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

⁶⁸ WILLIAM N. ESKRIDGE, JR. & JOHN FEREOHNS, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

⁶⁹ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) [hereinafter Strauss, *Irrelevance*].

⁷⁰ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Robert C. Post, *The Supreme Court, 2000 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

⁷¹ Other works include NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996); MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003) [hereinafter TUSHNET, *CONSTITUTIONAL ORDER*]; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) [hereinafter TUSHNET, *AWAY FROM THE COURTS*]; J.M. Balkin, *Populism and*

frame for thinking about how to connect the fact of *social* change to the necessity of *constitutional* change.

Needless to say, the reception of these theories by the Court has been . . . tepid. One need look no farther for confirmation of this fact than *Shelby County*,⁷² which blithely overturned a statute that academics had designated as a superstatute.⁷³

It's not hard to imagine why. Even a judge open—as Kennedy plainly is⁷⁴—to the possibility of culture shaping law might reasonably be skeptical of these approaches. After all, theories about the relationship between social change and constitutional change are plagued by the same difficulty—the rule of recognition problem.⁷⁵ Despite the best efforts of the academy, we don't have an easy way of identifying when constitutional moments occur, when a social movement does or should influence constitutional doctrine, even when a statute has moved into the “super” category.

Conservative judges might be forgiven, then, for being wary of such approaches. They might sensibly worry that if these approaches are defined too loosely, they'll do little more than provide an excuse for importing the views of liberal elites into the Constitution.

A rule of recognition that pivots off of state and local decisions, however, is less vulnerable to this risk. It requires judges to identify what's been done rather than take the measure of—or simply absorb—the social zeitgeist.

Moreover, the test for what's been done doesn't require judges to decide what an election actually meant. Legislation doesn't need to reach some hard-to-specify level of importance to matter for this purpose; it just needs to be passed in a good number of states. Better yet, the subject of state statutes tends

Progressivism as Constitutional Categories, 104 YALE L.J. 935 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Jack M. Balkin & Sanford V. Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

⁷² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); see ESKRIDGE & FEREJOHN, *supra* note 68; William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

⁷³ See, e.g., ESKRIDGE & FEREJOHN, *supra* note 68, at 19. Or DOMA itself, also designated as a superstatute. *Id.*

⁷⁴ As Linda McClain notes, Justice Kennedy is acutely aware of the “evolutionary process engaged in by citizens and their elected representatives” to change the “constitutional status of homosexuals.” McClain, *supra* note 14, at 463.

⁷⁵ See, e.g., ACKERMAN, *TRANSFORMATIONS*, *supra* note 67, at 91; Eskridge & Ferejohn, *supra* note 72, at 1266, 1275-76.

to be more specific than that of national elections. It's easier to figure out what a law legalizing same-sex marriage means than it is to figure out what the 1968 presidential election meant.⁷⁶

The Court knows this, which is presumably why it so often looks to state legislatures in evaluating what is cruel and unusual under the Eighth Amendment.⁷⁷ People worry about mere “nose counting,”⁷⁸ and rightly so. But for those who worry about judges' personal views slipping into constitutional doctrine, nose counting may well be superior to atmospheric judgments about what constitutes cruel and unusual punishment in this day and age.⁷⁹

It would be tempting to stop there—to equate *Windsor* with the Eighth Amendment cases or to imagine federalism as a face-saving means of folding social change into the Constitution—a fig leaf that lets the Justices adapt to the times without forcing them to offer squishy odes to the living Constitution.⁸⁰

But *Windsor* isn't the right case for that conclusion. The Eighth Amendment cases come at or near the end of the game, when a new national consensus has emerged and the Court is mostly policing outliers.⁸¹ *Windsor*, in sharp contrast, is focused on the process of social change *in media res*. At the time *Windsor* was decided, the marriage equality movement was at an inflection point, with twelve states and the District of Columbia having legalized same-sex

⁷⁶ Cf. Strauss, *Irrelevance*, *supra* note 69, at 1504 (“[T]hese forms of popular rule . . . do not provide a canonical text to be scrutinized and interpreted.”).

⁷⁷ This practice extends well beyond the Eighth Amendment. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 368-69 (2009) (“From due process to equal protection, from the First Amendment to the Fourth and Sixth, the Supreme Court routinely—and explicitly—determines constitutional protection based on whether a majority of states agrees with it.”); Hills, *supra* note 27; Young & Blondel, *supra* note 27, at 135-36.

⁷⁸ See, e.g., Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 155 (2005).

⁷⁹ See *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (“The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”); Roderick M. Hills, *Counting States*, 32 HARV. J.L. & PUB. POL’Y 17, 18 (2009) (suggesting this practice limits judicial discretion); Corinna Barrett Lain, *The Doctrinal Side of Majority Will*, 2010 MICH. ST. L. REV. 775, 789 (“Constitutional interpretation involves judgment calls, and state counting provides an objective, contemporary measure of how those calls should be made. The Justices have said as much themselves.”). Not everyone rests easy on this front. See, e.g., Young, *supra* note 78, at 153-56 (worrying that Justices can import their personal views into a nose-counting decision by altering “the denominator” for the count, as they do when examining foreign law); Lain, *supra*, at 793 (acknowledging the practice can be “subject to manipulation”).

⁸⁰ Cf. Siegel, *supra* note 27, at 29 (“The *Windsor* Court used federalism in the service of living Constitutionalism.”).

⁸¹ Cf. Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 933-34 (2014) (describing and recategorizing the process of policing outliers).

marriage.⁸² The game was far from over, which is why *Windsor* wasn't giving a constitutional blessing to a new consensus.

How do we think about *Windsor* given that unusual fact? I'm an election law scholar as well as student of federalism, so it's hard for me not to view all of this through the lens of Ely's *Democracy and Distrust*.⁸³ A process account helps me understand why Kennedy was willing to invalidate a federal law without saying anything, either way, about the constitutional status of similar state laws. The Court in *Windsor* was, in effect, "clearing the channels of political change"⁸⁴ by allowing proponents of marriage equality to take full advantage of the discursive benefits of structure that I described above. This read, while admittedly controversial, manages to make sense of the many mysteries of *Windsor* and highlights the ways in which the First Amendment and federalism serve as interlocking gears moving national debates forward, as I describe in the next Section.

B. *Clearing the Channels of Political Change*

As I noted in Section III.A, the core question scholars have posed about *Windsor*—why does it mingle rights-based and structural analysis in such an unusual fashion?—can be answered when one recognizes that rights and structure have served as interlocking gears moving us forward. But the connections between this neglected constitutional truth and *Windsor*'s many mysteries run deeper once one casts the opinion as an effort to clear the channels of political change and allow the marriage equality movement to and take full advantage of the discursive benefits of structure.

Remember that DOMA reflected what once was the national view, forged in the wake of Hawaii's threat to allow same-sex marriage in 1996.⁸⁵ But the brouhahas in the states over same-sex marriage signaled to the Court that the consensus was unraveling. Justice Kennedy is quite explicit on this point.⁸⁶ As Cristina Rodríguez has written,⁸⁷ federalism is all but built to deal with an

⁸² *United States v. Windsor*, 133 S. Ct. 2675, 2389 (2013).

⁸³ ELY, *supra* note 56, at 76-77.

⁸⁴ Perhaps, though, I should be invoking not just John Hart Ely, but the great Guido Calabresi as well. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (suggesting that judges should update statutes through common-law decisions by invalidating statutes that no longer enjoy contemporary majority support).

⁸⁵ For a history, see Klarman, *supra* note 33.

⁸⁶ *United States v. Windsor*, 133 S. Ct. 2675, 2689 (explaining that while "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage," now "came the beginnings of a new perspective, a new insight"); *id.* ("New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."); *id.* at 2693 describing the "evolving understanding of the meaning of equality").

⁸⁷ Rodríguez, *Negotiating Conflict*, *supra* note 45.

unraveling consensus. That's not because it allows us to hide in our own policymaking enclaves, be they red or blue. It's because it gives us a chance to work these problems out in sites that are more manageable than the national stage, to have a series of local conversations before we have a national one.⁸⁸

The Court would surely have stepped in if the federal government tried to silence proponents of marriage equality *in media res*. What it did in *Windsor* was take a similar stance on the structural side. It made sure that *federal law* didn't inhibit the debate running through the states, which Jessica Bulman-Pozen casts as staging grounds for national politics.⁸⁹ As Justice Kennedy points out, DOMA's very purpose was to short-circuit the debate about marriage equality. The Act, he writes, was intended to "discourage enactment of state same-sex marriage laws"⁹⁰ and "put a thumb on the scales" in favor of a traditional conception of marriage.⁹¹

Now think back to of *Windsor*'s most puzzling mysteries: the doctrinal test that Justice Kennedy deploys in *Romer* and *Windsor*. Both focus on the fact that the laws invalidated were both narrowly targeted and far-reaching, a test that doesn't make much sense of any of the conventional injuries attributed to *Windsor*. To be sure, these two characteristics are nominally treated as evidence of animus in the opinion. But they fit much more neatly with Kennedy's worries about DOMA shutting down a debate just as it was taking wing.⁹² The amendment challenged in *Romer* was deliberately designed to shut down a nascent debate by putting questions of LGBT equality out of reach of a

⁸⁸ For an elegant exploration of the importance of such conversations to national debates, see Rodríguez, *National Consensus*, *supra* note 45.

⁸⁹ Bulman-Pozen, *supra* note 46, at 1119.

⁹⁰ *Windsor*, 133 S. Ct. at 2693.

⁹¹ *Id.* (citation omitted).

⁹² I think you can identify a similar concern in a Voting Rights Act decision recently authored by Justice Kennedy. See *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). As I've argued elsewhere, in *LULAC*, Justice Kennedy deployed equal protection analysis to condemn efforts to shut down a burgeoning effort to mobilize Latino voters. See Gerken, *supra* note 58, at 110-13. Marc Poirier has put forward a deep, sociologically inflected account of the role the local—even the personal and the corporate—play in forging our understandings of liberty and equality. His account links *Windsor* and *Romer* together as part of the bottom-up development of societal views on dignity that is "managed by governments at various levels of scale." Poirier, *supra* note 14, at 939, 943. In Poirier's view, local and state activities are part and parcel of a broad range of social interactions, which include "micro performances" as well as personal, public, informal and formal interactions taking place within a variety of institutions. All of these interactions, Poirier argues, help social custom evolve. *Id.* at 940, 957. Poirier suggests that "Justice Kennedy is primarily relying on state processes, including judicial review at the state level, to articulate changed social understandings as they bubble up to the level of law." *Id.* at 983. But he, too, thinks that Justice Kennedy saw DOMA as a conversation stopper. In Poirier's words, it "blocked the piecemeal, checkerboard transitional process of states responding to citizens' evolving perceptions of human need and dignity." *Id.* at 976.

group that was powerful at the local level but couldn't win a fight at the state level. DOMA was deliberately designed to shut down a nascent debate by putting federal marriage policy out of reach of groups that were powerful at the state level but couldn't yet win a fight at the national level.

The test Kennedy uses in both cases—one that focuses on whether the legislation is both narrow and broad⁹³—makes perfect sense if you want to prevent someone from shutting down a nascent debate. After all, if you want to put a debate out of reach of advocates, you have to draft a law broadly and narrowly at the same time. You must write broadly because you don't want to leave an opening for supporters to find another policymaking path to pursue their goal. But you must also write narrowly so you can precisely target the debate you want to shut down and avoid interfering with the usual warp and woof of state and local decisionmaking. In *Romer*, that meant shunting all debates over LGBT equality to the state level without treading on the ability of local decisionmakers to pass laws regarding housing, employment and the like. In DOMA, that meant a wholesale federal ban on recognizing same-sex marriages that did not interfere with federal recognition of other marriages recognized by the states.

You might object that it's implausible to imagine *Windsor* as an effort to clear the channels of political change because the marriage equality movement was doing just fine with DOMA on the books, thank you very much. But that argument misses the crucial ways in which states policies shape federal ones. By lifting DOMA's restrictions, Justice Kennedy enabled proponents of marriage equality to take full advantage of the regulatory integration between the states and the federal government that I described in Part II.

Think again to the reasons why regulatory integration provides such an important tool for dissenters. First, state policymaking can help set the national agenda and force national policymakers to engage. The general rule in the marriage domain has been that federal lawmakers followed state lawmakers' lead. DOMA broke that rule, as Justice Kennedy himself points out. DOMA, he writes, was enacted “[a]gainst th[e] background” in which federal law followed state law.⁹⁴ Before *Windsor*, when the states changed their positions on same-sex marriage, the federal government didn't have to adjust. Now when the states move on marriage quality, they get to do what they do in so many arenas: tug the federal government along with them. In the wake of *Windsor*, then, the federal government has had to engage with the question of marriage equality.⁹⁵ It has had to figure out how to work same-sex marriages

⁹³ The statute targets a narrow class—same-sex couples who can marry under state law—but affects a large swath of federal statutes. *Windsor*, 133 S. Ct. at 2693-96.

⁹⁴ *Windsor*, 133 S. Ct. at 2692.

⁹⁵ Some have argued that the shift in federal policy has, in turn, fueled still more change at the state level. Doug NeJaime, for instance, notes that states banning same-sex marriage “keeps those couples from significant federal rights and benefits,” NeJaime, *supra* note 26, at 243, a fact that some believe has influenced the outcome of at least one of the lawsuits

into the federal regulatory system. It's precisely that type of forced engagement that federalism facilitates in an integrated regime like ours.

A second and related gift associated with the discursive benefits of structure is the opportunity to offer a real-world instantiation of an ideal, and here again regulatory integration matters. If you are going to offer a real-world instantiation of an ideal, you want to come as close to real-world conditions as you can. Granting same-sex couples marriage rights under state law obviously matters a great deal. But in a regulatory domain where federal law generally follows state law, the full instantiation of that ideal requires that same-sex marriages receive not just state recognition, but federal recognition.

That's just what *Windsor* guaranteed. And Justice Kennedy is quite self-conscious of that fact. The problem with DOMA, he writes, was that it converted into "second-class" marriages those the state wishes to bless fully,⁹⁶ it targeted "a class of persons that the laws of New York, and of 11 other States, have sought to protect,"⁹⁷ it undermined a "relationship deemed by the State worthy of dignity . . ."⁹⁸

As noted above, none of this matters under traditional rights-based analysis: you are either a protected class or you aren't, you either have a liberty right or you don't. But this distinction does matter if you care about the discursive benefits of structure. DOMA's crucial flaw—what Kennedy calls its "essence"—was its "interfere[nce] with state sovereign choices about who may be married."⁹⁹ As Linda McLain had noted,¹⁰⁰ DOMA interfered with states' efforts to provide full marital benefits to the same-sex marriages it had endorsed.

Just as one would expect, the federal government has made substantial changes to its policies to accommodate the reality of same-sex marriage in *Windsor's* wake. *Windsor* has thus prompted federal officials to confirm a point that proponents of marriage equality have long been trying to make at the state level—same-sex marriage works in practice and does not lead to the parade of horrors routinely invoked on the other side. Here again, the ability to convert an idea from an abstract ideal to a concrete reality is one of the gifts federalism supplies to dissenters.

Thanks to *Windsor*, proponents of same-sex marriage can now go to Washington armed with excellent proof that the federal system can, in fact, accommodate same-sex couples. Because *Windsor* has allowed advocates to take full advantage of the discursive benefits of structure in an integrated regulatory regime, the states can now tug the federal government along with

being brought. See Poirier, *supra* note 14, at 988-90 (discussing *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013)).

⁹⁶ *Windsor*, 133 S. Ct. at 2693-94.

⁹⁷ *Id.* at 2690; see also *id.* at 2692, 2693.

⁹⁸ *Id.* at 2692.

⁹⁹ *Id.* at 2681, 2693.

¹⁰⁰ McClain, *supra* note 14.

them. As a result, advocates now have a real-life instantiation of the *federal* policy they seek to pursue even before they've managed to convince federal lawmakers or the Court itself to do the right thing.

Note also how the Court's decision in *Windsor* even cleared the channel for political change at the judicial level (courts, of course, have long been sites of politicking for social movements). Just as DOMA loomed large over state legislators, uncertainty about the Court's view on these issues loomed large over lower-court judges. *Windsor*, in effect, licensed lower court judges to take part in the process of social change as well. As a result, dozens and dozens of judges invalidated same-sex marriage bans in *Windsor's* wake.¹⁰¹ This social fact has also changed the conditions in which the debate over the constitutionality of same-sex marriage will take place when the Court considers the question this spring.

I recognize that an effort to clear the channels of political change is a controversial move, one that even I am uncomfortable with. But it captures something deep about how the discursive benefits of structure work in practice. Indeed, if you want to understand the ways in which "Our Federalism" allows dissenters to influence both state and national policies, just think about the effects states can now have on *federal* policy in the wake of *Windsor*. High levels of regulatory overlap have long ensured that dissenters can affect state and federal policy at the same time, provided a statute like DOMA isn't standing in the way. And now DOMA is no longer standing in the way.

The notion that *Windsor* was clearing the channels of political change even makes sense of the last of the opinion's many mysteries. Remember that the opinion is written as if same-sex marriage is not yet a right, but it might be soon. But that is precisely what one would write if one were clearing the channels of change. Indeed, by dislodging an outdated consensus at the national level, Justice Kennedy has given proponents of marriage equality a good deal more running room. They can tug federal policymakers along with the states. They can go to Congress or the Court armed with far better evidence than they've had before that same-sex marriage works at both the state and federal level. Indeed, all the policymaking homework for integrating same-sex marriages into the federal system will already have been done by the time this question reaches Congress or the Court. By lifting DOMA, in sum, Justice Kennedy has ensured that the same-sex marriage debate will unfold differently than it would have had it been confined solely to the states.

That's what I meant when I invoked Ely's phrase about "clearing the channels of political change." Justice Kennedy didn't just insist that the national government stand aside while the people, in their capacity as state *peoples*, rethought the old consensus. He insisted that the marriage-equality

¹⁰¹ LAMBDA LEGAL, FAVORABLE RULINGS IN MARRIAGE EQUALITY CASES SINCE *U.S. v. WINDSOR* (2015), available at http://www.lambdalegal.org/sites/default/files/post-windsor_cases_ruling_in_favor_of_marriage_equality_claims_as_of_jan_15_2015.pdf, archived at <http://perma.cc/VT9J-7CK2>.

movement have access to the full range of structural advantages that federalism confers. He insisted that when the smaller gears of state policymaking move in the direction of marriage equality, the larger gear of federal policymaking move with them. And, consistent with the notion of “clearing the channels of political change,” he ensured that the interlocking gears of our democracy—rights *and* structure—were free to move without committing to them moving in a particular direction.

Someone accustomed to the conventions of federalism might think that I'm describing something akin to sovereignty here—the power of the states or their citizenries to make policy without interference from the federal government. But that just brings us back to the outmoded sovereignty account that *Windsor* eschews. There are deep continuities between rights, on the one hand, and a sovereignty account, on the other. Both rest on an autonomy account—the right to be left alone; the right to do something without interference; the right to preside over one's own domain, be it policymaking or personal. If this were about being left alone, however, the federal government could not stop state citizenries from refusing to marry same-sex couples, and *Windsor* plainly did not rule as such. But *Windsor* also didn't hold that a federal right to marry exists, either.

The advantage to viewing *Windsor* through an Elyan lens is that one doesn't have to rely on notions of sovereignty or traditional domains of autonomy, all of which have been eroded by the passage of time. Instead, one can look to the robust role that states play in maintaining a thriving national democracy.¹⁰²

The other advantage to viewing *Windsor* through an Elyan lens is that one also doesn't have to imagine the Court “conferring” a right upon same-sex couples. Instead, one can imagine them forging it themselves. The marriage-equality movement confirms one of the central insights of the nationalist school of federalism,¹⁰³ of which I am a proud founding member: states don't undermine national politics; they make national politics possible. And they do so not by operating separate and apart from national debates and national policymaking, but from being deeply interconnected to both. And if you value—as I do—the benefits that structure, governance, and “dissenting by deciding” confer upon democracy's outliers, it's at least plausible that there would be times when you want to be sure that an old consensus—frozen into a far-reaching federal policy—doesn't prevent us from finishing the conversation that democracy's outliers have begun in their states. There are times when you'd want to be sure that it's possible for the smaller gears of state lawmaking to move the giant gear of federal lawmaking forward.

¹⁰² Gerken, *supra* note 30, at 1890-1901.

¹⁰³ *Id.* at 1889-90.

CONCLUSION

As I noted above, I'm not ready to endorse this read of *Windsor* as the Platonic ideal, all things considered. It has rule-of-recognition problems of its own, not to mention a whole host of other problems embedded within it.¹⁰⁴

But I do think this read of *Windsor* has two, distinct advantages over the alternatives. First, it's the only interpretation that makes sense of the many mysteries of Kennedy's opinion. Scholars have offered lots of arguments about *Windsor* as a way station or a temporary reprieve or a heavy hint from the Court,¹⁰⁵ and they certainly have their realpolitik point. But those reads don't square with interstices of the analysis, let alone the unusual rhetoric of the opinion. My aim is to offer an internalist account of the decision, not a psychoanalytic one—the best read of what the opinion actually says, not an effort to divine what the opinion might mean.

Second, and more importantly, the account I've offered here reflects an important constitutional truth about how our democracy functions, one that has not gotten the attention of the courts or the vast majority of law professors to write on the subject. Because of our penchant for abstraction, clear conceptual categories, and tidy doctrinal lines, too many law professors have condemned *Windsor* as muddleheaded and thereby missed its true genius.

¹⁰⁴ The concerns are fairly obvious. Even if a court were able to identify when a national consensus has started to fray, it would then have to make exquisitely difficult judgments about whether the political process is working properly. The notion that DOMA could be invalidated on the grounds I suggest above is especially worrisome for someone like me, who both believes fervently in the values associated with dissent at the state and national level but also thinks it's perfectly acceptable for the national government to play the national supremacy trump card whenever it wishes.

¹⁰⁵ Siegel, *supra* note 27; see also Cruz, *supra* note 26, at 46-47 (describing *Windsor* as a temporizing strategy); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 140-41 (2013) (characterizing *Windsor* as an effort to temporize); Pildes, *supra* note 27 (arguing that the structure of the opinion reflects Justice Kennedy's desire to put off deciding the core issue); Mary L. Dudziak, *Windsor: LGBT Version of Reed v. Reed?*, BALKINIZATION (June 26, 2013, 4:26 PM), <http://balkin.blogspot.ca/2013/06/windsor-lgbt-version-of-reed-v-reed.html>, archived at <http://perma.cc/K8JM-DE7L> (“[*Reed v. Reed*, 404 U.S. 71 (1971)] was an indication that the rights of women would finally be taken seriously by the Court. We might also take *Windsor* as a signal that more robust equal protection rights for LGBT folks is on the way.”).

Jack Balkin thinks the Court has been far more strategic, issuing an ambiguous decision in *Windsor* to signal that lower courts should invalidate bans on same-sex marriage even where their legislatures won't, all with an eye to prod a supermajority of the states to license same-sex marriage so that the Court can step in, declare the game is over, and police whatever outliers remain. Jack Balkin, *The Supreme Court Simulates a State Bandwagon Effect in Favor of Same-Sex Marriage*, BALKINIZATION (Oct. 7, 2014, 11:03 AM), <http://balkin.blogspot.com/2014/10/the-supreme-court-simulates-state.html>, archived at <http://perma.cc/7VYZ-CLTU>.

Or maybe we've just ignored what Boston University's Larry Yackle wrote about the gay rights movement way back in 1993. He predicted that "the constitutional principles and rules we have developed to date will disappoint us at every turn" and that there will be no "fixed and firm doctrinal markers" to lead the way because "we are in . . . a real and human mess; it will not be disciplined by abstractions alone."¹⁰⁶

Windsor, for all its demerits, recognizes that we are in a real and human mess and cannot be disciplined by abstractions alone. It recognizes that rights and structure—long thought to be inimical or at least orthogonal to one another—are deeply and importantly connected to one another and to the central projects of our democracy. They are interlocking gears, moving the projects of discourse and integration forward. And while constitutional doctrine has not yet recognized this important fact, that's the doctrine's problem, not *Windsor*'s.

¹⁰⁶ Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 793 (1993).

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