

**“WHIFFS OF FEDERALISM”  
IN UNITED STATES V. WINDSOR:  
POWER, LOCALISM, AND KULTURKAMPF**

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## INTRODUCTION

This Article investigates two related questions raised by *United States v. Windsor*.<sup>1</sup> One is whether and how it is a federalism decision, or instead a localism decision. The other is how *Windsor* is an elaboration of what I view as a consistent approach by Justice Kennedy towards evolving norms of human dignity. I propose that Justice Kennedy's quasi-federalism is, in an important way, localism instead. In order to make this second point, the Article sets out an overall theory of how social change works with regard to identity processes and *Kulturkampf*.<sup>2</sup>

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

2. A definition:

While the term "*kulturkampf*" may refer to various periods in different social and political settings, in the United States at the turn of the millennium the term had come to signify the national coordination of political efforts to retrench civil rights and New Deal legacies in both social and legal terms.

Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627, 650 (2008). The notion that the United States was in the midst of a culture war between more orthodox traditionalists and more liberal progressives emerged in the 1990s, in significant part through the scholarly efforts of conservative sociologist James Davison Hunter, and through the announcement of a culture war as a campaign theme by Pat Robertson at the 1992 Republican National Convention. See, e.g., MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 1–7 (Eric Stano ed., 3d ed. 2011) (history of the emergence of culture war rhetoric in the United States in the early 1990s); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991) (key text in establishing the culture war rhetoric); Valdes, *supra*, at 650 n.81 (discussing Pat Robertson's campaign); Rhys H. Williams, *Introduction, in CULTURE WARS IN AMERICAN POLITICS: CRITICAL REVIEWS OF A POPULAR MYTH* 1–14 (Rhys H. Williams ed., 1997) (providing a history of the term culture war in contemporary United States culture and politics).

"*Kulturkampf*," the German word for culture war, was used by Justice Scalia in the opening sentence of his dissent in *Romer v. Evans*, thus embedding the German term in legal discourse. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a *Kulturkampf* for a fit of spite.") (emphasis added); see also *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("It is clear . . . that the Court has taken sides in the culture war . . ."). Ever since Justice Scalia's dissent in *Romer*, legal academics have felt free to use the German term.

Sociologists and political scientists have long questioned how extensive and how central the *Kulturkampf* is to American politics. See, e.g., N.J. Demerath & Yonghe Yang, *What American Culture War? A View from the Trenches as Opposed to the Command Posts and the Press Corps, in CULTURE WARS IN AMERICAN POLITICS, supra*, at 17, 36 (the polarization argument "oversimplifies American ideological diversity and vastly exaggerates the cultural divide among us.");

Justice Kennedy’s majority opinion says directly that *Windsor* is not a federalism decision.<sup>3</sup> Chief Justice Roberts says it is a federalism decision, but not a very good one.<sup>4</sup> Justice Scalia has several insulting things to say about Justice Kennedy’s opinion—“amorphous federalism” being only one of them.<sup>5</sup> “[W]hiffs of federalism,” which I have used in my title, comes from Justice Alito’s separate dissenting opinion.<sup>6</sup>

Clearly, there is much in Justice Kennedy’s *Windsor* opinion about what the federal government can and cannot do regarding the states’ decisions about marriage recognition, but Justice Kennedy is cautious to avoid a clear federalism

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FIORINA ET AL., *supra*, at 8 (“The simple truth is that there is no culture war in the United States. . . .”); JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?* (Gertrude Himmelfarb et al. eds., 2006); IRENE TAVISS THOMSON, *CULTURE WARS AND ENDURING AMERICAN DILEMMAS* 175 (2010) (“[T]here is no culture war, just newer iterations of long-standing American cultural dilemmas”); Williams, *supra*, at 12 (“There is not a ‘culture war’ in the United States. . . .”). The perception of a culture war results in part from “systematic and self-serving misrepresentation by issue activists, and selective coverage by an uncritical media more concerned with news value than with getting the story right.” FIORINA ET AL., *supra*, at 8.

Nevertheless, the word “*Kulturkampf*” is a useful shorthand description of pervasive cultural and political tensions over abortion, sexual freedom, homosexuality, pornography, and public school curricula, among other issues, including the question of legal recognition of same-sex marriages. *See, e.g.*, Stephen H. Aden, *A Tale of Two Cities in the Gay Rights Kulturkampf: Are the Federal Courts Presiding Over the Cultural Balkanization of America?*, 35 WAKE FOREST L. REV. 295, 298 (2000) (“The term culture war and the martial tone adherent to it have been consciously adopted by fundamentalists and anti-progressive forces for years.”); Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 147 (2009) (“incessant culture war”); *id.* at 149–61 (describing the antigay culture war); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 57–59, 80, 82 (1999) (describing an antihomosexual *Kulturkampf* from 1946–1961).

3. “[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.” *Windsor*, 133 S. Ct. at 2692.

4. “I think the majority goes off course. . . . [B]ut it is undeniable that its judgment is based on federalism.” *Id.* at 2697 (Roberts, C.J., dissenting).

5. *Id.* at 2707 (Scalia, J., dissenting). Justice Scalia also calls Justice Kennedy’s justifications “rootless and shifting.” *Id.* at 2705. He writes that the beginning of Justice Kennedy’s opinion may initially fool many readers into thinking it is a federalism opinion, and that even after Justice Kennedy has disavowed that justification, the opinion continues to appear to rely on principles of federalism. *Id.* Justice Scalia says Justice Kennedy’s opinion makes “federalism noises.” *Id.* at 2709. And Justice Scalia provides a turn of phrase that will long be quoted, describing Justice Kennedy’s opinion as containing “disappearing trail[s] of . . . legalistic argle-bargle.” *Id.*

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

holding.<sup>7</sup> He channels his argument through the “liberty” component of the Due Process Clause of the Fifth Amendment.<sup>8</sup> His opinion is based on a kind of triangulation, considering what the federal legislature may and may not do regarding individuals and couples in a sphere where the states are traditionally in charge—that is, determining the principles and details of the definition and recognition of marriage.<sup>9</sup> Although the question before the Court involves the constitutionality of an exercise of federal power, Justice Kennedy never loses sight of the stakes, which are individual liberty and dignity. The understanding of individual liberty and dignity is evolving, and is interpreted and furthered by some states’ decisions to confer the legal status of marriage on same-sex couples.<sup>10</sup> But this is not full state power, full federalism. Crucially, Justice Kennedy points out that the leeway he assigns to the states in *Windsor*

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7. As June Carbone writes, “Justice Kennedy approached, but then backed off, federalism as a justification for the opinion.” June Carbone, *It Became Necessary to Destroy Marriage In Order to Defend It*, 91 DENV. U. L. REV. ONLINE 35, 39 (2013).

8. *Windsor*, 133 S. Ct. at 2695 (Kennedy, J., majority opinion) (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”). There is an Equal Protection component to the reasoning, to be sure, but it plays a supporting role. “While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* See *Jenkins v. Miller*, No. 2:12-CV-184, 2013 WL 5770387, at \*25–\*26 (D. Vt. Oct. 24, 2013) (reading *Windsor* as a liberty decision that also holds that the class of same-sex marriage couples receives equal protection analysis as a class, although the standard of review is unclear). A number of scholars have noted generally the convergence of Equal Protection and Substantive Due Process arguments in constitutional discourse. For one persuasive account, see Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007) [hereinafter Karst, *Liberties of Equal Citizens*].

9. Justice Kennedy argues that states have “by history and tradition” defined and regulated marriage. *Windsor*, 133 S. Ct. at 2689. Marriage is “treated as being within the authority and realm of the separate States.” *Id.* at 2690. “Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.” *Id.* However, the Defense of Marriage Act (DOMA) “singles out a class of persons [same-sex couples] 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.” *Id.* at 2695–96. DOMA is invalid because it has no legitimate purpose related to traditional, limited federal determinations around marital status in specific contexts: DOMA’s sole purpose and effect is “to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Id.* at 2696.

10. *Id.* at 2689.

to recognize the unfolding understanding of liberty and dignity is subject to constitutional “guarantees.”<sup>11</sup>

The way Justice Kennedy structures the *Windsor* reasoning is actually consistent with what he has been articulating elsewhere, not just in the area of human dignity.<sup>12</sup> These other instances include his property jurisprudence;<sup>13</sup> what he said in his 1987 confirmation hearings about human dignity and constitutional interpretation;<sup>14</sup> and what he said about privacy, unenumerated rights generally, and the “dictates of judicial restraint” in a 1986 speech at Stanford when he was a Ninth Circuit judge.<sup>15</sup> Justice Kennedy holds a consistent conception about how the state and federal levels of government relate to one another and how both levels relate to what he views to be evolving understandings of human dignity or liberty. These evolving understandings inevitably occur locally but are managed by governments at various levels of scale.<sup>16</sup>

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11. *Id.* at 2691 (stating that “[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons,” and citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

12. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (relying on dignity reasoning); see also *Romer v. Evans*, 517 U.S. 620 (1996). Although the *Romer* decision does not discuss dignity in so many words, it centrally concerns the levels of scale at which local governments, and other entities such as universities, may recognize the dignity of LGBT folk through antidiscrimination laws without unjustified interference from governmental authority at higher levels of scale.

13. I will advert to *Kelo v. City of New London*, 545 U.S. 496, 493 (2005) (Kennedy, J., concurring); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment). *Lujan* is, of course, an environmental standing case, but since I consider most environmental problems to be at heart about how to manage resources or externalities that are not easily addressed with common law private property doctrines and procedures alone, I view *Lujan* as a species of property case. The specific issue on which Justice Kennedy writes in *Lujan* is the possibility that, in addressing environmental concerns, our understanding of injury will need to evolve beyond what is available at common law. *Lujan*, 504 U.S. at 580.

14. See *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearing on S. 100-1037 Before the S. Comm. on the Judiciary*, 110th Cong. 1 (1987) [hereinafter *Kennedy Confirmation Hearing*].

15. Anthony M. Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint, Speech delivered at the Canadian Institute for Advanced Legal Studies: The Stanford Lectures (July 24, 1986) [hereinafter Kennedy, Unenumerated Rights], available at <http://joshblackman.com/blog/wp-content/uploads/2013/09/Kennedy.-Unenumerated-Rights-speech-1986-1.pdf>.

16. Justice Kennedy’s jurisprudence is sometimes characterized as ad hoc and

This Article's argument proceeds as follows. In Part I, we find an entry into the complex question of how the understanding of liberty and dignity evolves, and when law comes to reflect those changes, through two colloquies that occurred during the March 2013 oral arguments in the same-sex marriage cases.<sup>17</sup> Part I then examines the role of microperformances and the local, which are central to one type of account of the evolution of social custom, and it ties that discussion to questions of scale, which implicate both federalism and localism.<sup>18</sup>

Part II.A takes up the topic of dignity, which forms the linchpin of Justice Kennedy's reasoning in *Windsor*, as in some earlier cases—notably for our purposes, *Lawrence v. Texas*.<sup>19</sup> First, it observes that dignity is always socially situated, and that in Justice Kennedy's opinion in *Windsor*, dignity turns crucially on individual experiences at the local and the micro levels of scale.<sup>20</sup> Along the way, the Article examines two important statements made by Justice Kennedy during his days in the 1980s as a Ninth Circuit judge concerning the role of dignity in constitutional decision-making; the way in which understandings of liberty and dignity must be understood to evolve; and, in Justice Kennedy's words, “the dictates of judicial restraint.”<sup>21</sup>

Justice Kennedy's understanding of evolving social norms and their relation to constitutional decision-making appears in other areas of his Supreme Court jurisprudence as well. Part II.B examines his property jurisprudence, a perhaps unexpected comparator.<sup>22</sup> Again we find pervasive themes of evolution of legal principle from local experience, such that

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inconsistent. In fact, “[s]een as a whole, . . . his opinions articulate a distinctive approach to constitutional interpretation based on coherent moral conceptions of personal liberty and human dignity, the limits of government power, and the role of courts in enforcing both.” FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 7 (2009).

17. See *infra* Part I.A. In addition to *Windsor*, the Court heard oral argument in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

18. See *infra* Part I.B.

19. 539 U.S. 558 (2003). See *infra* Part II.

20. See *infra* Part II.A.

21. That is the point of Justice Kennedy's 1986 speech. Kennedy, Unenumerated Rights, *supra* note 15. Justice Kennedy was then called upon to defend his statements in his 1987 confirmation hearings. *Kennedy Confirmation Hearing*, *supra* note 14. See *infra* Part II.A.

22. See *infra* Part II.B.

broad questions presented as constitutional matters to federal judges and Justices often must be left open; rules from on high by judges (and Justices) often must be limited and are inappropriate or at least premature if too broad.<sup>23</sup>

In *Windsor*, Justice Kennedy exercises considerable caution, refraining from articulating either a clear federalism rule or a clear equal protection or substantive due process liberty rule that would resolve the marriage equality question once and for all. Part III of the Article suggests that, despite restraint on Justice Kennedy’s part, advocates and judges are putting *Windsor* to use to precisely this end.<sup>24</sup> Movement towards marriage equality has occurred in part because of the effects of *Windsor*’s implementation by the federal government.<sup>25</sup> Part III.A considers the resolution of the New Jersey marriage equality litigation in an order from the New Jersey Supreme Court denying a stay of a lower court order that relies on the effects of *Windsor*.<sup>26</sup> But *Windsor* also might govern aspects of challenges to state-level Defense of Marriage Acts (DOMAs). The Article examines some aspects of the post-*Windsor* federal district court marriage equality opinions to date. These district court opinions use *Windsor* for more than the opinion was on its surface intended to achieve, in interesting ways.<sup>27</sup>

A couple of disclaimers. I am not attempting a perspective on all of Justice Kennedy’s jurisprudence, though some of what I say appears to apply to areas other than those addressed in this Article. Nor am I attempting to address the notion of dignity as a constitutional value, generally, or in the United States Supreme Court, or even in all of Justice Kennedy’s writings on the topic. Dignity is of concern here because of its central role in Justice Kennedy’s argument in some of his opinions, where it seems to me to function to force attention down to the level of local and microinteractions, where the consequences of court and other actions are experienced as constraints or enhancements on liberty.

This Article does not contend that Justice Kennedy’s

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23. *Id.*

24. *See infra* Part III.

25. *See infra* Part III.A.

26. *Garden State Equal. v. Dow*, 79 A.3d 1036 (N.J. 2013) (order denying stay).

27. *See infra* Part III.B.

method will lead to just results in all areas. Two conversations following one presentation of this paper raised serious concerns about the Court's approach to race if left to depend on evolving popular conceptions of rights.<sup>28</sup> To be sure, race is not an unenumerated right; it is addressed explicitly in the Constitution, so Justice Kennedy's concern about judicial restraint might be different. Moreover, Justice Kennedy did not author any of the opinions in *Shelby County*,<sup>29</sup> though he wrote the majority opinion in *Fisher*.<sup>30</sup> My colleagues might also have mentioned Justice Kennedy's majority opinion and Justice Ginsburg's dissent in *Gonzales v. Carhart*,<sup>31</sup> especially in light

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28. Professors Nan Hunter and Tiffany Graham mentioned as concerns voting rights and affirmative action, most recently addressed by the Court this past term in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (Roberts, C.J.) (holding Section 4 of the Voting Rights Act of 1965 unconstitutional based on outdated findings) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (Kennedy, J.) (holding that the lower courts applied strict scrutiny incorrectly to the University of Texas's race-conscious admissions policy, and remanding for a new determination). See also Dawn Johnsen, Windsor, Shelby County, and the Demise of Originalism: A Personal Account, 89 IND. L.J. 3, 22 (2014) (noting "strikingly different outcomes for race and sexual orientation" in *Shelby County* and then in *Windsor* because, in *Shelby County*, "Justices Scalia and Thomas abandoned originalism and joined an opinion that focused instead on the changed conditions for racial minorities in the years since Congress first passed the [Voting Rights] Act."). Professors Hunter and Graham might also have referenced *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which Justice O'Connor's majority opinion speculated that race-conscious admissions policies might well not be necessary in twenty-five years. *Id.* at 343.

Laurence Tribe and Joshua Matz express a similar reservation about the potential significance of "LGBT equality advocates' recent romance with federalism." Laurence H. Tribe & Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 211 (2013). Pointing out that "the relationship between federalism and individual rights is a lot more complex than the Court's flat assertion that state governments will protect liberty better than the federal government in certain policy domains," *id.* at 209, they express concern that federalism's respect for state autonomy and sub-national political processes may "afford[ ] a shield to regressive state laws . . ." *Id.* at 210. They suggest that LGBT advocates may have been lulled by "a rather particular federalism: one that does not respect states' choices about whether to expand liberty, but only those that actually do; and that limits federal legislative power when it intrudes on liberty-enhancing state policy but not when it intrudes on comparatively regressive state policy." *Id.* Federalism may not always turn out to be so kind. See June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV., 49, 66 (2011) [hereinafter Carbone, *Marriage as a State of Mind*] (pointing out that localism and federalism may advance or hinder the cause of marriage equality).

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

30. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

31. 550 U.S. 124 (2007) (upholding the federal Partial Birth Abortion Ban Act



of Justice Kennedy’s language in that opinion indicating deference to a state’s determination as to how to balance a state’s concern about a woman’s possible regret at having undergone an abortion.<sup>32</sup> Yes, the people and the states can get their understanding wrong, the evolutionary view of liberty and dignity can veer away from justice, and the courts can mistakenly allow states (and where applicable, the federal government) to balance and perhaps discount emerging understandings of rights, when justice might require a constitutional constraint. All I seek to establish herein is that Justice Kennedy’s constitutional method is longstanding and consistent, which helps us to appreciate the structure of the *Windsor* opinion. That approach explains how *Windsor* is neither a federalism decision nor a full-throated equal protection decision, but instead a manifestation of judicial restraint in the service of an evolving, bottom-up understanding of liberty and dignity—one which Justice Kennedy has been talking about since the 1980s.

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of 2003). Justices Kennedy and Ginsburg disagree fundamentally as to how to understand and apply *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and what to do with the several lower courts’ findings regarding the medical necessity of the procedure in some circumstances in light of the mother’s health. *Compare Gonzales*, 550 U.S. at 145–46 (Kennedy, J.) (setting forth an interpretation of *Casey*), *id.* at 156–60 (Kennedy, J.) (asserting that *Casey* allows the government to “use its voice and its regulatory authority to show its profound respect for the life within the woman”), *id.* at 161–67 (Kennedy, J.) (holding that in light of medical uncertainty the Act does not require a medical exception in order to be constitutional on its face), *with id.* at 169–70 (Ginsburg, J., dissenting) (setting forth an interpretation of *Casey*), *id.* at 172–74 (Ginsburg, J., dissenting) (arguing that *Casey* requires an exception for the health of the mother when there is medical uncertainty), *id.* at 177–80 (Ginsburg, J., dissenting) (favoring the district courts’ findings of fact on the risks of the procedures over inadequate with inaccurate fact finding by Congress in the legislative history), *id.* at 183 (Ginsburg, J., dissenting) (arguing that the weight given by the Court to Congress’s moral concern dishonors the precedent of *Casey* and *Lawrence*).

32. Justice Kennedy characterizes a state’s concern to protect a woman from such regret as part of reasonable framework for the state’s balancing of rights under *Casey*. *Id.* at 159. Justice Ginsburg characterizes Justice Kennedy’s concern about regret as an oppressive “shibboleth,” *id.* at 183, one that flies in the face of the constitutional protection *Casey* provides for a woman’s choices around her own destiny and place in society. *Id.* at 183–86 (Ginsburg, J., dissenting).

I. POWER, THE LOCAL, AND THE EVOLUTION OF SOCIAL PRACTICE AROUND HOMOSEXUALITY

This Part begins by examining two colloquies from the oral arguments in *United States v. Windsor*<sup>33</sup> and *Hollingsworth v. Perry*,<sup>34</sup> in which marriage equality advocates tried to respond to questioning from conservative Justices with notions of the evolution of social understandings and practices around homosexuality.<sup>35</sup> It proceeds to a theoretical discussion about the role of microinteractions in generating shifts in social understandings and practices around stigmatized identity, first generally and then focusing on homosexuality. The notion of scale is introduced, with microinteractions and local places and spaces at one end, state and federal concerns in the middle, and a larger sense of citizenship at the large end.<sup>36</sup> This discussion lays the groundwork for my assertion elsewhere that “federalism is not the main event”<sup>37</sup> in the current *Kulturkampf*; and for the assertion in this Article that localism, in addition to federalism, is much of what concerns Justice Kennedy in *Windsor*.

A. *The Windsor and Perry Oral Arguments*

We approach our topic through the oral arguments in the two marriage cases from the past term, *United States v. Windsor*<sup>38</sup> and *Hollingsworth v. Perry*.<sup>39</sup> Two pieces of these colloquies are relevant to the questions I am discussing. In the *Windsor* argument, Chief Justice Roberts challenged Edith Windsor’s attorney, Roberta Kaplan. He asked whether homosexuals are still politically powerless.<sup>40</sup> He was interested in testing an argument in favor of heightened scrutiny in the

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

34. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

35. *See infra* Part I.A.

36. *See infra* Part I.B.

37. 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, 387 (2008) [hereinafter Poirier, *Not the Main Event*].

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

39. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

40. The Chief Justice asked, “You don’t doubt that the lobby supporting the enactment of same-sex marriage laws in different states is politically powerful, do you?” Transcript of Oral Argument at 107, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Windsor* Transcript].

equal protection analysis,<sup>41</sup> in light of political successes for the LGBT (lesbian, gay, bisexual, transgender) community, not the least of which was a recent, salient sequence of states accepting marriage equality.<sup>42</sup> But Kaplan did not answer the question.<sup>43</sup>

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41. As Jane Schacter explains,

[o]ne of the several factors that the Court has identified as relevant to determining whether a group merits special judicial solicitude [i.e., heightened scrutiny in equal protection analysis] is whether the group has been relegated to “such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”

Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1365 (2011) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The history of this account of heightened scrutiny goes back at least as far as the iconic footnote four in the *Carolene Products* case, and was theorized in John Hart Ely’s 1980 book *Democracy and Distrust*. *Id.* at 1364 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), and JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)). Schacter’s article is especially timely and thoughtful. In addition to a general history of the political powerlessness test, it examines the doctrine’s appearance in federal and state supreme court opinions regarding sexual orientation, *id.* at 1378–83; summarizes the expert witness testimony and Judge Vaughn Walker’s findings of fact on political powerlessness in the California Proposition 8 case, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded for lack of standing*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *id.* at 1383–90; assesses the political powerlessness test in light of the way that the same-sex marriage debate has unfolded politically, especially in light of back-and-forth between legislatures, courts, and popular initiatives and referenda, *id.* at 1390–1402; and proposes doctrinal reforms. *Id.* at 1402–07. Schacter argues that “political powerlessness” should be assessed as an aspect of past discrimination and continued hostility, which, in the case of LGBT initiatives to change the law of marriage, has resulted in one hostile ballot initiative after another. *Id.* at 1403, 1406. Schacter could have answered Chief Justice Roberts’s question about political powerlessness, if he had been willing to listen.

For another helpful account of political powerlessness as a test in the same-sex marriage litigation, see Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 537–43. The paradox, Yoshino argues, is that “[a] group must have an enormous amount of political power before it will be deemed politically powerless by the Court.” *Id.* at 541.

42. Marriage equality states at the time of the *Windsor* oral argument on March 27, 2013, were Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, as well as the District of Columbia and some Indian tribe jurisdictions. Additional states where marriage now is or soon will be available are California, Delaware, Hawaii, Illinois, and Rhode Island, with several other states subject to marriage equality court orders which have been stayed pending appeal. *State by State Laws*, MARRIAGE EQUALITY USA (Mar. 22, 2014), <http://www.marriageequality.org/by-state>.

43. Kaplan first responded that “no other group in recent history has been subject to popular referenda to take away rights that have already been given or exclude those rights, the way gay people have.” *Windsor* Transcript, *supra* note

She kept saying things along the lines of, “Well, it’s not really about political power. It is about some kind of social change or evolutionary change in the understanding of gay people.”<sup>44</sup>

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40, at 108. She pointed out that only two of those referenda had ever lost. *Id.* Kaplan also argued that until 1990 gay people were formally not allowed to enter the country. *Id.* One of the unsuccessful anti-marriage equality referenda that Kaplan referred to occurred in Minnesota, on November 6, 2012. She omits to mention that on that same day, three other states adopted marriage equality by popular vote: Maine, Maryland, and Washington. See Zack Ford, *Sweeping 2012 Victories Show Promise of LGBT Equality’s Future*, THINKPROGRESS (Nov. 7, 2012, 9:29 AM), <http://thinkprogress.org/lgbt/2012/11/07/1155121/sweeping-2012-victories-show-promise-of-lgbt-equalitys-future/>.

44. It is worth reproducing some of this conversation.

CHIEF JUSTICE ROBERTS: Well, but you just referred to a sea change in people’s understandings and values from 1996, when DOMA was enacted, and I’m just trying to see where that comes from, if not from the political effectiveness of . . . groups on your side of the case.

MS. KAPLAN: To flip the language of the House Report [on DOMA], Mr. Chief Justice, I think it comes from a moral understanding today that gay people are no different, and that gay married couples’ relationships are not significantly different from the relationships of straight married people . . .

CHIEF JUSTICE ROBERTS: I understand that. I am just trying to see how – where that . . . moral understanding came from, if not the political effectiveness of a particular group.

MS. KAPLAN: I – I think it came – is, again very similar to . . . what you saw between *Bowers* and *Lawrence*. I think it came to a societal understanding.

I don’t believe that societal understanding came strictly through political power; and I don’t think that gay people today have political power as . . . this Court has used that term . . . in connection with the heightened scrutiny analysis.

*Windsor* Transcript, *supra* note 40, at 108–09. In response to earlier questioning by Chief Justice Roberts, Kaplan had argued there was not animus or bigotry by all members of Congress in the enactment of DOMA, but rather a “misunderstanding of gay people.” *Id.* at 106. “[T]imes can blind,” she argued, *id.* at 105, and in 1996 people did not have the understanding they do nowadays of gay couples. *Id.* at 105–06. Kaplan’s phrase “times can blind” is a direct quote from the next-to-last paragraph of Justice Kennedy’s opinion in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (stating that those who drew and ratified the Due Process Clauses of the Fifth Amendment or Fourteenth Amendment “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”). In the *Windsor* oral argument, Justice Scalia called this change in societal understanding a “sea change,” Kaplan agreed, and that opened the door for Chief Justice Roberts to inquire about political power. *Windsor* Transcript, *supra* note 40, at 106–07. Neither of those two Justices was deterred by Kaplan’s reference to Justice Kennedy’s evolutionary jurisprudence of liberty as Justice Kennedy articulated it in *Lawrence*.

Chief Justice Roberts persisted.<sup>45</sup> But Kaplan did not enter into a discussion of “How many Congressmen?” or “How many judges?” as measures of political powerlessness.

Just a bit earlier in the *Windsor* argument, Justice Scalia had asked, at the time DOMA was passed, how many states recognized same-sex marriage and how many recognize it now. Kaplan provided the answer for March 2013—nine.<sup>46</sup> Of course, that could suggest effective political power between 1996 and 2013. Kaplan responded to Justice Scalia’s characterization of a “sea change” with the idea of a societal shift in understanding of gay people and their relationships, the same response she also provides a moment later in response to Chief Justice Roberts.<sup>47</sup> But she did not go into the notion of a shift in understanding in any detail.

Similarly, in the *Hollingsworth v. Perry* argument, Justice Scalia challenged Ted Olson, the advocate for the same-sex couples, repeatedly asking, “When did it become unconstitutional to exclude homosexual couples from marriage?”<sup>48</sup> Olson said, essentially, that he did not want to answer that question in Justice Scalia’s way.<sup>49</sup> Instead, he responded, there had been some kind of evolution, some kind of social change: “It was constitutional when we, as a culture, determined that sexual orientation is a characteristic of individuals that they cannot control . . . . There’s no specific date in time. This is an evolutionary cycle.”<sup>50</sup> Olson threw a question back at Justice Scalia, asking “When did it become unconstitutional to prohibit interracial marriages?”<sup>51</sup> And

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45. *Windsor* Transcript, *supra* note 40, at 107–08.

46. *Id.* at 106–07. Justice Ginsburg followed up, asking Kaplan about the history of civil unions. Kaplan apparently did not know that answer. *Id.* at 107. In 1996, there were no civil unions. Vermont was the first civil union state, in 2000. See, e.g., DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004) (book-length description of the process in the Vermont Legislature that led to adopting of civil unions rather than marriage equality).

47. *Windsor* Transcript, *supra* note 40, at 106–07. Earlier, Justice Breyer had observed that “there’s a revolution going on in the states,” *id.* at 102, and Kaplan agreed, stating that some states have already resolved “the cultural, the political, the moral.” *Id.* at 103.

48. Transcript of Oral Argument at 37–42, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No.12-144) [hereinafter *Perry Transcript*].

49. After beating around the bush, and in the face of repeated questioning, Olson eventually said, “I can’t answer that question, and I don’t think this Court has ever phrased the question in this way.” *Id.* at 41.

50. *Id.* at 39.

51. *Id.* at 38.

Justice Scalia responded, “It’s an easy question . . . . [A]t the time the Equal Protection Clause was adopted.”<sup>52</sup> Then he reminded Olson who gets to ask the questions in a Supreme Court argument.<sup>53</sup> So the two never joined the issue, because Justice Scalia would not concede that evolution in social practices addressed by the constitutional text permits judges to reinterpret the constitutional text, and Olson refused to assign a particular date to the reflections in the law of a change in a widely shared understanding of individuals’ constitutional rights, achieved through the processes of social change and evolution.

“Justice Scalia is notable for his forays into the world of how to interpret both the Constitution and statutes.”<sup>54</sup> Generally speaking, Justice Scalia usually wants to say that law is and always has been a certain way.<sup>55</sup> Judges should follow the law as it always has been until it is changed through democratic processes. Judges are sometimes accused of improperly exercising political power rather than following the law, which, because it is laid down by legislative and electoral process, is understood to be more directly democratic and therefore legitimate exercise of power.<sup>56</sup> Jurisprudentially,

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52. *Id.* As Dawn Johnsen observes, “Behind Justice Scalia’s question at oral argument was a form of originalism . . . that seeks to interpret the Constitution with reference only to the text and the original meaning of the text at the time of the provision’s adoption, understood at a very specific level of meaning.” Johnsen, *supra* note 28, at 4.

53. *Perry Transcript*, *supra* note 48, at 38.

54. William Funk, *Review Essay, Faith in Texts—Justice Scalia’s Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?*, 49 ADMIN. L. REV. 825, 827 (1997).

55. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that the Constitution, like other laws, is “an enactment that has a fixed meaning ascertainable through the usual devices ascertainable to those learned in the law.”); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Justice Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999) (“Scalia envisions the Constitution as a ‘dead’ document, its meaning fixed at the time of ratification. He believes the Supreme Court should implement this fixed meaning and no more.”).

56. One might distinguish generally between “political” referring to legislative and electoral processes, and “political” referring to interpersonal, often small-scale, non-judicial processes. As Nikolas Rose puts it, “Politics has become identified, on the one hand, with the party and the programme and, on the other, with the questions of who possesses power in the State, rather than the dynamics of power relations within the encounters that make up the everyday experience of individuals.” Nikolas Rose, *Governing “Advanced” Liberal Democracies*, in FOUCAULT AND POLITICAL REASON 37, 37 (Andrew Barry, Thomas Osborne, & Nikolas Rose eds., 1996).

Justice Scalia’s position insulates judges from being blamed for pronouncing that a constitutional value has changed in the culture, because judges are understood as not doing anything that is not pegged to democratically adopted texts that they merely subsequently interpret.<sup>57</sup> When judges declare that evolutionary change in social custom or understanding require the law to change, it looks as though the judges themselves are changing the law.<sup>58</sup> This may be acceptable for common-law processes, but not for a certain kind of view of statutory or constitutional interpretation.<sup>59</sup>

Nevertheless, those seeking to persuade judges to declare a change in the law, including advocates Kaplan in *Windsor* and Olson in *Perry*, if they were being fully forthcoming, might need to talk to the Court about evolution of social norms and customs and particularly social norms and customs in terms of personal relationships, sexuality, sexual identity, and family structure. In the oral arguments, Kaplan and Olson seem to be stuck dodging questions about political power, a position which is more or less required by the doctrinal categories used by the hostile Justices in their questions.

*B. Evolution of Customary Practice and Theories of Social Construction: Microperformances, the Local, and Federalism*

Either the marriage equality advocates before the Supreme Court do not have at hand the vocabulary to discuss evolution

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57. Thus here, Justice Scalia takes the position that if he does not know when the law changed, he does not know how to decide the case. See *Perry Transcript*, *supra* note 48, at 41.

58. Scalia, *supra* note 55, at 863 (“[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law”). As Colucci writes, summarizing Justice Scalia’s objection to Justice Kennedy’s jurisprudential approach in the cases invoking liberty and dignity, “Scalia’s larger objection arises from his belief that the greatest danger in judicial interpretation is that judges will read their own preference into the law and thus deny the power of the people under an essentially democratic Constitution.” COLUCCI, *supra* note 16, at 37.

59. See, e.g., Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 139 (2008) (“Justice Scalia believes his objective methodology can stop American judges from interpreting statutes as though they were elaborating common law principles.”); Zlotnick, *supra* note 55, at 1388 (“Scalia sees textualism both as a constitutionally mandated end in itself and as a means to restrict the judiciary to its proper role . . .”).

of cultural understanding and practice and its relation to law, or the marriage equality advocates do not want to use that language before judges. If they needed the vocabulary, then some of my scholarship does offer this.<sup>60</sup> There are, of course, many vocabularies with which to describe everyday practices that result in evolution of legal understandings, which are eventually acknowledged by judges.<sup>61</sup> For example, one might want to look at the work of Erving Goffman in a whole series of

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60. See, e.g., Poirier, *Not the Main Event*, *supra* note 37, at 390–91 (arguing that “the gender and sexuality *Kulturkampf* of which the marriage equality controversy is a part occurs at many levels of scale, the most important being either smaller or larger than the state level. . . . [It includes] the level of direct presence and visibility, where microperformances of gender and sexuality occur and become visible.”); Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 4 (2008) [hereinafter Poirier, *Microperformances*] (arguing that “ongoing processes of identity formation and reproduction can help us to better understand some aspects of the same-sex marriage controversy” because “[w]hen same sex couples choose to be visible, their presence challenges a number of social norms, and sometimes legal norms as well, with regard to sex, gender, and sexual orientation . . . . Those norms can shift.”); Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FLA. INT’L U. L. REV. 307, 307 (2008) [hereinafter Poirier, *Gender, Place*] (considering how “performances of transgressive or stigmatized identity around sex and gender have the potential to transform, at one and the same time, (1) an individual’s sense of identity around sex and gender, (2) the character of specific spaces and places, (3) social norms of identity around sex and gender, and (4) the legal rules in specific jurisdictions”).

61. See, e.g., William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1355–60 (2010) (describing post-liberal approaches to sexuality and gender that understand cultural processes of struggle as productive of identity); Mae Kuykendall, *Liberty in a Divided and Experimental Culture: Respecting Choice and Enforcing Connection in the American Family*, 12 UCLA WOMEN’S L.J. 251, 251–52, 256, 278–79 (2003) (arguing that the law lags behind actual family practices, and that we need to expand our social vocabulary around family so as to achieve a new grammar and lexicon for family structures); Mae Kuykendall, *Gay Marriages and Civil Unions: The Judiciary and Linguistic Space in Liberal Society*, 52 MERCER L. REV. 1003, 1009–12 (2001) (describing courts enmeshed in same-sex marriage controversies as speakers who rearrange the public vocabulary and either enrich or diminish the register of public speech); Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 386, 389 (1999) (arguing that “[p]ublic efforts to deny same-sex marriages are . . . Unsayings that strive to cancel, erase and shut off private and public realities encoded in language” and that “legal Unsayings of gay marriage function as linguistic failures that signal a policy-making failure to absorb linguistic change”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, *Covering*] (theorizing gay and lesbian assimilation with reference to the concept of covering, a term drawn from ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963)).



studies involving microinteractions, personal relationships, frames, stigma, and how those are maintained in an ongoing, homeostatic process of interrelationships.<sup>62</sup> One might want to look at the work of Judith Butler<sup>63</sup> and Michael Warner,<sup>64</sup> and others in queer theory<sup>65</sup> on how preexisting social and cultural

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62. See, e.g., ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 493–95 (1974) (considering the possibility of unhinging and transforming the framing of normal events and recommending further study through the application of microsociology); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) (exploring at book length the strategies available to those whose social identities are “spoiled” as opposed to normal); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Erving Goffman, *The Interaction Order*, 48 *AM. SOC. REV.* 1 (1983).

63. See, e.g., JUDITH BUTLER, *UNDOING GENDER* 217 (1994) (“As a consequence of being in the mode of becoming, and in always living with the constitutive possibility of becoming otherwise, the body is that which can occupy the norm in myriad ways, exceed the norm, rework the norm, and expose realities to which we thought we were confined as open to transformation.”); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 122 (1993) (discussing how the law’s creation of identity “might also be ruptured, forced into a rearticulation that calls into question the monotheistic force of its own unilateral operation” through “parodic inhabiting of conformity”); *id.* at 138 (arguing that the “resignification of the symbolic terms of kinship in *Paris is Burning* [FOX LORBER, 1990] . . . raises the questions of how precisely the apparently static workings of the symbolic order become vulnerable to subversive repetition and resignification); Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 19 (Diana Fuss ed., 1991) (pointing out that there are various versions of lesbian and gay identity, suggesting that it is “a sign of despair over public politics when identity becomes its own policy, bringing with it those who would ‘police’ it from various sides” and arguing that “[i]n avowing the sign’s strategic provisionality (rather than its strategic essentialism), . . . identity can become a site of contest and revision . . . . It is in the safeguarding of the future of the political signifiers—preserving the signifier as a site of rearticulation—that Laclau and Mouffe discern its democratic promise.”).

64. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF THE QUEER LIFE* vii–ix (1999) (stating that the book as a whole is structured from abstract to concrete, and that ultimately “the world has much to learn from the disreputable queers who have the most experience in the politics of shame, but who for that very reason have been least likely to gain a hearing—either in the official policy circles where their interests are allegedly represented or in the theoretical and philosophical debates about morality, sex, and shame where their point of view can be most transformative.”); MICHAEL WARNER, *Publics and Counterpublics*, in *PUBLICS AND COUNTERPUBLICS* 65, 114–24 (2002) (arguing that public discourse creates its subject populations, that this process is misrecognized, and that there are subpopulations that mark themselves off with parallel discourses, which Warner, following Nancy Fraser, denotes “counterpublics”).

65. Authorities like Judith Butler, Michael Warner, and Michel Foucault are not speaking in the register of legal doctrine and will have almost no persuasive authority to most judges, certainly not in a way that would lead them to be cited

patterns can be disrupted. Cultural practices can be preserved or disrupted in various ways, including addressing the conflict via law at various scales of government. But they can also be disrupted by people just looking weird, holding hands in strange places, or introducing this person next to them not as “my partner”—which is sort of ambiguous—but as “my husband,” as when a man says, “I’d like you to meet my husband.” So there is the potential for bottom-up shifting of social practice through visible, transgressive behavior.<sup>66</sup>

This potential for bottom-up change helps to explain the shift in understanding that both Kaplan and Olson somewhat hesitantly invoke.<sup>67</sup> It often occurs at a very micro level—“microinteractions.”<sup>68</sup> And visible, transgressive behavior, diffuse and bottom-up as it necessarily is, does not look very

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in opinions. *See infra* note 77 (examining the very few judicial opinions that cite each of these authorities). There are other angles here. Suzanne Goldberg, who has litigated LGBT matters at the highest levels, has assessed the pros and cons of making in court social-constructionist arguments about identity, however accurate those accounts of social practice and identity may be. *See* Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 630–32 (2002) (arguing that social constructionist arguments around sexual identity, while accurate, are too risky to make in court because courts will be reluctant to treat them as a protected group for purposes of legal protection unless they are understood as naturally occurring groups; the inaccurate, more simplistic presentation is a better litigation strategy).

66. *See, e.g.*, Poirier, *Microperformances*, *supra* note 60, at 22–25, 76–84 (discussing how transgressive microperformances may shift societal understandings of normal and stigmatized identities; the first passage discusses Erving Goffman, the second Judith Butler).

67. Those writing outside the purview of a hostile court have the freedom to be more forthright. *See, e.g.*, Jay Michaelson, *On Listening to the Kulturkampf, Or, How America Overruled Bowers v. Hardwick Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1559–60 (2000) (arguing that the foundations of *Bowers v. Hardwick*, 478 U.S. 186 (1996), “begin to look quite shaky” not because of a significantly different Supreme Court or because of the holding in *Romer v. Evans*, 517 U.S. 620 (1996), but because of “an exponential rise in openly gay television characters, Hollywood celebrities, and politicians; a widespread extension by corporations of family benefits to gay and lesbian domestic partners; and unprecedented public debate on gay marriage, gays in the military, gays at the office, gays just about everywhere.”); Schacter, *supra* note 41, at 1397–98 (arguing that the shift from *Bowers v. Hardwick* to *Lawrence v. Texas* is “plausibly attributed to surrounding social change”); David M. Skover & Kellye Y. Testy, *Lesbigay Identity as Commodity*, 90 CALIF. L. REV. 223, 223 (2002) (arguing that both legal theorists and civil rights practitioners err in ignoring the commodification and celebration of LesBiGay identities, and that these represent a cultural shift that “will influence, for better or worse, the LesBiGay quest for liberty and equality”).

68. *See* Poirier, *Microperformances*, *supra* note 60, at 22 (discussing the complexifying potential of microinteractions).

much like political power as Justice Roberts and Justice Scalia conceive it.<sup>69</sup> Nor does it fit well into the frame of federalism, understood as an allocation of authority between federal and state governments.<sup>70</sup>

If one were to look for discussion of law and microinteractions (I tend to use the word “microperformances”)<sup>71</sup> in the law review literature, my scholarship is one source. A few scholars are picking up the

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69. For contrasts between traditional notions of top-down power and bottom-up notions of reciprocal, mutually productive power in light of Foucault and others, see, e.g., Maxine Eichner, *On Postmodern Feminist Legal Theory*, 35 HARV. C.R.-C.L. L. REV. 1, 8–9, 22–28 (2001) (identifying a mainstream “dominance” view of power, as imposed from above, and several variants of “discourse theory” based theories of power, including Steven Winter’s approach, grounded in Michel Foucault, of power as based in shared historical social practice); MICHEL FOUCAULT, *The Subject and Power*, in POWER (THE ESSENTIAL WORKS OF FOUCAULT, 1954–1984, VOL. 3) 326, 327 (James D. Faubion ed., 2001) (arguing that his work over the past twenty years was intended to supplement two ways of thinking about power—in terms of the legitimacy of power, and of institutional power and the state—with a third, in order to “study[ ] the objectivization of the subject”); ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 14–17 (1994) (describing Foucault’s theory of productive power, in contrast to a traditional notion of repressive power); Paul Patton, *Foucault’s Subject of Power*, in THE LATER FOUCAULT 64, 67 (Jeremy Moss ed., 1998) (“Foucault is committed to the view that social relations are inevitably and inescapably power relations. On his view, there is no possible social field outside or beyond power, and no possible form of interpersonal interaction which is not at the same time a power relation.”); Jana Sawicki, *Feminism, Foucault, and “Subjects” of Power and Freedom*, in FEMINIST INTERPRETATIONS OF MICHEL FOUCAULT 159, 167 (Susan J. Hekman ed., 1996) (discussing how Judith Butler’s interpretation of Foucault reformulates agency as “enactments of variation within regulated, normative, and habitual processes of signification”); Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 727 (1996) (suggesting that “the phenomena described as ‘power’ are necessarily situated in and conditioned upon a complex, pre-existing field of social interactions . . . yield[ing] the framework of an alternative *social* understanding of power”). As Frank Munger writes:

Michel Foucault’s popularity among American scholars reflects the acceptance of his insight that power is everywhere not because it affects everything, but because it emanates from everywhere. Power is inherent in “techniques of discipline” shared across many different settings in society. . . . According to Professor Foucault, the state itself links together an overall strategy from the micropowers implicit in such techniques; thus, its own power is inseparable from the manner in which it is exercised in the many different settings over which it presides.

Frank Munger, *Sociology of Law for a Postliberal Society*, 27 LOY. L.A. L. REV. 89, 120–21 (1993).

70. See Poirier, *Not the Main Event*, *supra* note 37.

71. See, e.g., Poirier, *Microperformances*, *supra* note 60.

tune as to “microperformances” specifically.<sup>72</sup> There is quite a lot on *microaggressions* in the legal academic literature.<sup>73</sup> But discussions of microinteractions are also to the point, because the whole sense of who you are and how you relate to other people does not exist in the abstract, independent of all of these very small interactions in which you are stigmatized or

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72. See, e.g., William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1358 (2010) (arguing that “[s]exual and gender variation is not just benign, but *critically productive*,” relying on the notion of microperformances, and citing GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 62, and Poirier, *Microperformances*, *supra* note 60); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 855 n.209 (2010) (exploring and disagreeing with some of the argument around microperformances expressed in Poirier, *Name Calling: Identifying Stigma and the “Civil Union”/“Marriage” Distinction*, *infra* note 219, and invoking the notion of identity performance in KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2008)).

73. A noted group of clinical psychologists has defined racial microaggressions as follows: “Racial microaggressions are brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group.” Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 273 (2007). In a recent book, Derald Wing Sue situates microaggression as an effect of subtle, often unconscious bias. DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* xv–xvii (2010). He defines microaggressions here as “brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership.” *Id.* at xvi. Microaggressions are thus a subset of microperformances; and the focus in discussions of microaggressions is typically on their effects and on how to attenuate or eliminate them; whereas discussion of microinteractions and microperformances is often instead about how identity is created and recreated at a very small scale interpersonal level.

As for law review literature deploying the concept of microaggressions, it is copious. One germinal article is Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989). Some other representative articles using the terms are John O. Calmore, *Displacing the Common Sense Intrusion of Whiteness From Within and Without: “The Chicano Fight for Justice in East L.A.”*, 92 CALIF. L. REV. 1517, 1524–26 (2004) (book review) (discussing how racism is perpetuated in everyday life through routine practices); Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POLY & L. 54 (2011); Angela Onwuachi-Willig, *A Room with Many Views: A Response to Essays on According to Our Hearts: Rhinelander v. Rhinelander and the Multiracial Family*, 16 J. GENDER RACE & JUST. 793 (2013); Russell Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008); Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 15–17 (2002) (discussing Dr. Charles Pierce’s psychological theories of race and microaggression). Many other articles use the concept of microaggressions without deploying the term.

recognized.<sup>74</sup> Advocates who may be seeking a vocabulary for bottom-up social change might look at the work of some of these people—though it is most unlikely that scholars such as Michel Foucault<sup>75</sup> and Judith Butler<sup>76</sup> will find their way into a Supreme Court argument.<sup>77</sup> But these authorities and others,

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74. Poirier, *Microperformances*, *supra* note 60, at 17–28 (discussing the role of microinteractions in reproducing or shifting identities).

75. “To date, a fully elaborated Foucaultian jurisprudence still eludes us.” BEN GOLDER & PETER FITZPATRICK, *FOUCAULT’S LAW 1* (2009). In fact, “one rarely finds an extended discussion of what precisely Foucault says about law in the many different places in his work where it is discussed.” Duncan Ivison, *The Disciplinary Moment: Foucault, Law and the Reinscription of Rights*, in *THE LATER FOUCAULT* 129, 131 (Jeremy Moss ed., 1998). For some useful accounts of Foucault and law, see, for example, Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 *STAN. L. REV.* 449 (1996) (reviewing HUNT & WICKHAM, *supra* note 69); Isaak Dore, *Foucault on Power*, 78 *UMKC L. REV.* 737 (2010); GOLDER & FITZPATRICK, *supra*, at 71–82 (arguing that for Foucault, law has two dimensions, one determinate and norm-expressing, the other resistant, fluid, and constantly opening into possibility); Janet E. Halley, *Romer v. Hardwick*, 68 *U. COLO. L. REV.* 429, 450–51 (1997) (finding an “uncanny proximity” between Justice Kennedy’s concern in *Romer* with how Colorado’s Amendment 2 will affect very local and discrete interactions and Michel Foucault’s conception of micropower); HUNT & WICKHAM, *supra* note 69, at 39–58 (summarizing Foucault’s approach to law); Ivison, *supra*, at 142 (arguing that a certain notion of rights claims inheres in Foucault’s arguments about law); FOUCAULT, *The Subject and Power*, *supra* note 69, at 326; Sawicki, *supra* note 69.

76. See BUTLER, *supra* note 63; see also Poirier, *Microperformances*, *supra* note 60, at 76–84 (discussing how Butler’s analysis of transgressive microperformances applies to the same-sex marriage controversy and the possibility for change).

77. Just to see whether their work has penetrated doctrinal legal discourse, I searched online for citations to Michael Warner, Judith Butler, and Michel Foucault in the case law. I found no citations to Michael Warner’s work. I found one citation to Judith Butler’s work. *Iceberg v. Whole Foods Market Group, Inc.*, 914 F. Supp. 2d 870, 879 (E.D. Mich. 2013) (same-sex sexual harassment case, citing Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law*, 21 *COLUM. J. GENDER & L.* 405 (2011)); search on Westlaw Next for “Judith Butler” in law journals database on December 16, 2013.

I did find a few citations in judicial opinions to Michel Foucault. He is cited as a historian, not a social theorist. The most interesting occasion involved reference to his work on the history of sexuality, in the course of an analysis of the history of the use of sex toys in the United States, in a case involving a ban by the state of Alabama on the sale of sex toys. *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1278, 1282, 1288 (N.D. Ala. 2002) (relying on MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1 (1990), as part of an examination of “our Nation’s history and tradition,” as required for finding a new substantive Due Process claim under *Washington v. Glucksberg*, 521 U.S. 701, 720–21 (1997)), *rev’d sub nom.* *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1242 (11th Cir. 2004) (describing the district court’s reliance on Foucault). Foucault’s work on sexuality has been cited in a few other cases. See, e.g., *Hoffman v. Saginaw Pub. Sch.*, No. 12-10354, 2012 WL 2450805 at \*8 n.6 (E.D. Mich. June 27, 2012) (peer-on-peer school sexual harassment case, citing FOUCAULT, *HISTORY OF SEXUALITY*, *supra*). Also cited was

working off of insights around identity and performance,<sup>78</sup> are helpful because they take up the question of power at multiple levels and of the role of evolutionary shifts in eventually effecting legal change.<sup>79</sup>

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Foucault's work on the history of the prison and of punishment. *See, e.g.*, Barrera-Echavarria v. Rison, 21 F.3d 314, 318 (9th Cir. 1994) (relying on historical research on *lettres de cachet* by Arlette Farge and Michel Foucault), *vacated*, 44 F.3d 1441 (9th Cir. 1995); Lareau v. Manson, 507 F. Supp. 1177, 1189–90 (D. Conn. 1980) (citing MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1979) in the context of a lawsuit over prison conditions); United States v. Torniero, 570 F. Supp. 721, 731 n.18 (D. Conn. 1983) (citing FOUCAULT, *DISCIPLINE & PUNISH, supra*); Washington v. Meachum, No. 534616, 1995 WL 127823, at \*28 (D. Conn. Mar. 6, 1995) (citing FOUCAULT, *DISCIPLINE & PUNISH, supra*); Dist. Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1292 n.18 (Mass. 1980) (opinion validating capital punishment in the State of Massachusetts, citing FOUCAULT, *DISCIPLINE & PUNISH, supra*). One case cites Foucault's work on the history of the insane asylum. Pashby v. Delia, 709 F.3d 307, 334 n.5 (4th Cir. 2013) (in a lawsuit over Medicaid eligibility for personal home care services, citing MICHEL FOUCAULT, *HISTORY OF MADNESS* 44–77 (Jean Khalifa ed., Jonathan Murphy & Jean Khalifa trans., 2006) (1961)). My basic point remains intact—no case law discusses Foucault for his views on the social construction of the self or his concepts of governance and biopower.

78. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Eskridge, *supra* note 72, at 1355–60 (describing post-liberal approaches to sexuality and gender that understand cultural processes of struggle as productive of identity); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 588–99 (1992) (discussing flaunting, concealment, and the costs of concealment); Halley, *supra* note 75, at 449–51 (discussing the local effects of Amendment 2, describing a hypothetical microinteraction between a lesbian and a library clerk, and drawing a link to Michel Foucault's conception of micropower); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490, 1493 (2005) (exploring recent insights from social cognition law as how “race alters intrapersonal, interpersonal, and intergroup interactions” with consequences for understanding the role of the media in perpetuating stereotypes and prejudice, and the limits of the law in addressing these processes); Yoshino, *Covering, supra* note 61, at 772 (discussing “passing” and “covering” as forms of assimilation achieved by managing performance of identity); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don't Ask, Don't Tell,”* 108 YALE L.J. 485, 490 (1998) (arguing that the Court favors with heightened scrutiny groups whose identity characteristics cannot be concealed, thereby creating an assimilationist bias and an incentive for groups whose identities can be concealed to do so) [hereinafter Yoshino, *Assimilationist Bias in Equal Protection*].

79. Two law review articles explicitly link Justice Kennedy's jurisprudence to critical theory of one sort or another. Heather Gerken's analysis of *Parents Involved in Community School v. Seattle School District No. 1*, 551 U.S. 701 (2007), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), notes a “dawning awareness . . . that the choices a state makes in grouping individuals affects the choices individuals make in expressing their identity” and asserts that Justice Kennedy “acknowledg[es] the state's inevitable role in constructing the space in which citizens work out questions of identity.” Heather

In the talk that served as the springboard for this Article, I used four figures, which I will reproduce here as we go along. They help to anchor the concepts and may provide a kind of mnemonic, as visual information is often both rich and condensed.

Here is the first figure.

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- 5 Citizenship
  - 4 Nation/federal
  - 3 State
  - 2 Local (both juridical and customary/informal)
  - 1 Microperformances

**Figure 1: Levels of Interaction and of Identity Processes**

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At two levels on this Figure, which I have labeled levels three and four, we are talking about federalism. That is where Justices Roberts and Scalia want to keep the conversation. It is the question of federal versus state authority, and it is juridical. But much of the actual creation of the social identity norms underneath that, either challenging the legal norms or maintaining the legal norms, is at a local level—that is, level two, and, below that, at the level of interpersonal microinteractions, level one. Both the stakes and the payoff of shifting the norms are felt at this micro level. Typically, almost no discussion of that underlying structure of informal local and micro scale gets incorporated into the legal doctrinal discourse as such but it is terribly important to understand.<sup>80</sup> They are the levels towards which Kaplan and Olson gesture.

Let me first address the local and micro levels—that is,

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K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 107, 112 (2007). Gerken observes that “the stories Justice Kennedy tells in these cases bring him closer to the views of many race scholars.” *Id.* at 123. And Janet Halley finds that Justice Kennedy’s concern in *Romer* with the effect of Colorado’s Amendment 2 on the microinteractions of LGBT folks “tracks Michel Foucault’s conception of micropower with uncanny proximity.” Halley, *supra* note 75, at 450 (discussing Justice Kennedy’s opinion in *Romer v. Evans*, 517 U.S. 620 (1996)).

80. On “conversation strategies” that attempt to address microinteractions around identity so as to shift them at an intimate level, see, for example, Poirier, *Microperformances*, *supra* note 60, at 59–72.

levels two and one of Figure 1. I was pleased to learn that the title of this Symposium was “Federalism All the Way Down,”<sup>81</sup> because cultural stasis or cultural change is all about community and neighborhood. It is very much about the local church, the local sports team.<sup>82</sup> When you have a Little League operation that excludes girls, you are sending a message to a whole generation of girls about sports and identity and gender.<sup>83</sup> The message is conveyed one exclusion at a time, as well as by generally shared knowledge about the exclusion as a policy. In New Jersey, the Little League is a “place of public accommodation” and, therefore, the Little League has to admit girls.<sup>84</sup> It is interesting that the Little League *does not have* a physical place at which it meets—it has to use public ball fields.<sup>85</sup> How is that arrangement—meeting in places that belong to others—a “place of public accommodation” as to which the Little League can be held legally responsible for discrimination? It is because those in Little League are open and visibly interacting with others in the community and inviting them into their group’s activities.<sup>86</sup>

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81. The title of the Symposium comes from Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); and Professor Gerken is this Symposium’s keynote speaker. She makes an important argument for “pushing federalism all the way down,” *id.* at 21, and asks “Why Stop with States?,” *id.* at 22, and then “Why Stop with Cities?” *Id.* at 23. In discussion at the Symposium, I argued that it is important not to limit our inquiry to juridical institutions as we go “all the way down” to these local levels, especially when dealing with conflicts around social and moral issues. The social practices of groups that foster community identity—the Boy Scouts, the Little League, and the church group—are often more important than the juries or local land use boards that Gerken mentions. For a discussion of the multiscale nature of identity conflicts involving both juridical institutions and microinteractions, see generally Poirier, *Gender, Place*, *supra* note 60.

82. Kenneth Karst writes,

[T]he life of every individual citizen goes on here and now — in the “here” of home, neighborhood, social circle, religious congregation, work, or school; in the “now” of day-to-day activities that provide continuous streams of talk and meaning-laden behavior. I am calling these forms of communicative interaction — both the talk and the behavior — by the name of *local discourse*.

Kenneth Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LITERATURE 1, 2 (2000).

83. Come to think of it, the message about girls goes out to boys and adults, as well as girls themselves.

84. Nat’l Org. for Women, *Essex Cnty. Chapter v. Little League Baseball, Inc.*, 318 A.2d 33, 37–38 (N.J. Super. Ct. App. Div. 1974).

85. *Id.* at 37.

86. See Poirier, *Gender, Place*, *supra* note 60, at 313 (discussing the *Little*



Sometimes the place aspect of managing local identity norms and microinteractions is clear. In *Hurley*, the St. Patrick's Day Parade case,<sup>87</sup> the place is public streets in Boston, but these streets are turned over to a private organization for a festivity that affirms Irish identity. The local lesbian, gay, and bisexual activists want to show up for the parade, and they want to show up not just as individuals, but instead marked with a banner that identifies them as gay, lesbian, and bisexual Irish.<sup>88</sup> In the same way, the beads I wear around my neck now and which you see communicate that I am a Buddhist—if you know what they mean.<sup>89</sup> People wear their identity and perform it, and then they are excluded or admitted to places in which identity is performed, depending on whether they perform incorrectly or in a stigmatized way.<sup>90</sup> You kick out the effeminate man or the mannish woman. Not only do the

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*League* case in terms of access to discursive space); see also, e.g., *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 771–72 (Minn. 1981), *rev'd on other grounds*, 468 U.S. 609 (1984) (opinion for the United States District Court for the District of Minnesota on certification, considering whether the United States Jaycees were a place of public accommodation under Minnesota law; parsing “public business facility” to include meeting places as well as physical facilities and mobile sites as well as fixed sites); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1210 (N.J. 1999), *rev'd on other grounds*, 530 U.S. 640 (2000) (declining to interpret the New Jersey public accommodations statute to apply only to membership associations connected to a particular location or facility).

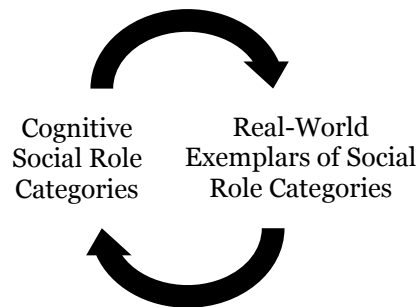
87. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

88. Madhavi Sunder's extraordinarily perceptive student note describes the issue as “access to discursive space.” Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 144 (1996). I discuss various aspects of visibility and the Boy Scouts case in Poirier, *Gender, Place*, *supra* note 60, at 313–17.

89. I have at times been congratulated on my rosary, or on wearing really cool costume beads. Identity communicated by performance depends in part not only on what the beholder sees, but on what s/he recognizes. Cf. EVE KOSOFKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 75–82 (1990) (discussing the process of coming out, disclosing a heretofore concealed identity to one who has been blind to it, with no certainty as to the consequences, by reference to Queen Esther's coming out as Jewish to her husband, King Assuérus, in order to save her people, in Jean Racine's *Esther* (a version of the story told in the biblical *Book of Esther*)); Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 78, at 498 (“Whether a trait is visible will thus depend not only on the trait but also on the decoding capacity of the audience, which in turn will depend on the social context.”).

90. See generally RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013).

excluded lose out on the benefits of full participation, they suffer a loss of autonomy and a loss of dignity in recognition and relationship.



**Figure 2: The (Re)production of Social Practice--  
Homeostasis and Disruption**

This matter of access to place and consequently to public visibility, at the micro and local levels, contributes to either perpetuating or shifting social norms around identity. There is always a question around allowing transgressive visibility, or excluding people, or suppressing transgressive behavior as a way of suppressing visibility. In a vastly oversimplified depiction, I have used in Figure 2 a circle broken into two arrows, each of which points into the other. At the micro level, where bodies are and how they are seen interacts with intangible interpretive frames, constructs, and social practices in an ongoing process. Figure 2 represents this never-ending, homeostatic process of norm production and reproduction.<sup>91</sup> Stereotypes reproduce in much the same way as a language, in a kind of diffuse process of (re)learning patterns of cognitive association.<sup>92</sup>

The stereotypical, stigmatizing, and discriminatory

91. Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1103 (1999).

92. Marc R. Poirier, *The Cultural Property Claim within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 383–84 (2008); Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 491–94 (2003); Poirier, *Gender Stereotypes*, *supra* note 91, at 1109–15.

identity frames and norms that are reproduced in these ongoing patterns of interaction can be shifted.<sup>93</sup> This shifting is achieved at the local and micro levels at first not so much by exercising political power as by transgressive visibility. This visibility gradually leads to more widespread acceptance, typically piecemeal at first, in terms of what kinds of changes accrue.

This theoretical description fits well with observable shifts in social understandings and practices around homosexuality. As Jonathan Rauch recently wrote, “[A]s more gay people come out of the closet and live and love openly, we are no longer an alien presence, a sinister underground, a threat to children; we are the family down the block.”<sup>94</sup> Michael Klarman aptly describes this ongoing process:

With regard to *Windsor*, the critical development has been the coming-out phenomenon, which over a period of decades has led to extraordinary changes in attitudes and practices regarding sexual orientation. . . . As more gays and lesbians come out of the closet, the social environment becomes more gay friendly. In turn, as the social environment becomes more hospitable, more gays and lesbians feel freer to come out of the closet. The social dynamic is powerfully reinforcing. . . . [K]nowing someone who is gay powerfully influences support for gay equality.<sup>95</sup>

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93. See generally Poirier, *Microperformances*, *supra* note 60.

94. Jonathan Rauch, *The Case for Hate Speech*, THE ATLANTIC (Oct. 23, 2013, 7:08 PM), <http://www.theatlantic.com/magazine/archive/2013/11/the-case-for-hate-speech/309524/>. Kenneth Karst makes a similar observation. During the period between *Bowers* and *Hardwick*,

[s]urely . . . the most influential of all developments in [the] “politics of recognition” was an ever-growing wave of decisions by individual lesbians and gay men to “come out,” publicly identifying their sexual orientation. These avowals not only liberate individuals from lives of pretense, but also educate their friends and relations—and, in the aggregate, promote group status equality. One who has assumed he or she has never met a gay man, now confronted by a live example in the person of a good friend, must redefine the meanings attached to homosexual orientation. Multiplied by the millions, these redefinitions had produced new attitudes.

Karst, *Liberties of Equal Citizens*, *supra* note 8, at 134.

95. Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 132 (2013).

Klarman goes on to describe some of the many different fields of social encounter where these changes can occur—media, popular culture, law, business practices, and politics.<sup>96</sup>

With regard to issues involved in our current *Kulturkampf* around sexuality, gender, and homosexuality, piecemeal measures might include, inter alia, modifying obscenity laws; eliminating sodomy laws, softening religious strictures on sexual identity and sexual behavior; shifting scientifically authoritative psychological models that address sexuality; adjusting conventions about what can be shown in art; and convincing marketers that the transgressive visibility is profitable.<sup>97</sup> Not to mention shifts in various practices around family structure and child rearing. Eventually, the summation of all the tiny shifts at the micro and local levels generates the possibility of some kind of consolidation of the change through the law at the level of local juridical bodies, in addition to the informal but important local social formations. This process of juridical bodies at various levels of scale absorbing shifts in social practice and producing revisions of law is one aspect of “federalism all the way down.” Social change becomes widespread and, once established locally, in effect moves back up the scale to greater visibility and, perhaps, greater authority.<sup>98</sup> Figure 1 represents graphically the multiscale nature of the kind of cultural and evolutionary change that

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96. *Id.* at 133.

97. See, e.g., WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002); Developments in the Law—The Law of Marriage and Family, *Inching Down the Aisle; Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2009 (2003) (discussing inter alia, YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002)); Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 437 (Robert Wintemute & Mads Andenaes eds., 2001); Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1 (2003); Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291 (2007).

98. One particular kind of authority is achieved when a social practice is understood to be “natural,” rather than the product of prior and ongoing practices. See, e.g., SANDRA LIPSTIZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY, 2–3, 6–38 (1990) (discussing the way in which treating social practice around sex and gender as inevitable and natural (which she calls biological essentialism) preserves the status quo and insulates them from processes of criticism and change). The question of the naturalization of social practices is beyond the scope of this Article.

Roberta Kaplan and Ted Olson referred to, but did not explain, in their oral arguments.<sup>99</sup> It is multiscalar, with the lowest rung representing individual experiences in microinteractions. Above that is the local level, both in its manifestation as social groups like the local church, the PTA chapter, the bowling league, or the service organization group, and local juridical organizations, like the town, jury, or community college.<sup>100</sup> Above that are the state and federal levels, which can vie for formal legal authority using the doctrines, vocabulary, and principles of federalism. State and local juridical entities can, of course, vie for formal legal authority using the doctrines, vocabulary, and principles of state and local government law—home rule and delegated authority versus preemption, for example.<sup>101</sup>

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99. Many scholars and media sources who refer to evolutionary processes of social change from the bottom up use metaphors, rather than offering any detailed description that might help to explain the mechanism. Familiar terms such as “momentum,” “landslide,” “slippery slope,” and “tipping point” are all metaphors from physics, but surely cultural shift has nothing whatsoever to do with mass and energy. It is a process of developing a social consensus through frequent signaling to an audience, often signaling by those in authority. Exploring better ways to describe the process is a project beyond the scope of this Article.

100. These are the kinds of local organizations that Gerken identifies in her article on federalism all the way down. Gerken, *supra* note 81, at 8 (“We have . . . not imagined the many institutions that constitute states and cities—juries, zoning commissions, local school boards, locally elected prosecutors’ offices, state administrative agencies, and the like—as being part of ‘Our Federalism.’”). For my account of bottom-up evolutionary changes in cultural practice, we must also consider non-juridical entities “all the way down”—for that is where microinteractions most often occur. In an important sense, the local congregation and the bowling league are more important than the jury and the planning board.

101. *See, e.g.*, *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1241–48 (Pa. 2004) (setting forth principles of home rule and preemption under Pennsylvania law, and holding that the City of Philadelphia did not violate home rule in establishing a category of Life Partners, because Life Partners status is so different from marriage, which must be defined by state law; that the City’s provision of employee benefits to Life Partners is valid as a local matter, because not a matter of statewide concern; but that protection against discrimination is invalid because the scheme would protect couples outside the City who registered as Life Partners, and was therefore in excess of the City’s authority); *Arlington Cnty. v. White*, 528 S.E.2d 706, 707, 709 (Va. 2000) (county acted beyond its delegated authority in providing health benefits for partners in same-sex couples); Carbone, *Marriage as a State of Mind*, *supra* note 28, at 67–81 (cataloguing the options for municipalities to support same-sex marriages under a variety of state law regimes); Cathy Karlberg, New Development, *Philadelphia’s Life Partnership Ordinance: Broadening the Same-Sex Marriage Debate and Implications for Federalism*, 11 RUTGERS J.L. & RELIGION 508 (2010) (discussing the Philadelphia Life Partnership ordinance and subsequent litigation in light of preemption principles around same-sex marriage).

That brings us to an interesting aspect of expressive association and public accommodation law in cases like *Roberts v. United States Jaycees*,<sup>102</sup> *Dale*, the Boy Scouts decision,<sup>103</sup> and the New Jersey *Little League* case:<sup>104</sup> the question of the scale or scales at which cultural contests take place. Federal, state, and local juridical bodies all deploy the law at different levels of scale. The private institutions involved in these membership cases are multiscale, too, even though not formally governmental. The circumstances out of which those cases arise—specific local inclusions or exclusions of specific persons' bodies—and the ensuing court decisions have ramifications and generate arguments at all of the levels depicted in Figure 1.

Scale is one reason why *Romer v. Evans*,<sup>105</sup> the Colorado Amendment 2 case, is so interesting. *Romer* can be understood as, in part, a local government law decision.<sup>106</sup> It says

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102. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *Roberts* involved a multiscale dispute within a nonjuridical civic organization, the Jaycees. The state-level Jaycees were perfectly willing to comply with Minnesota's antidiscrimination law and admit women as members; the national organization fought the law on First Amendment grounds, and lost. *Id.* at 614 (describing how the Minneapolis and St. Paul chapters of the Jaycees had admitted women as members beginning in 1974 and 1975 respectively, and how over a period of some ten years the national organization imposed sanctions on these local chapters for doing so). In fact, it was the Minneapolis and St. Paul chapters that brought the discrimination charge against the national organization. *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 766 (Minn. 1981), *rev'd on other grounds*, 468 U.S. 609 (1984).

103. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This contest was also multiscale—many local troops thought they had a local option on whether or not to exclude gay youth and LGBT adult leaders. As a result of the general publicity that the litigation generated, and the outcome of the Supreme Court case, the Boy Scouts of America formally banned local option. See Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 L. & SEXUALITY 271, 280–82 (2003). The conflict was also multiscale in that the New Jersey Supreme Court viewed the protection afforded by the state's Law Against Discrimination to outweigh the interference with expressive association claimed as a First Amendment injury by the Boy Scouts. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

104. *Nat'l Org. for Women, Essex Cnty. Chapter v. Little League Baseball*, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974).

105. 517 U.S. 620 (1996).

106. See Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257, 266–75 (1999) (arguing that *Romer* may indicate the demise of a traditional principle of local government law that local authority is absolutely determined by state, and substitute instead a principle that in some measure local governments have a legitimate interest in determining local policy matters regardless of state law or policy); see also Carbone, *Marriage as a State of Mind*, *supra* note 28, at 62–63 (examining the local/state tension in

opponents of a local policy cannot up and trump local juridical recognition of social change by resorting to the state plebiscite, constitutional level of politics in order to reverse state and local political decisions regarding liberty and dignity without having a good reason.<sup>107</sup> They may have to allow something more local and patchwork to occur and ripen. Justice Scalia’s dissent in *Romer* counters with examples of prohibition<sup>108</sup> and polygamy,<sup>109</sup> where those seeking to put an end to what was perceived as localized immoral practices resorted to state-constitutional, federal-legislative and federal-judicial levels (polygamy), and to a federal-constitutional level (prohibition).<sup>110</sup> But Justice Scalia also maintains, in a brief dissent in another case handed down the same day in light of *Romer*, that the result would have been different if the plebiscite were local and reversing a local policy.<sup>111</sup>

What is floating above all of these levels of scale, I would argue, is a sense of citizenship. That is level five in Figure 1. This is the level of what is imagined to be your identity vis-à-vis your neighbors and your community—whatever scale that takes. A few years ago, law professor Rose Cuison Villazor invited me to speak about sexual citizenship and same-sex marriage at Southern Methodist University. I am still grateful for that challenge. I thought at first, “What is she talking about? Citizenship is about immigration.” But there is a huge body of literature on citizenship in a broader sense. The

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*Romer* in terms of “beachhead” federalism (citing Poirier, *Microperformances*, *supra* note 60, at 388).

107. *Romer*, 517 U.S. at 627 (quoting from the opinion below: “the ‘ultimate effect’ of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.” 854 P.2d 1270, 1285 (Colo. 1993), *aff’d*, 517 U.S. 620 (1996)).

108. *Id.* at 647–48 (Scalia, J., dissenting) (discussing the Eighteenth Amendment, which established nationwide prohibition).

109. *Id.* at 648–49 (discussing bans on polygamy).

110. In the case of prohibition, a constitutional-level ban on the manufacture, sale and transportation of “intoxicating liquors” did not seem to work out so well, and after more than a decade of tumult the Twenty-First Amendment devolved the question of legality and manner of sales of alcoholic beverages back to the states. U.S. CONST. amend. XXI, repealing U.S. CONST. amend. XVIII.

111. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996) (Scalia, J., dissenting) (arguing that the Court should have taken the case in order to address the “ultra-*Romer* issue[s],” and that revoking of protections for homosexuality at the lowest level of government was not addressed by the *Romer* opinion).

literature often discusses whether people are admitted or excluded, whether they are welcomed or scorned in a community (however community is approached), and whether they have access to various kinds of formal and informal institutions.<sup>112</sup> These processes are manifested and experienced at the micro level and are managed at the levels of state or federal juridical entities as well as of local entities, both juridical and informal. Out of all of these processes, the following questions arise: Do you belong to the community? Will you be able to function as a human being on a par with others in this community? How will you be recognized? When we manage microinteractions through local processes, both juridical local and neighborhood community local, and through state and federal disputes about allocation of decision-making and, sometimes, sovereignty, we are also articulating who we are and who is excluded at some inchoate and potentially global level.

When social and moral issues are contested through transgressive visibility in the face of threats of exclusion, there hovers above all of these specific territorial levels the idea of an imaginary community to which we long to belong.<sup>113</sup> I do not mean imaginary in a bad sense. I mean it in the straightforward sense that it does not have a place. For community “is a largely mental construct, whose ‘objective’ manifestations in locality or ethnicity give it credibility.”<sup>114</sup>

There is a fancy word, “nullibietous,” which means “having no physical place.”<sup>115</sup> At the level of sense of belonging, citizenship manifests in microinteractions and is channeled and (re)produced at these three juridical levels as well (local, state, and federal). Because of the parceling out of authority via territorial jurisdiction, they all have their own roles in the

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112. For a fourfold analysis of levels of citizenship, see, for example, Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 456–88 (2000); BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL RECOGNITION OF SEX AND BELONGING* 3–5 (2007); see also Angela Harris, *Loving Before and After the Law*, 76 *FORDHAM L. REV.* 2821, 2821–22 (2008) (applying Bosniak’s fourfold taxonomy of citizenship to same-sex marriage).

113. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991).

114. ANTHONY P. COHEN, *THE SYMBOLIC CONSTRUCTION OF COMMUNITY* 108 (1985).

115. See Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 *COLUM. J. GENDER & L.* 343, 412 n.279 (2008) (discussing how cultural identity is nullibietous).



process.<sup>116</sup> But in a crucial sense, membership and citizenship are fundamentally semiotic and nullibietous. Meaning resides in no physical place and can potentially travel anywhere.

In cultural and political struggles over social mores and norms, we are often contesting social practice at all of these levels of scale simultaneously. That is the frame within which I get so excited about what I think Justice Kennedy is doing in *Windsor*, even if it does not provide us much of a federalism argument or a clear fundamental right or equal protection holding. To me, Justice Kennedy seems to get right the multiscalar processes of *Kulturkampf*.<sup>117</sup>

## II. JUSTICE KENNEDY’S EVOLUTIONARY DIGNITY AND THE LOCAL

This Part explores several aspects of localism and evolving understandings, as they appear in Justice Kennedy’s jurisprudence. First, dignity is much in evidence these days in constitutional opinions, Justice Kennedy’s among them. Part II.A considers how certain core aspects of dignity are inevitably relational and socially situated, and therefore are linked to local processes. Read carefully, the *Windsor* opinion is replete with references to local interaction implicating dignity and respect, or their opposites, inferiority and humiliation. This is not accidental. Justice Kennedy has his eye on local interactions here as both the source and goal of evolutionary liberty, even as he writes about state authority and its constitutional limits.<sup>118</sup>

Part II.B provides examples of localism and evolutionary

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116. I sketch this idea of tiers of citizenship process in rudimentary form at the end of Poirier, *Gender, Place*, *supra* note 60, at 336–39. There I wrote that “[c]itizenship arguments extrapolate from specific legal changes invalidating specific practices of exclusion into a broader theory of change, moving towards equal citizenship.” *Id.* at 339 (footnote omitted). As Mariana Valverde has written, “[A]sking questions about the scales of different practices of citizenship and the scales of different uses of coercive law is likely to result in some new insights. Governance is always scalar, and practices of citizenship too are always scale-specific.” Mariana Valverde, *Practices of Citizenship and Scales of Governance*, 13 *NEW CRIM. L. REV.* 216, 240 (2010).

117. For a discussion of the current use of “*Kulturkampf*” in legal and legal academic circles, see *supra* note 2. For a discerning view of Justice Kennedy’s appreciation of the effects of micropower in *Romer*, see Halley, *supra* note 75, at 450–51.

118. See *infra* Part II.A.

understanding in Justice Kennedy's jurisprudence in the property area. His opinions in this field frequently defer to ongoing smaller-scale processes and decline to announce sweeping constitutional rules.<sup>119</sup>

Part II.C offers a brief reflection on evolution and timing, suggesting that the seventeen-year interval between *Bowers v. Hardwick*<sup>120</sup> and *Lawrence v. Texas*,<sup>121</sup> and the seventeen-year interval between the federal DOMA (1996) and *Windsor*, are not accidental. They can be seen to reflect a generation-length shift in the understanding of the situation and status of LGBT folk.<sup>122</sup>

#### A. *The Local and Federalism in Windsor*

The term "dignity" appears in various strands of Supreme Court jurisprudence, even though the word is not literally written into the Constitution.<sup>123</sup> Justice Kennedy wrote of dignity in *Lawrence v. Texas*<sup>124</sup> and again in *Windsor*.<sup>125</sup> He also spoke about it in his 1987 confirmation hearings in explaining his view on how judges should approach unenumerated rights,<sup>126</sup> a topic he also addressed in his 1986

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119. See *infra* Part II.B.

120. 478 U.S. 186 (1986).

121. 539 U.S. 558 (2003).

122. See *infra* Part II.C.

123. For a useful taxonomy of the different doctrinal uses of "dignity" by the Supreme Court, see Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). See also Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (analyzing the tension in different usages of dignity in Justice Kennedy's jurisprudence, with a particular focus on *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

124. 539 U.S. 558, 567, 574–75 (2003).

125. 133 S. Ct. 2675, 2689, 2692–93, 2694, 2696 (2013).

126. *Kennedy Confirmation Hearing*, *supra* note 14. In one passage, Senator Gordon Humphrey of New Hampshire asked, "What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not?" *Id.* at 180. Justice Kennedy replied,

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

*Id.* Justice Kennedy then pointed out counterbalancing restraints, which stem

Stanford speech to the Canadian Institute for Advanced Legal Studies.<sup>127</sup> Although the word dignity is not in the United

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from the “very strong” rights of the states and from the deference that the Court owes to the democratic process and to the legislative process. *Id.* This deference is owed both because the legislature is itself an interpreter of the Constitution, and because the legislature, knowing the values of the people, must be given respect. *Id.* Later in that day’s proceedings, Justice Kennedy clarified that he had in mind that a judge should approach unenumerated rights relying on the categories he had listed earlier not out of her or his subjective beliefs or personal ideas of justice, but “because we think that there is a thread, a link to what the Framers provided in the original document.” *Id.* at 209. The conversation between then-Judge Kennedy and Senator Humphrey picked up again later. Senator Humphrey expressed discomfort with Judge Kennedy’s ideas around “the essentiality of the right to human dignity, the inability of the person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment.” *Id.* at 231. Judge Kennedy responded:

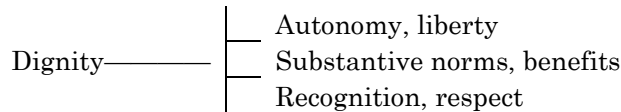
The framers had—by that I mean those who ratified the Constitution—a very important idea when they used the word “person” and when they used the word “liberty.” And these words have content in history of western thought and in the history of our law and in the history of the Constitution, and I think judges can give this content. They cannot simply follow their own subjective views as to what is fair or what is right or what is dignified. They can do that so that they can understand what the Constitution has always meant.

*Id.* at 231–32. As Frank Colucci summarizes it, “Kennedy . . . rejects originalism and accepts a judicial role to discover the true nature of the substantive moral ideals stated in the text of the Constitution.” COLUCCI, *supra* note 16, at 4.

Daniel Conkle proposes a similar theory of substantive due process which he calls “evolving national values,” based in part on Justice Kennedy’s reliance, in *Lawrence*, on the laws of the past half-century, as well as on evolving international norms. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 67–68, 121–24, 127–29 (2006) [hereinafter Conkle, *Three Theories*]; cf. Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy’s Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25 (2007) (arguing that Justice Kennedy’s interpretive methodology separates him from the conservatives on the Court). Conkle’s argument benefits from discerning a third category in between originalism and the Living Constitution approach. Parshall does appropriately note Justice Kennedy’s “sensitivity toward evolving majority opinion,” Parshall, *supra*, at 70, and his insistence on using objective indicia of consensus, *id.* at 71.

127. Kennedy, Unenumerated Rights, *supra* note 15. In this speech, when discussing the expansive formulation of “liberty” in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), Justice Kennedy distinguishes between “essential rights in a just system” and “essential rights in our own constitutional system.” *Id.* at 13. He proposes that “the two are not coextensive. One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution.” *Id.* “[T]he natural tendency to equate a just regime with the constitutional regime” is “irrelevant to the judicial authority to reform it under the guise of announcing constitutional rights not justified by the text of the instrument.” *Id.* at 18.

States Constitution, Justice Kennedy clearly thinks it is related to liberty, a word that *is* in the Constitution, and to the conception of a just society that the Ratifiers intended. Dignity also shows up in post-World War II European human rights jurisprudence and is a specific constitutional term in some countries.<sup>128</sup>



**Figure 3: Aspects of Dignity**

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There is a good deal of not always helpful discussion about the meaning of “dignity” in United States jurisprudence out there in academia. But there is some very useful material, too. Neomi Rao helpfully and thoroughly argues that dignity in

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At his confirmation hearing the following year, Justice Kennedy was asked to clarify his approach to the expansive liberty of *Meyer* as expressed in his 1986 Stanford speech.

Senator LEAHY. What do you look for beyond just the feeling that our people accept these rights to make them such fundamental rights that they are judicially enforceable?

Judge KENNEDY. Well, there is a whole list of things, and one problem with the list is that it may not sound exhaustive enough. But, essentially, we look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers.

Those are the kinds of things you look at, but it is hardly an exhaustive list. You, of course, must balance that against the rights asserted by the State, of which there are many.

*Kennedy Confirmation Hearing, supra* note 14, at 170–71.

128. See, e.g., Arthur Chaskalson, *Dignity as a Constitutional Value: A South African Perspective*, 26 AM. U. INT’L L. REV. 1377 (2011); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008) (examining the usages of “dignity” in various constitutions). Chief Justice Chaskalson’s article includes not only his reflections on a constitutional jurisprudence of human dignity but also responses by American legal scholars Frank Michelman and Herman Schwartz.

constitutional jurisprudence has three different aspects.<sup>129</sup> One indicates individual intrinsic worth, including autonomy;<sup>130</sup> a second is about specific substantive values, and this aspect of dignity may entail substantive benefits;<sup>131</sup> and a third concerns recognition, reaffirmation, and respect.<sup>132</sup>

Katherine Franke parses the aspects of dignity in quite a similar way, when critiquing an argument by Jeremy Waldron that dignity involves responsibility to others.<sup>133</sup> Franke sees Waldron as setting aside what I would call an inherent autonomy aspect to dignity,<sup>134</sup> because there is always a core aspect of dignity that involves relationship and obligation.<sup>135</sup> This aspect of dignity draws one back into social norms. As Franke writes, “[D]ignity is accomplished more relationally than ontologically, according to a set of norms that facilitate that recognition, and are administered by a range of social, legal, and political institutions.”<sup>136</sup> Franke is concerned that “[c]ollapsing rights into responsibilities . . . conceals the degree to which an individual’s or group’s identity is dependent upon and the product of the epistemic capacities of others to apprehend that dignity.”<sup>137</sup>

I am happy to take in both of these astute accounts of how dignity works, for both Rao and Franke show how a key aspect of dignity—its relational, respect-reinforcing aspect—is ineluctably local and culture specific. As the two authorities argue in different ways, dignity is embedded within local

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129. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

130. *Id.* at 187, 196–207.

131. *Id.* at 187–88, 221–26, 235–41.

132. *Id.* at 188–89, 243–50.

133. Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron’s Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1177 (2011) (commenting on Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2011)). Waldron’s Tanner lectures on dignity have been published as a full-length book with a similar title and argument, as well as commentary essays. JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012).

134. *Id.* at 1180 (“it seems that dignity isn’t something that one simply has by virtue of being a human”). In Waldron’s view, according to Franke, “possessing dignity is not inherent in one’s identity as human . . . .” *Id.* at 1178; *see also id.* at 1198–99 (discerning in *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009), “an outlier among the same-sex marriage cases” because it relied on absolute equality rather than norm-based dignity).

135. *Id.* at 1178–79.

136. *Id.* at 1178.

137. *Id.* at 1199–1200.

cultural practices. Whatever its formal recognition, its manifestations are local and historical. Moreover, I would assert that process occurs in the form of microperformances.

As it happens, Rao, who clerked for Justice Thomas and whose career path to this point suggests that she sees herself somewhere in the conservative or libertarian camp, finds that the autonomy aspect of dignity is underplayed generally.<sup>138</sup> She also thinks Justice Kennedy has no business relying on dignity in *Windsor*; dignity is not in the Constitution's "liberty."<sup>139</sup> Franke, from a very different part of the political spectrum as a queer feminist, also criticizes dignity as an approach to the same-sex marriage controversy (writing before *Windsor*—no doubt she would criticize the opinion for this reason).<sup>140</sup> She believes that reliance on dignity diminishes the right to individual autonomy by linking it to a traditional family structure and cultural lexicon.<sup>141</sup> The libertarian and the queer critiques of dignity converge around autonomy.

It is no accident that Justice Kennedy's opinion in *Windsor* uses dignity language much more than either equal protection or liberty language.<sup>142</sup> It even says "equal dignity."<sup>143</sup> Read the

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138. Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29 (2013) (critiquing *Windsor*'s use of dignity).

139. *Id.*

140. My expectation as to Franke's position on *Windsor* is grounded in her critique of Waldron, Franke, *supra* note 133, as well as in other writings. For example, Franke criticizes the same-sex marriage project as a "project of inclusion in We the People [that] presupposes . . . a certain kind of citizen-subject who becomes politically legible by and through a particular form of intimate affiliation." Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006). She describes an emerging "desire for governance, a desire for recognition – recognition by legal and state authority." *Id.* at 240. She laments "[the] failure of the movement's leaders to appreciate the creative political possibilities that the middle ground between criminalization and assimilation might have offered up." *Id.* at 244.

141. Franke is suspicious of a "thickly normative, dignity-based approach" to marriage equality. Franke, *supra* note 133, at 1198. "[A]n opportunity has been lost . . . to expand the social and legal ideal of family beyond a fairly traditional model." *Id.* at 1197. The dignity strategy takes as a given normative

frames that work to differentiate the dignified from the deprived, and . . . [that] operate as a disciplinary set of norms that facilitate that recognition. . . . [P]olitical and legal strategies that tether rights to responsibility are less able to provide the tools to transform the very norms and conditions that make the equalization of rank possible.

*Id.* at 1200.

142. Jon Davidson, Legal Dir. of Lambda Legal, Annual Nat'l LGBT Bar Ass'n Meeting in San Francisco (Aug. 2013).

143. Justice Kennedy writes that DOMA interferes with the "equal dignity" of

opinion carefully. Over and over, Justice Kennedy stresses community, locality, and relationship as the stakes that underlie his decision.<sup>144</sup> If the parents are not married, how will the kids experience school and what will the community think?<sup>145</sup> Dignity is about relationship; it is about autonomy; it is about choice; it is about who you get into bed with in your home *and* the transcendent aspect of your relations—that weird juxtaposition in the first paragraph in *Lawrence*;<sup>146</sup> it is about recognition. Dignity has a local and micro aspect, inasmuch as it recognizes the importance of allowing microinteractions to occur in a respectful way. Dignity is therefore inevitably tied to a specific community and evolving history.<sup>147</sup>

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same sex marriages. *United States v. Windsor*, 133 S. Ct 2675, 2693 (2013).

144. Thus, Justice Kennedy writes, “Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.* at 2689. A bit later:

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

*Id.* at 2962. And again, “The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.” *Id.* The state’s recognition of marriage between same-sex couples “reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.” *Id.* at 2692–93. The state’s classifications have a “substantial societal impact . . . in the daily lives and customs of its people.” *Id.* at 2693. DOMA’s differentiation “demeans the couple . . .” *Id.* at 2694. Moreover, “it humiliates tens of thousands of children now being raised by same-sex couples” for “it makes even more difficult for the children to understand the closeness and integrity of their own family and its concord with other families in their community and in their daily lives.” *Id.*

145. *Windsor*, 133 S. Ct. at 2694 (describing the potential humiliation if children of their same-sex parents are not married).

146. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

147. As Rao writes, “Dignity as recognition reflects a strongly communitarian understanding of the individual. In this view, a person’s dignity depends only in part on rights and must include recognition and validation by the community and state.” Rao, *The Trouble with Dignity*, *supra* note 138, at 33 (footnote omitted). “Recognition requires the community to validate and to have a good opinion of each person.” Rao, *Three Concepts of Dignity*, *supra* note 129, at 248. As Franke puts it, “possessing dignity is not inherent in one’s identity as human, but rather takes work . . . . Dignity in this sense is not something one simply has but rather is earned through hard work on the self, and is fully settled only once it has been

In writing the *Windsor* opinion, Justice Kennedy begins with the experiences of people at the local level and in microinteractions. Citizens in some places are reconsidering what marriage is or can be.<sup>148</sup> As a result, some states are changing their laws.<sup>149</sup> Justice Kennedy focuses in on the evolution of the laws in New York: “Slowly at first and then in

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recognized by another.” Franke, *supra* note 133, at 1178.

Substantive dignity (Rao’s second category) also “depends on conformity to social norms that will vary over time and in different communities. Moreover, such dignity will evolve as political and social preferences change.” Rao, *Three Concepts of Dignity*, *supra* note 129, at 222.

Others have made similar observations. See, e.g., McCrudden, *supra* note 128, at 720 (asserting that dignity’s role “in practice, is to enable local context to be incorporated under the appearance of using a universal principle. Dignity, in the judicial context, not only permits the incorporation of local contingencies in the interpretation of human rights norms; it requires it.”); Rao, *On the Use and Abuse of Dignity*, *supra* note 128, at 205 (asserting that “the value of human dignity comes in part from its evolving and plastic nature—its appeal, as well as its difficulties, lies in its amorphous content. Concepts of ‘dignity’ have a long social, religious, and legal history that informs the modern usage of the term.”); Denise Reaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 695 (2003) (concluding that the meaning of dignity “will vary from one set of social circumstances to another, making context crucial to the discussion in any given case”); Siegel, *Dignity and Politics of Protection*, *supra* note 123, at 1702–03 (observing that “[d]ignity is a value that bridges communities. It is a value to which opponents and proponents of the abortion right are committed, in politics and in law. . . . Dignity can do all this good work because it is a compelling and multifaceted concept.”); *id.* at 1736–37 (“dignity’s requirements vary within and across legal systems”).

148. As Justice Kennedy points out,

[U]ntil 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 a woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization . . . For others, however, came the beginnings of a new perspective, a new insight.

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

149. As Justice Kennedy describes this state-by-state process,

Accordingly, some states concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

*Id.* At the very beginning of the *Windsor* opinion, Justice Kennedy sets up 1996 as the year when “some States were beginning to consider the concept of same-sex marriage” and when Congress enacted DOMA as a preemptive response to the States. *Id.* at 2682.



rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>150</sup> New York first recognized same-sex marriages performed elsewhere, then amended its own marriage law “[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage” and “correct[ed] what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.”<sup>151</sup> Justice Kennedy notes that, as of the writing of the *Windsor* opinion, eleven other states and the District of Columbia have done the same, “decid[ing] that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”<sup>152</sup>

Justice Kennedy makes his approach to dignity deeply personal, in what might appear to be the utterly routine—his treatment of the facts. He writes that Edie Windsor and Thea Spyer met in 1963, and describes the evolution of their relationship over a period of fifty years.<sup>153</sup> Starting with their longing to marry,<sup>154</sup> he describes step-by-step their ability to find formal recognition first by New York City domestic partnership, then by marriage in Canada, then by recognition of their Canadian marriage in New York.<sup>155</sup> But then the problem is the federal government’s refusal to recognize their now-legal relationship.<sup>156</sup> Consider carefully Justice Kennedy’s approach in that statement of the facts. We are moving up the scale (Figure 1) in terms of who is going to give some kind of legal force to this fifty-year-old relationship. In terms of Figure 3 (Dignity), dignity in *Windsor* simultaneously invokes autonomy, benefits, and respect/recognition. They converge.

The question of when the ever-changing microinteractions at the local level achieve the effect of local and then state

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150. *Id.* at 2689.

151. *Id.*

152. *Id.*

153. *Id.* at 2683, 2689.

154. “When at first Windsor and Spyer longed to marry . . .” *Id.* at 2689. I find this phrasing touching.

155. *Id.* at 2683, 2689.

156. *Id.* at 2683, 2689–90, 2692 (describing the effective function of DOMA vis-à-vis state recognition).

political recognition is terribly important for Justice Kennedy, even though he does not appear to believe that judges should take the lead in recognizing changes in human understanding of dignity. He writes that states, one by one, are figuring out whether things have changed enough to recognize the shift in microinteractions at the individual and local levels by addressing the status of same-sex couples and according same-sex couples the dignity of being married.<sup>157</sup> As Justice Kennedy sees it, the federal government, in 1996, in DOMA, said “Never!”<sup>158</sup> It blocked the piecemeal, checkerboard transitional process of states responding to citizens’ evolving perceptions of human need and dignity.<sup>159</sup> To be sure, as Justice Kennedy acknowledges, the federal government is authorized by the Constitution to take the position, that in a specific program, it needs to define marriage separately to avoid marriage fraud for immigration, or to have consistency over how probate works in a particular context.<sup>160</sup> It has often done so. But the federal government does not, by tradition, have general authority over the juridical recognition of local and community processes that make up one part of marriage.<sup>161</sup> It does not have that competency. That is up to the states.

[T]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the state used its historic and essential authority to define the marital relation in this way, its role and its power and making the decision enhanced the recognition, dignity, and protection of the

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157. “DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.” *Id.* at 2692. “DOMA seeks to injure the very class New York seeks to protect.” *Id.* at 2693.

158. “DOMA . . . enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.” *Id.* at 2690.

159. “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 . . . . [N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Id.* at 2695–96.

160. *Id.* at 2695.

161. *See id.* at 2691.

class in their own community.<sup>162</sup>

In short, the precise constitutional difficulty found in *Windsor* is that, in DOMA, the federal government intrudes on the historic role of the states. DOMA is designed to injure the same class that some states seek to protect.<sup>163</sup> And that is why we find whiffs of federalism in *Windsor*. Justice Kennedy is saying that authority over conferring legal status, with regard to the microinteractions that involve relationships and dignity where marriage is concerned, is a state matter and not a federal matter, though subject to constitutional guarantees.<sup>164</sup> He does not provide an overarching principle of liberty or equal protection that would constrain the states,<sup>165</sup> even though he outlines some of the arguments that might commend applying a constraining constitutional principle. Nor does he take the opposite tack, by providing a bright-line test to separate the two sovereign spheres, federal and state,<sup>166</sup> even though he casts the states as primarily implementing the legal recognition of transitions in unenumerated rights, as well as the management of family structure. On its own terms, *Windsor* is simply a message to the federal legislature to back

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162. *Id.* at 2962.

163. *Id.* at 2693.

164. Reva Siegel sees *Windsor* as invoking “traditions of ‘family localism’” as part of an equality argument. Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 87 (2013). The localism part is clear, and Siegel is surely correct that “the *Windsor* opinion locates DOMA in a federated constitutional order.” *Id.* I do not see that Justice Kennedy has quite tied the knot on an equality argument that would compel the states against their will. *But cf.* *Kitchen v. Herbert*, No. 2:13-CV-217-RJS, 2013 U.S. Dist. LEXIS 180087 (D. Utah Dec. 20, 2013) (finding that *Windsor* compels invalidation of Utah statutory and constitutional limitations of marriage to one man and one woman, under federal due process and equal protection); Douglas NeJaime, *Windsor’s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013) (discerning that *Windsor* conceptually sets up a right to marry by narrating the basic purposes of marriage in a way that directs away from procreation and towards a combination of private relationships and public benefits).

165. He does note that state marriage law can be subject to certain constitutional guarantees concerning the rights of persons. *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Those who wish to use *Windsor* to compel nonrecognition states to move to marriage equality might want to take note of this hint. At some point, human dignity garners federal constitutional protections. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 923 (1992).

166. *Windsor* is not a “states can choose what to do” opinion, which is what I believe Justices Scalia, Roberts, and Alito are looking for with their hunger to get a federalism decision on same-sex marriage out of the Court.

off of this particular intrusion.<sup>167</sup>

*Windsor* is, in an important respect, parallel to *Romer*,<sup>168</sup> in terms of concern for levels of authority. This is a different aspect from the understanding of the animus doctrine for which *Romer* is most often remembered.<sup>169</sup> *Romer* can be read to turn in significant part on a notion that each juridical sphere has its competencies, which cannot be exceeded. *Romer* “limit[s] the authority of the states to make important choices on matters of basic political and social morality.”<sup>170</sup> In *Romer*, the Court catalogs local antidiscrimination measures that Amendment 2 blocked.<sup>171</sup> “Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.”<sup>172</sup> In *Romer*, Amendment 2 reached broadly, down to governmental process at the local level, without justification.<sup>173</sup> Justice Scalia’s dissent in a case that was remanded in light of *Romer* suggests this reading.<sup>174</sup> And indeed, on remand, the Sixth Circuit distinguished *Romer* on the basis of the scale of government, contrasting the mismatch in *Romer* between a broad and large-scale constitutional amendment, and local and state legal

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167. *Windsor*, 133 S. Ct. at 2695–96 (DOMA singles out a class that the state has chosen to recognize, and is invalid because “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

168. *Romer v. Evans*, 528 U.S. 620 (1996).

169. *Id.* at 632 (stating that the sheer breadth of the challenged state constitutional amendment is inexplicable by anything except animus towards the class it affects). *See id.* at 644 (Scalia, J., dissenting) (conflating animus and animosity). *See, e.g.*, *Witt v. Dep’t of the Air Force*, 538 F.3d 1264, 1275 (9th Cir. 2008) (suggesting *Romer* as one of two sources for a doctrine of equal protection rational basis review based on animus); *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1111 (C.D. Cal. 2006) (stating that *Romer* is often cited for the proposition that bare animus does not constitute a rational basis).

170. Earl M. Maltz, *Justice Kennedy’s Vision of Federalism*, 31 RUTGERS L.J. 761, 766 (2000).

171. *Romer*, 517 U.S. at 628–29.

172. *Id.* at 629.

173. *Id.* at 632.

174. *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (Scalia, J., dissenting from grant of certiorari, vacation, and remand in light of *Romer*) (arguing that the Court should have denied certiorari or taken the case in order to address the “ultra-*Romer* issue” that it presents—because, essentially, the revoking of protections for homosexuality at the lowest level of government by the lowest level of government was not addressed by the *Romer* opinion).

protections.<sup>175</sup>

In *Windsor*, the situation is arguably parallel. DOMA reached too broadly down into governmental process at the state level, without justification.<sup>176</sup> One need not find “intent to harm” animus, as *Romer* did. In *Romer*, arguably, “[t]he animus results not from any personal intent of the voters of Colorado to insult the class of homosexuals . . . but from the wide-ranging symbolic and practical effects of the law.”<sup>177</sup> The key to understanding the parallel between *Windsor* and *Romer* is not to focus on which level of power is being constrained by the Court’s decision, for in the one case it is the state that is constrained by the Court’s constitutional ruling, and in the other, the federal government, but rather to recognize that the Court steps in to protect the evolving understanding of human dignity as it is investigated locally by the people and then recognized by local and state governments.<sup>178</sup>

*B. The Local and Federalism in Justice Kennedy’s  
Property Jurisprudence*

One might inquire where else Justice Kennedy gives significant deference to the local and micro levels when facing constitutional challenges involving legal acknowledgement of

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175. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296–97 (6th Cir. 1997) (noting that the amendment to the Cincinnati City Charter applied only at the lowest (municipal) level of government and thus “could not dispossess gay Cincinnatians of any rights derived from any higher level of state law and enforced by a superior apparatus of state government, in contrast to the effect of Colorado’s Amendment 2, at issue in *Romer*). See Rosenthal, *supra* note 106, at 261–62 (arguing that *Romer* allows a state or municipality to repeal its own laws protecting gays and lesbians).

176. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (showing how the reach of DOMA departs from the history and tradition of reliance on state law to define marriage).

177. COLUCCI, *supra* note 16, at 124. See Halley, *supra* note 75, at 451 (arguing that Justice Kennedy in *Romer* understands animus not as the bias of agents, but as “a kind of blithe insouciance about the range of their action”); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 925 (2012) (arguing, after a survey of Supreme Court cases, that “there are many forms of subjective intent other than ‘spite’ that fall into the category of unconstitutional animus”).

178. Compare Halley, *supra* note 75, at 450–51 (arguing that in *Romer* Justice Kennedy has assessed the harmful microinteractions that will occur if local antidiscrimination provisions are lifted through the effect of Colorado Amendment 2), with the argument in *Windsor* as to the micro-level effects of the federal government’s interference with a state’s recognizing same-sex marriage. *Windsor*, 133 S. Ct. at 2689, 2692–94.

slow, ongoing processes of social change. One could, of course, look at *Lawrence*<sup>179</sup>—or *Romer*, although *Romer* does not talk about dignity expressly<sup>180</sup>—and as I have just explored, it can be read as a localism decision.<sup>181</sup> One could look at the joint opinion in *Planned Parenthood* as well.<sup>182</sup> But let us review Justice Kennedy’s property jurisprudence,<sup>183</sup> for property is another area where local social practice and performance heavily influence the course of the law.<sup>184</sup>

Consider, first, *Lucas v. South Carolina*.<sup>185</sup> There is a separate Justice Kennedy opinion in *Lucas*.<sup>186</sup> Justice Kennedy essentially says, in part, “I know the common law has something to do with background expectations as to property,<sup>187</sup> but property understandings have evolved over

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

180. *Romer v. Evans*, 517 U.S. 620 (1996). Rao reads *Romer* as a dignity decision. Rao, *Three Concepts of Dignity*, *supra* note 129, at 257 n.308.

181. See *supra* text accompanying note 106.

182. “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992) (joint opinion of Justices O’Connor, Kennedy, and Souter). The opinion describes a role for the states—not the Justices, in the first instance.

Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

*Id.* at 850–51. Whatever one may make of the substantive rule as applied later, for example in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the partial birth abortion case, the structure of the argument in *Casey* is the same as in *Windsor*. It is generally recognized that Justice Kennedy was the author of the substantive due process portion of the joint opinion in *Casey*. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 33 (2002–2003).

183. As one property scholar recently put it, “Justice Kennedy’s property jurisprudence has largely been neglected by legal scholars . . .” John G. Sprankling, *The Property Jurisprudence of Justice Kennedy*, 44 MCGEORGE L. REV. 61, 61 (2013).

184. Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 153–55 (2002) (arguing that property is performed). See Nicholas Blomley, *Performing Property: Making the World*, 26 CANADIAN J. L. & JURIS. 23, 33–37 (2013).

185. 505 U.S. 1003 (1992).

186. *Id.* at 1032 (Kennedy, J., concurring).

187. *Id.* at 1034–35 (discussing background expectations). See *Pa. Coal Co. v. Mahon*, 260 U.S. 229 (1922) (stating that the owner’s expectations have been a principal factor in assessing whether a regulation goes “too far” and becomes a

time.”<sup>188</sup> The question of expectations is circular.<sup>189</sup> Depending on what legislatures say, and what judges say, both legislatures’ and judges’ actions may shift background expectations.<sup>190</sup> Justice Kennedy cannot pin it down, but he does not like what Justice Scalia writes in the majority opinion because Justice Scalia has frozen the notion of what background expectations for property are by linking it too closely to common law.<sup>191</sup> Essentially, Justice Kennedy leaves room for the social practices that constitute property on the ground to evolve and thus to recognize new interests and injuries legally.<sup>192</sup>

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taking); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (articulating three considerations for assessing regulatory takings, including the property owner’s investment-backed expectation). 438 U.S. at 124.

188. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (stating that “the State should not be prevented from enacting new regulatory initiatives” and that “[t]he Takings Clause does not require a static body of property law”).

189. *Id.* at 1034 (Kennedy, J., concurring) (“There is an inherent tendency towards circularity. . . ; [F]or if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres.”). The circularity is not too problematic, because “[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.” *Id.* at 1035.

190. *Id.*

191. *Id.* (“The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”).

192. An important question around evolving expectations and property practices was bypassed in *Palazzolo v. United States*, 533 U.S. 606 (2001). One of the issues in that case was raised by the fact that the owner challenging a land use permit denial as a regulatory taking had acquired the property after the challenged regulation was in place. 533 U.S. at 626. The Rhode Island Supreme Court held that the owner therefore had no reasonable investment-backed expectation remaining upon which he could base a regulatory takings claim. *Id.* at 616 (citing 747 A.2d 707, 717 (R.I. 2000) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) for the regulatory takings touchstone of “reasonable investment-backed expectations”). Basically, he knew what he was getting into. Justice Kennedy’s majority opinion in *Palazzolo* rejected the straightforward rule advanced by the state. *Id.* at 626–28. It held that the property owner’s *Penn Central* claim was “not barred by the bare fact that the title was acquired after the effective date of the state-imposed restriction.” *Id.* at 630. But Justice Kennedy’s opinion declined to provide any guidance as to “the precise circumstances when a legislative enactment can be deemed a background principle” or to determine whether such a circumstance had occurred here. *Id.* at 629. Instead, it remanded to the state courts for a determination in light of *Penn Central*. *Id.* at 632 (remanding because the claims under *Penn Central* were not examined below).

Justice Kennedy’s judicial restraint was too much for Justice Scalia. Although Justice Scalia joined the majority opinion, he wrote a concurring opinion

Justice Kennedy says something similar in his partial concurrence in *Lujan v. Defenders of Wildlife*,<sup>193</sup> opining that we cannot just rely on a shared and immutable sense of what counts as constitutional injury for standing purposes.<sup>194</sup> Sometimes new problems come to light, legislatures respond to them, and they articulate circumstances which we now recognize as injury but which we did not at an earlier time.<sup>195</sup> One of the points of Justice Kennedy's separate opinion, then, is that we have to leave room for that evolution in our environmental standing jurisprudence in light of changing understandings that are consolidated into law by legislatures.<sup>196</sup>

What does Justice Kennedy say in his concurrence in *Kelo*?<sup>197</sup> Yes, "public use" could be abused in some kinds of governmental eminent domain decisions, but in the case before the Court, it was not.<sup>198</sup> There was a local and then a statewide legislative process, blessed by the Connecticut courts, with lots of public participation and transparency.<sup>199</sup> Maybe there is a discernible category of unsavory takings on the wrong side of

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interpreting Justice Kennedy's majority opinion. Justice Scalia also took the position that "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." *Id.* at 637 (Scalia, J., concurring).

Justice O'Connor disagreed with Justice Scalia's approach. She wrote that the timing of a regulation was not immaterial, *id.* at 633 (O'Connor, J., concurring), and that courts can properly consider the effect of existing regulations on regulatory taking claims, *id.* at 635, but also that there is "no set formula" for their determinations, *id.* at 636. In short, *Palazzolo*, as Justice Kennedy wrote the opinion and as Justice O'Connor interpreted it, facilitates an ongoing state level process around claims of regulatory taking (albeit one based on the Federal Constitution) over the Supreme Court's articulation of a broad, clear rule. This is all to Justice Scalia's dismay.

193. 504 U.S. 555, 579 (Kennedy, J., concurring).

194. *Id.* at 580 ("As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.").

195. *Id.*

196. *Id.*

197. *Kelo v. City of New London*, 545 U.S. 469 (2005).

198. *Id.* at 493 (Kennedy, J., concurring) ("My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings.").

199. *Id.* at 491-93 (describing both the political process and the judicial review of that process within the state court system).



“public use,” but it is not this case.<sup>200</sup> Justice Kennedy argues that the courts should look very individually at how the public need has been articulated, in terms of process as well as substance.<sup>201</sup> *Kelo* is a localism decision.<sup>202</sup>

So, in all of these property cases, *Lucas*, *Lujan*, and *Kelo*, 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. In each case, he votes to keep the federal constitution out of it. It is remarkably consistent as a position, and it does have as its basis a strong role for state legislatures (and, where appropriate, federal legislatures) to be the first responders to social change.<sup>203</sup> The property jurisprudence is consistent with *Lawrence* and now *Windsor* (and in a different way *Romer*, where the state plebiscite process was held to overstep its bounds for no good reason, overruling more local juridical entities’ shifts in position as part of the larger *Kulturkampf*).

Is it federalism, when all is said and done? You tell me.

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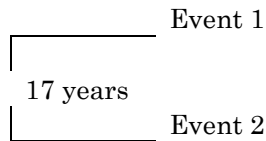
200. *Id.* at 493 (“In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.”).

201. *Id.* at 493 (“This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard . . .”). Sprankling points out that this reluctance to move ahead broadly, and a tendency to favor fact-intensive tests that require case-by-case adjudication, is characteristic of Justice Kennedy’s property jurisprudence. Sprankling, *supra* note 183, at 62.

202. See Marc R. Poirier, *Federalism and Localism in Kelo and San Remo*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 101 (Robin Paul Malloy ed., 2008) (arguing in part that *Kelo* is a localism decision). To be sure, I focus on Justice Stevens’s majority opinion, but Justice Kennedy provides the crucial fifth vote in the case.

203. Reviewing several public addresses that then-Judge Kennedy made during the 1980s (including his 1986 Stanford Unenumerated Rights address, *supra* note 15), Colucci concludes that “Kennedy presents a moral and political defense of state governments. State governments may be superior republican institutions to the federal government, he argues, because they are closer to the people they represent and thus more responsible to their will.” COLUCCI, *supra* note 16, at 137. Colucci points out that Justice Kennedy makes the same point in his dissent in *Davis v. Monroe County*. See *id.* at 151 (citing *Davis*, 526 U.S. 629, 684–85 (1999) (Kennedy, J., dissenting) (arguing that federalism assures that “essential choices can be made by a government more proximate to the people than the vast apparatuses of federal power,” and that complex decisions about peer-to-peer sexual harassments in schools are “best made by parents and by the teachers and school administrators who can counsel with them.”)).

*C. Generational Change in Social Practice: Timing and  
the Role of the Court*



**Figure 4: Seventeen Years**

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This last figure shows a seventeen-year interval between two events. *Bowers v. Hardwick*, 1986, and *Lawrence v. Texas*, 2003—seventeen years. DOMA, 1996, and *Windsor*, 2013—seventeen years. What is going on? I would suggest that seventeen years is roughly the amount of time it takes for a generation to grow up from grade school to graduation from college. Social science suggests that the development of our lifelong identity—what we read, what music we listen to, what world events we define ourselves in relation to—occurs during a period of roughly twenty years, a generation.<sup>204</sup> These

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204. See, e.g., John Quiggin, *The Generation Game*, <http://crookedtimber.org/2012/08/17/the-generation-game-2/> (“for the crucial decade from 16 to 25 . . . common experiences related to growing up at a particular time can be very important”; earlier life stages are governed by family, later ones by other more individualized circumstances). One can distinguish cohorts from generations, which are marked by years of birth, and are typically understood to be from twenty to twenty-five years. Charles D. Schewe, Geoffrey E. Meredith, & Stephanie M. Noble, *Defining Moments: Segmenting by Cohorts*, 9 *MARKETING MGMT.* 48, 48 (2000). A cohort can be as long or as short as the external events that defines it. *Id.* Generation and cohort are sometimes used interchangeably, though they can usefully be distinguished. John Markert, *Demographics of Age: Generational and Cohort Confusion*, 26 *J. OF CURRENT ISSUES & RES. IN ADVER.* 11, 11 (2004). And in delineating age categories, the dates can range for seven to ten up to twenty years. *Id.* For the idea of a cohort defined by the gradual increased visibility of a familiarity with of LGBT folk, see *supra* text at notes 94–96, I suspect that there are not likely to be clear boundaries to generational cohorts around acceptance of homosexuality, as there might be with a cohort defined by a shared experience of war or economic distress. All this boils down to saying that the generational shift in attitudes towards homosexuality is clear, that it does not have a precise starting and ending point, but that it can be understood to be roughly of the length of time between *Bowers* and *Lawrence* and again between DOMA and *Windsor*.

generational limitations on world view may not be exactly tied to, but they reflect, changing social norms.<sup>205</sup> For example, pro-LGBT advocates took the view that if we could not get rid of “Don’t Ask Don’t Tell” legislatively, the military would grow out of it as all of the older officers retired.<sup>206</sup> I suspect that was true. I have often said that the major weapon of the LGBT movement’s struggle for respectability is death. Not killing people, no French Revolution Terror. But as to cultural matters these days, there is a generational transition in what is familiar and acceptable, and this interval of seventeen-to-twenty years is part of it.

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205. As Fiorina et al. write:

[Y]ounger Americans . . . are definitely more tolerant of homosexuals and more accepting of homosexual rights than older Americans. . . . Americans of all ages have become more accepting, but older cohorts are dying off and being replaced by more tolerant younger cohorts. . . . If commandants on the “orthodox” side hope to win a culture war over homosexuality, they had better do it soon – their potential ranks are being thinned by mortality.

FIORINA ET AL., *supra* note 2, at 123–24; *accord*, Kenneth L. Karst, *Though Streets Broad and Narrow: Six “Centrist” Jurists on the Path to Inclusion*, 2010 SUP. CT. REV. 1, 28 n.125 (“Public opinion on the rights of lesbians and gay men has been changing rapidly, with sympathetic attitudes varying inversely with age.”); Klarman, *supra* note 95, at 255–56 (half of the ever-increasing public support for same-sex marriage comes from generational turnover, and half from the effect of coming out on older generations; the young are far more likely to know someone who is gay or lesbian; grew up in a far more tolerant environment; and are far more likely to believe that homosexuality is immutable); Johnsen, *supra* note 28, at 22 (“[T]he ultimate achievement of marriage equality throughout the nation now appears a matter of time, in large part because younger Americans are by far the most supportive.”); Rauch, *supra* note 94, at 18 (stating that one reason the cause of gay equality generally and gay marriage specifically has advanced so rapidly is “[d]emographics: . . . younger people who are more relaxed about homosexuality are replacing older people who harbor longstanding prejudices”); Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What It Means*, N.Y. TIMES, Mar. 26, 2013, [http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?\\_php=true&\\_type=blogs&\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_php=true&_type=blogs&_r=0) (half the change in acceptance of same-sex marriage is due to generational shift).

206. See, e.g., Sharra E. Greer et al., Conference Remarks, *“Rum, Sodomy, and the Lash”: What the Military Thrives on and How it Affects Legal Recruitment and Law Schools*, 14 DUKE J. GENDER L. & POL. 1143, 1165 (2007) (In response to an audience question, Sharra Greer discussed a generational shift in the military towards acceptance of gay and lesbian service members.). At the time, Ms. Greer was the Director of Law and Policy for the Servicemembers Legal Defense Network, a national nonprofit dedicated to ending “Don’t Ask, Don’t Tell.” *Id.* at 1143.

III. THE EFFECTS OF *WINDSOR*, PRECEDENTIAL AND OTHERWISE

This Part considers, first, the fact that after *Windsor*, federal benefits have become available to same-sex married couples, but not to same-sex couples in legally recognized civil unions or domestic partnerships, through a number of regulatory actions by the different affected federal agencies. This disparity has demonstrated beyond a doubt the inequitable consequences of a state's continuing refusal to allow same-sex couples to marry, which in turn has carried at least one state, New Jersey, across the finish line to marriage equality.<sup>207</sup>

The larger problem with *Windsor*, written as it is, is that it sets out two sets of arguments at length, but does not decide them. As with inexpensive furniture, some further assembly is required; but the directions are inadequate. Justice Kennedy limits his express holding to an unjustified excess of federal power. But the two arguments—state authority over domestic relations and constitutional limits on that authority in the service of liberty and equal protection—are in tension in challenges to state DOMAs. *Windsor* leaves lower federal courts and state courts, for the time being, to discern how this tension should be resolved. Part III.B examines some aspects of the federal district court decisions involving state DOMA challenges that were handed down between December 2013, and February 2014, and considers how they have navigated the deliberate inconclusiveness of the *Windsor* opinion.<sup>208</sup>

A. *Windsor Functions to Advance Social Change Even Without a Clear Ruling on Power and Federalism*

Those who are looking to extract a broadly applicable, clear rule from *Windsor* will not get all the way to a federalism rule; and they will not get a fundamental rights rule, and they will not get a heightened scrutiny rule as to an equal protection claim.<sup>209</sup> They do get a somewhat hard-to-follow finding about how *Romer* is to be applied to statutes and state constitutional provisions that limit marriage to a man and a woman.<sup>210</sup>

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207. See *infra* Part III.A.

208. See *infra* Part III.B.

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

210. *Id.* at 2692 (determining that DOMA is legislation “of an unusual

Meanwhile, they will read a good deal of verbiage about the reasons why states like New York have moved to marriage equality, and how that affects the daily experience of same-sex couples and their children and families.

Regardless of the doctrinal basis for its result, *Windsor* controls as to other constitutional challenges to DOMA.<sup>211</sup> But does the dearth of rules in *Windsor* mean *Windsor* does not help the broader cause of marriage equality very much?

Developments in New Jersey have shown that *Windsor* can move things along anyway, without a clear rule.<sup>212</sup> *Windsor* tells the federal government that it has to recognize same-sex marriage in the states that do so.<sup>213</sup> That means the federal government, in the months after *Windsor*, and all the major relevant federal agencies—the Office of Personnel Management, the Department of Defense, the Medicare Administration, the Department of State, and so on—have all issued rules saying, in effect, “If you are a married same-sex

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character”) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *id.* at 2693–96 (Part IV, finding that DOMA violates basic due process and equal protection principles applicable to the federal government, and citing *Romer*, *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973)). As Justice Scalia points out, these three cases, plus *Lawrence*, are the only cases that the majority in *Windsor* cites as to the Constitution’s application to DOMA. 533 S. Ct. at 2706 (Scalia, J., dissenting).

211. See, e.g., *Golinski v. U.S. Office of Personnel Mgmt.*, 724 F.3d 1048 (9th Cir. 2013) (relying on *Windsor*, granting stipulated dismissal appeals of rulings requiring federal personnel system to grant family health benefits to same-sex spouse); *McLaughlin v. Hagel*, No. 11-11905-RJS, 2013 WL 6622898 (D. Mass. Dec. 17, 2013) (describing the application of *Windsor* to invalidate DOMA in lawsuit by same-sex military spouses); *Cooper-Harris v. United States*, No. 2:12-00887-CBM, 2013 WL 4607436 (C.D. Cal. Aug. 29, 2013) (establishing veterans’ benefits for same-sex military spouses); *Cozen O’Connor, P.C. v. Tobits*, No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013) (where state recognizes same-sex marriage, same-sex spouse must be recognized for federal ERISA purposes).

212. See *Garden State Equal. v. Dow*, 82 A.3d 336, 339 (N.J. Super. Ct. Law Div. 2013) (granting motion for a declaratory order, on summary judgment, declaring civil union a violation of New Jersey’s equal protection guarantee and injunction, and requiring New Jersey to recognize same-sex marriages “as a legal matter” following *Windsor*); *Garden State Equal. v. Dow*, 79 A.3d 1036, 1038, 1042–43 (N.J. Oct. 18, 2013) (order denying state’s motion for stay) (stating that *Windsor* “changed the contours” of the case, and holding that the state had not shown a likelihood of succeeding on the merits, in large part because *Windsor* “changed the landscape”); *infra* Part IV.A (discussing the effect of *Windsor* on the New Jersey marriage equality litigation).

213. *Windsor*, 133 S. Ct. at 2694–96 (detailing some of the government benefits unavailable to same-sex married couples because of DOMA, and limiting its invalidation of DOMA to same-sex couples whose marriage is recognized by a state).

couple under the laws of some state, here are your benefits.”<sup>214</sup>

The federal government’s administrative compliance with *Windsor* can itself have a determinative effect in some of the pending marriage equality litigation. As Doug NeJaime writes, “*Windsor* changed the complexion of challenges involving nonmarital relations recognition. . . . [N]ow the state, in limiting same-sex couples to a nonmarital status, keeps those couples from significant federal rights and benefits.”<sup>215</sup> New

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214. See, e.g., Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Aug. 29, 2013), <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf> (setting forth procedures for treating same-sex couples as married for purposes of federal taxation); Processing Appeals Involving Same-Sex Marriages (*United States v. Windsor*), HALLEX I-5-1-19, 2014 WL 555267 (Feb. 12, 2014) (advising the Social Security Administration’s Office of Disability Adjustment and Review of new policies and procedure for adjudicating claims involving same-sex marriages); see also Press Release, Office of the White House Press Secretary, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), available at <http://www.whitehouse.gov/doma-statement> (instructing all federal agencies to implement the *Windsor* ruling); *Garden State Equal.*, 82 A.3d at 346–48 (describing “the clear trend” after *Windsor* for federal agencies “to limit the extension of benefits only to those same-sex couples in legally recognized marriages,” and providing numerous examples). Lambda Legal has produced a series of fourteen fact sheets detailing the changes in federal law as to same-sex married couples in a number of important areas, including private employment benefits, civil and military federal employees, the Family and Medical Leave Act, federal taxes, federal student aid, immigration, Medicaid, Social Security benefits, Medicare spousal benefits, military spousal benefits, veteran’s spousal benefits, bankruptcy, Temporary Aid for Needy Families, and Supplemental Security Income for the Aged, Blind, and Disabled. Lambda Legal, *After DOMA*, <http://www.lambdalegal.org/publications/after-doma> (last visited Mar. 5, 2014); see also Samuel V. Schoonmaker, IV & Wendy Dunne di Christina, *Repercussions of the Windsor Decision Beyond DOMA: Family, Tax, Estate, and Employment Issues*, 47 FAMILY L.Q. 409, 411–13 (2013) (summarizing several of the major federal agencies’ approaches to recognition of same-sex marriages). Not everything is resolved, however.

One important question, not answered uniformly by the federal agencies implementing *Windsor*, is whether a same-sex marriage is to be recognized based on the law of the state of celebration (*lex loci celebrationis*) or the law of the state in which a couple is domiciled. See, e.g., *Garden State Equal.*, 82 A.3d at 364 n.9 (explaining that a New Jersey civil union couple who were also legally married in another state might be treated differently by a federal agency, depending on whether that particular agency had decided to rely on the *lex loci celebrationis* or the law of the state of domicile in implementing *Windsor*); Meg Penrose, *Something to [Lex Loci] Celebrationis: Federal Benefits Following United States v. Windsor*, 41 HASTINGS CONST. L.Q. 41, 68–69 (2013) (arguing in favor of a single federal recognition rule based on the place of celebration of the marriage, as opposed to a federal recognition rule based on domicile that would shift as a couple changed domicile, or perhaps travelled); Schoonmaker & di Christina, *supra*, at 414 (advocating for the *lex loci celebrationis* as a uniform and stable rule).

215. NeJaime, *supra* note 164, at 242–43.

Jersey, for example, recognized civil union. It also had a state constitutional equality principle, articulated in *Lewis v. Harris* in 2006,<sup>216</sup> that a civil union couple was supposed to obtain all the benefits of marriage with civil union.<sup>217</sup> That is what *Lewis* required, not marriage per se, but the benefits of marriage.<sup>218</sup> Just prior to *Windsor*, the attempt to use the holding in *Lewis* to show civil union to be inadequate and to compel marriage equality in New Jersey depended very heavily on stigma and subordination arguments around the state constitutional equality standard articulated by *Lewis*.<sup>219</sup> Plaintiffs contended that a couple’s differently named legal status was by its very nature unequal.<sup>220</sup>

After *Windsor*, the whole controversy in *Garden State Equality v. Dow*, the follow-on case to *Lewis v. Harris*,<sup>221</sup> resolved in a matter of weeks. A trial court ruled in the plaintiffs’ favor on a summary judgment motion, based in large part on the effects of the federal government’s compliance with *Windsor* on benefits available to civil union couples in contrast to married couples.<sup>222</sup> In an order on a motion denying a stay of the Superior Court’s order, the New Jersey Supreme Court

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216. 908 A.2d 196 (N.J. 2006).

217. *Id.* at 462.

218. *Lewis* allowed the legislature to choose as between marriage and some other, new legal institution with which to recognize same-sex couples. *See id.* at 457–60.

219. *See, e.g.,* Marc R. Poirier, *Name Calling: Identifying Stigma and the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009).

220. *Garden State Equal.*, 82 A.3d at 343 (describing the complaint in *Garden State Equal.*).

221. After the failure of an attempt to get *Lewis v. Harris* back immediately in front of the New Jersey Supreme Court on a motion in aid of litigant’s rights, *Lewis v. Harris*, 997 A.2d 227 (N.J. 2010) (3-3 decision) (denying motion and requiring further evidence as to why civil union did not provide the equality required by the 2006 *Lewis v. Harris* decision), a new proceeding designed to elicit evidence was filed in Superior Court: *Garden State Equal. v. Dow*. *See Garden State Equal.*, 82 A.3d at 342–43 (describing how the New Jersey Supreme Court’s 2010 decision in *Lewis v. Harris* led to the filing of the new lawsuit, *Garden State Equal. v. Dow*, in 2011).

222. *Garden State Equal.*, 82 A.3d 336 (granting summary judgment to plaintiffs); *see also* *Garden State Equal. v. Dow*, 79 A.3d 479 (N.J. Super. Ct. Law Div. Oct. 10, 2013) (denying stay pending appeal). Plaintiffs filed the motion for summary judgment exactly one week after *Windsor* was handed down. *Garden State Equal.*, 82 A.3d at 344. They provided affidavits from four civil union couples—two where one civil union partner was a federal employee and the other was not, and two where one civil union partner was a United States citizen and the other was not—demonstrating the effect of denial of federal benefits to civil union couples. *Id.* at 345.

signaled it would very likely uphold the trial court, based on the effects of *Windsor*.<sup>223</sup> At that point, Chris Christie, New Jersey's ambitious Republican Governor, who had been litigating against marriage equality aggressively, threw in the towel.<sup>224</sup> *Windsor* in effect makes concrete the consequences of not recognizing same-sex marriage, in terms of a disparity in benefits, as well as of recognition.<sup>225</sup> That alone, without a broad holding on either federalism or rights, will season the

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223. *Garden State Equal. v. Dow*, 79 A.3d at 1038 (order denying stay, stating that *Windsor* "changed the contour of the pending lawsuit.").

224. Kate Zernike & Mark Santora, *As Gays Wed in New Jersey, Christie Ends Court Fight*, N.Y. TIMES, Oct. 21, 2013, [http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?\\_r=0](http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?_r=0). The matter may not be at an end, as the ruling requiring marriage equality in New Jersey came from a trial level court and could be overturned; or the New Jersey Supreme Court could find itself with a different composition in the future. See Editorial, *Gay Marriage, Again*, STAR-LEDGER (Newark, N.J.), Dec. 12, 2013, at 22 (stating that there is a remote chance the New Jersey Supreme Court's decision could change); Salvador Rizzo, *Christie Ends Legal Battle Against Gay Marriage: Governor Disagrees With Court, But Vows to Enforce the Law*, STAR-LEDGER (Newark, N.J.), Oct. 22, 2013, at 1, 9 (quoting Professor Robert F. Williams of Rutgers School of Law Camden to the effect that the resolution was not rock solid and could be overturned in a future case). There are also unresolved questions about the status of existing civil unions: do they automatically become marriages, must the civil union partners get married, and under what procedure; or may civil unions still exist, because marriage is available also. See Editorial, *Gay Marriage, Again, supra* (setting forth the options and endorsing new legislation without a religion exemption); Matt Friedman, *The Legislature's Options*, STAR-LEDGER (Newark, N.J.), Oct. 22, 2013, at 9 (setting forth and explaining the legislature's options: do nothing; override Governor Christie's veto; or enact a new bill); Steven Goldstein, *Why Legislation for Equality Still Matters*, STAR-LEDGER (Newark, N.J.), Oct. 22, 2013, at 15 (expressing concern that the court's decision does not address religious exceptions, while the carefully-drafted legislation did). A bill to establish marriage equality legislatively, as well as to clarify the scope of religious exemptions, was proposed, but has been withdrawn. See Matt Friedman, *N.J. Senate Pulls Gay Marriage Bill*, STAR-LEDGER (Newark, N.J.), Dec. 16, 2013, [http://www.nj.com/politics/index.ssf/2013/12/nj\\_senate\\_pulls\\_gay\\_marriage\\_bill.html](http://www.nj.com/politics/index.ssf/2013/12/nj_senate_pulls_gay_marriage_bill.html); Matt Friedman, *N.J. Assembly Democrats Not on Board with State Senate Gay Marriage Bill*, STAR-LEDGER (Newark, N.J.), Dec. 11, 2013, [http://www.nj.com/politics/index.ssf/2013/12/nj\\_assembly\\_democrats\\_not\\_on\\_board\\_with\\_state\\_senate\\_gay\\_marriage\\_bill.html](http://www.nj.com/politics/index.ssf/2013/12/nj_assembly_democrats_not_on_board_with_state_senate_gay_marriage_bill.html); Mary Pat Gallagher, *Same-Sex Marriage Bill Stalled by Discord Over Religious Exemption*, NEW JERSEY L. J., Dec. 18, 2013, <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202633640794&thepage=1>. So currently marriage equality in New Jersey depends on a Superior Court decision that the Governor decided not to appeal.

225. *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013) (describing how DOMA deprives same-sex marriage couples of the "benefits and responsibilities that come with federal recognition of their marriages," as well as placing the couple in an unstable "second tier" position, which is demeaning).



process of change.

*B. Making Windsor Do Doctrinal and Factual Work Despite Itself*

*Windsor* is having significant effects doctrinally as well, despite the deliberate limitations of Justice Kennedy’s opinion. It of course governs other lawsuits challenging DOMA.<sup>226</sup> But its influence goes beyond that, especially as an application of the principle of *Romer*-style Equal Protection scrutiny to laws that refuse to grant same-sex couples the status of legal marriage.

A few months after *Windsor* came down, in the short period from December 2013 through February 2014, six federal district courts found state DOMA laws and constitutional provisions unconstitutional,<sup>227</sup> and another issued a preliminary injunction finding a likelihood of success on the merits.<sup>228</sup> These courts sit in some of the most conservative parts of the United States. Their marriage equality opinions discuss the implications of *Windsor*.<sup>229</sup> They have a hard time finding in *Windsor* a clear holding on any of the core doctrinal issues that are at stake—Equal Protection, Due Process liberty,

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226. See, e.g., cases cited *supra* note 211.

227. *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (applies to Cook County, Ill. only); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013); *Bostic v. Rainey*, 2:13-cv-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014). *Obergefell v. Wymyslo* involved an attempt to obtain Ohio recognition of death certificates of same-sex marriages valid in another state, and the court was careful to stress that the issue was the right to remain married, rather than the right to become married in the first place. *Obergefell*, 962 F. Supp. 2d at 968.

228. *De Leon v. Perry*, No. SA-13-CA-00983-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014).

229. In *Lee v. Orr*, explicit discussion of *Windsor* occurred in two orders from 2013 issuing preliminary injunctions, rather than in the subsequent brief order issuing a permanent injunction in early 2014. *Lee*, 2013 WL 6490577 (as to a class of medically critically ill plaintiffs in Cook County, Illinois, issuing a preliminary injunction requiring the Cook County, Illinois, Clerk to perform same-sex marriages in advance of the June 1, 2014 effective date of Illinois’s marriage equality law); *Gray v. Orr*, No. 1:13-cv-08849, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (as to specific critically ill plaintiffs, issuing a preliminary injunction requiring the Cook County, Illinois, Clerk to perform same-sex marriages in advance of the June 1, 2014, effective date of Illinois’s marriage equality law).

and the standard of judicial review under each of these constitutional headings. As Judge Kern wrote in the Oklahoma decision, “Both parties argue that *Windsor* supports their position and both are right.”<sup>230</sup> Principles and rules must be “gleaned” from *Windsor*.<sup>231</sup>

On the one hand, “much of the majority’s reasoning regarding the ‘purpose and effect’ of DOMA can readily be applied to the purpose and effect of similar or identical state law statutes.”<sup>232</sup> Justice Scalia’s dissent plays a leading role here. His statement that “the majority arms well every challenger to a state law restricting marriage to its traditional definition” is quoted in several of the district court opinions.<sup>233</sup> Justice Scalia also wrote that several passages from Justice Kennedy’s opinion were directly “transposable”<sup>234</sup> to state DOMA challenges, and he provided three examples, in which he quoted from the majority opinion, literally struck through the references to federal law, and inserted state language instead.<sup>235</sup> And indeed, two of the district court opinions actually follow through on Justice Scalia’s suggestion, quoting from *Windsor* but inserting language about Kentucky<sup>236</sup> and Texas.<sup>237</sup>

On the other hand, as Judge Kern writes in the Oklahoma case, *Windsor* supports the states’ positions because “it engages in a lengthy discussion of states’ authority to define and regulate marriage, which can be construed as a yellow light cautioning against *Windsor*’s extension into similar state definitions.”<sup>238</sup> This is our federalism question. How much leeway do states have? One of the two principles that Judge Kern gleans from *Windsor* is that a state law defining marriage is not an “‘unusual deviation’ from the state/federal balance, such that its mere existence provides ‘strong evidence’ of

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230. *Bishop*, 2014 WL 116013, slip op. at 18.

231. *Id.* at 19.

232. *Id.* at 18.

233. *See, e.g., id.* at 18 (quoting Scalia, J., dissenting, *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013)).

234. 133 S. Ct. at 2710 (Scalia, J., dissenting).

235. *Id.* at 2709–10.

236. *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at 7 (W.D. Ky. Feb. 12, 2014) (directly quoting *Windsor*, 133 S. Ct. at 2694, but replacing terms referring to the federal law with terms relevant to Kentucky law).

237. *De Leon v. Perry*, No. SA-13-CA-00983-OLG, 2014 WL 715741, at 23 (W.D. Tex. Feb. 26, 2014).

238. *Bishop*, 2014 WL 116013, slip op. at 18.

improper purpose. A state definition must be approached differently, and with more caution, than the Supreme Court approached DOMA.”<sup>239</sup> At the same time, Judge Kern writes, we learn from *Windsor* that “courts reviewing marriage regulations, by either the state or federal government, must be wary of whether ‘defending’ traditional marriage is a guise for impermissible discrimination against same-sex couples.”<sup>240</sup>

On the matter of constitutional constraint of the states, two sentences from Justice Kennedy’s *Windsor* opinion are destined to be widely cited as support for constitutional limitations on state definitions of marriage, as they already have been in the district court opinions through February 2014.<sup>241</sup> Justice Kennedy writes of “the long-established precept that the benefits, incidents, and obligations of marriage are uniform for all couples within each State, though they may vary, *subject to constitutional guarantees*, from one State to the next.”<sup>242</sup> Earlier, Justice Kennedy writes, in the same vein, that “State laws defining and regulating marriage must . . . respect *the constitutional rights of persons*; but, subject to those guarantees, ‘regulation of domestic relations’ is an area that has long been regarded as a virtually exclusive province of the states.”<sup>243</sup> But these general statements do not help define that limitation. Although, as Judge Kern observes, “A citation to *Loving* is a disclaimer of enormous proportions.”<sup>244</sup>

Parts of the *Windsor* opinion seem to be serving, as what Allison Orr Larsen calls, “factual precedent.”<sup>245</sup> By that she means the “citation in a lower court of a higher court’s generalized factual claim,” along with “reliance on the Supreme Court’s assertion of legislative fact—a general factual claim—

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239. *Id.* at 19 (citations omitted).

240. *Id.*

241. *De Leon*, 2014 WL 715741, slip op. at 18 (“constitutional guarantees”); *Bishop*, 2014 WL 116013, slip op. at 18 (“constitutional guarantees”); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at 97 (D. Utah Dec. 20, 2013) (“constitutional guarantees”); *Bostic v. Rainey*, 2:13-cv-395, 2014 WL 561978, at 16 (E.D. Va. Feb. 13, 2014) (“constitutional rights of persons”); *Bourke*, 2014 WL 556729, slip op. at 11 (“constitutional rights of persons”).

242. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (emphasis added). Publication deadlines preclude examination in the article of further marriage equality decisions that have occurred from March 2014 onward.

243. *Id.* at 2691 (emphasis added) (citing *Loving v. Virginia*, 388 U.S. 1 (1967), and quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

244. *Bishop*, 2014 WL 116013, slip op. at 18.

245. Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013).

as authority to prove that the observation is true.”<sup>246</sup> Justice Kennedy writes that federal refusal to recognize state-sanctioned same-sex marriage creates a “second-tier” marriage that “demeans the couple.”<sup>247</sup> He goes on to state that nonrecognition “humiliates tens of thousands of children now being raised by same-sex couples,” with the consequence that it is “even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>248</sup> The district court opinions use the “second-tier marriage is demeaning” passage to establish harm to same-sex couples.<sup>249</sup> And they use the “humiliating the children” passage to rebut proffered justifications that limiting marriage to opposite-sex couples protects children.<sup>250</sup> It is not clear to what extent they are short-cutting their own fact finding, in reliance on *Windsor*.

Faced with the lack of definitiveness of Justice Kennedy’s opinion, the district courts are turning to Justice Scalia’s account of what the majority did in *Windsor*.<sup>251</sup> The Utah district court was challenged on the propriety of this point and addressed the question in its order denying a motion for stay of

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246. *Id.* at 73. Larsen explains her idea thus:

Supreme Court opinions are changing. They contain more factual claims about the world than ever before, and those claims are now rich with empirical data. The Supreme Court’s fact finding is also highly accessible; fast digital research leads directly to factual language in old cases that is perfect for argument in new ones. An unacknowledged consequence of all this is the rise of . . . “factual precedents”: the tendency of lower courts to cite Supreme Court precedent on factual subjects, as evidence that the factual claims are indeed true.

*Id.* at 59.

247. 133 S. Ct. at 2694.

248. *Id.*

249. *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at 6 (W.D. Ky. Feb. 12, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at 28–29 (D. Utah Dec. 20, 2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 980, 995 (S.D. Ohio 2013).

250. *Obergefell*, 962 F. Supp. 2d at 995; *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at 31 (N.D. Okla. Jan. 14, 2014); *Bourke*, 2104 WL 556729, slip op. at 8; *De Leon v. Perry*, No. SA-13-CA-00983-OLG, 2014 WL 715741, at 16 (W.D. Tex. Feb. 26, 2014); *Kitchen*, 2013 WL 6834634, slip op. at 26.

251. *Kitchen*, 2013 WL 6697874, slip op. at 7 (agreeing with Justice Scalia that the logical outcome of *Windsor* is that constitutional concerns will trump important federalism concerns); *Obergefell*, 962 F. Supp. 2d at 973 n.1 (noting Justice Scalia’s prediction as to how *Windsor* would be used in state DOMA challenges); *Bostic v. Rainey*, 2:13-cv-395, 2014 WL 561978, at 16–17 (E.D. Va. Feb. 13, 2014); *Bourke*, 2014 WL 556729, slip op. at 6 n.14.

its order. As Judge Shelby explained:

Although Justice Scalia clearly disagreed with the outcome in *Windsor* and believed the majority of the Supreme Court had decided the case wrongly, his opinion about the reasoning underlying *Windsor* and the possible effects of this reasoning in future cases is nevertheless perceptive and compelling. The court . . . cited Justice Scalia’s dissent not as binding precedent, but as persuasive authority.<sup>252</sup>

Still, it is odd that Justice Scalia should be interpreting for the lower courts what Justice Kennedy said.

The post-*Windsor* district court opinions, for the most part, do explicitly treat the Supreme Court’s *Windsor* decision as dispositive on one threshold issue. They view it as part of a series of doctrinal developments that indicate that it is no longer necessary for lower courts to follow the summary disposition of the equal protection and substantive due process right to marriage claims made by the same-sex couple in *Baker v. Nelson*.<sup>253</sup> *Baker v. Nelson* has up until very recently barred courts from addressing federal constitutional challenges to limitations of marriages to opposite-sex couples.<sup>254</sup> Summary dispositions lose their precedential value “when doctrinal developments indicate otherwise.”<sup>255</sup> The Supreme Court’s *Windsor* decision is relied on in two related ways for this point. First, it is cast as part of a series of cases that demonstrate “erosion over time” of the doctrinal foundations of *Baker*.<sup>256</sup>

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252. *Kitchen*, 2013 WL 6834634, slip op. at 2 (order denying stay).

253. 409 U.S. 810 (1972) (dismissing for want of a substantial federal question an appeal from *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (finding no constitutional right of same-sex couples to marry under the Fourteenth Amendment)). The recent marriage equality decisions expressly finding *Baker* no longer controlling include *Bostic*, 2014 WL 561978, slip op. at 9–10; *Bishop*, 2014 WL 116013, slip op. at 15–17; *De Leon*, 2014 WL 715741, slip op. at 8–10; *Kitchen*, 2013 WL 6697874, slip op. at 7–9. Another court resolves the *Baker v. Nelson* issue without discussing *Windsor*’s role, saying simply that, “a lot has changed since [1971].” *Bourke*, 2014 WL 556729, slip op. at 1.

254. Recent examples are *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002–03 (D. Nev. 2012), *appeal pending*, and *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1084–88 (D. Haw. 2012), *appeal pending*.

255. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting Port Auth. Bondholder’s Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 253 n.3 (2d Cir. 1967)).

256. *Bishop*, 2014 WL 116013, slip op. at 16; *accord*, *De Leon*, 2014 WL 715741, slip op. at 10 (situating *Windsor* as part of a series of cases that are “the type of

Second, “statements made by the Justices [in *Windsor*] indicate that lower courts should be applying *Windsor* (and not *Baker*) to the logical ‘next issue’ of state prohibitions of same-sex marriage.”<sup>257</sup> It is also sometimes noted that the Second Circuit’s opinion in *Windsor v. United States* expressly held that *Baker v. Nelson* was no longer controlling.<sup>258</sup> The district courts have had to work hard to discern even this doctrinal consequence of the Supreme Court’s *Windsor* opinion.

On the question of level of scrutiny, the district courts have garnered little guidance from *Windsor*.<sup>259</sup> They have taken different approaches. Most of the six courts found that the state DOMA fails even under rational basis scrutiny, sometimes without distinguishing which kind of rational basis scrutiny applies.<sup>260</sup> One district court determined that, in light of evolving precedent, it was free to apply heightened scrutiny.<sup>261</sup> More important than any of the district courts’ resolutions on levels of scrutiny, a Ninth Circuit opinion, *SmithKline*

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doctrinal development that renders *Baker*’s summary disposition of no precedential value”).

257. *Bishop*, 2014 WL 116013, slip op. at 17 (citing to the *Windsor* dissents of Chief Justice Roberts and Justice Scalia); *accord, Kitchen*, slip op. at 8 (same).

258. *Bishop*, 2014 WL 116013, slip op. at 16 (citing *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2765 (2013)); *De Leon*, slip op. at 10 (same).

259. *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at 4 (W.D. Ky. Feb. 12, 2014) (“no clear answer” as to how the *Windsor* majority approached the question of standard of review); *id.* at 5 (*Windsor* has not made clear whether sexual orientation is a suspect category).

260. *De Leon*, 2014 WL 715741, slip op. at 14 (equal protection challenge); *id.* at 21–23 (applying rational basis review to due process challenge on refusal to recognize valid out-of-state same-sex marriages); *Kitchen*, 2013 WL 6697874, slip op. at 22, 23, 25 (qualifying its Equal Protection analysis by noting the “lack of guidance” from *Romer* and *Windsor* on the question of whether the discrimination in the law is of “unusual character,” and resolving the Equal Protection challenge under standard rational basis principles); *Bostic v. Rainey*, 2:13-cv-395, 2014 WL 561978, at 22 n.16 (E.D. Va. Feb. 13, 2014) (resolving the case under rational basis scrutiny, and therefore finding no need to address plaintiffs’ “compelling” arguments concerning heightened scrutiny); *Bourke*, 2014 WL 556729, slip op. at 4–5 (noting that arguments in favor of treating sexual orientation as a suspect class are likely valid, noting the uncertainty of authority, including *Windsor*, and then proceeding to apply rational basis review); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at 2 n.1 (N.D. Ill. Feb. 21, 2014) (although the Supreme Court has not yet established the level of scrutiny applied to claims based on sexual orientation, a fair reading of *Windsor* suggests that the claim would not withstand even rational basis scrutiny).

261. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987 n.13 (citing inter alia the Second Circuit’s opinion in *Windsor v. United States*, 669 F.3d 169, 181–85 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013), which did apply heightened scrutiny).

*Beecham Corp. v. Abbott Laboratories*,<sup>262</sup> has discerned that *Windsor* must have applied a heightened standard of review to the Equal Protection claim in the case based on sexual orientation, even though the Supreme Court in *Windsor* was not explicit.<sup>263</sup> The Ninth Circuit’s view on heightened scrutiny in *SmithKline Beecham* is important to the immediate future of marriage equality litigation, although it appears now to be of precedential value to other federal circuits but not to govern an immediately pending appeal.<sup>264</sup>

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262. 740 F.3d 471 (9th Cir. 2014).

263. *Id.* at 480 (“*Windsor* . . . did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary”). To interpret *Windsor*, the Ninth Circuit used as its model *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). *SmithKline Beecham*, 740 F.3d at 480–81. *Witt* was able to discern that *Lawrence v. Texas* had in fact applied heightened scrutiny rather than a rational basis analysis. *Id.* at 480. The three factors applied in *SmithKline Beecham*, relying on *Witt*, to discern whether the Supreme Court had used heightened scrutiny without saying so, were: (1) examining the actual purpose and history of the challenged legislation rather than accepting any conceivable purpose, *id.* at 481–42; (2) the need to justify the statute in light of its imposition of harm, stigma, and second-class status on a class, *id.* at 482–83; and (3) citation of what the Ninth Circuit deemed to be heightened scrutiny cases, including *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). *Id.* at 483. The Ninth Circuit concluded that it was “required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.” *Id.* at 484.

264. The Ninth Circuit has before it, in *Sevcik v. Sandoval* a consolidated appeal of two pre-*Windsor* federal district court marriage equality decisions, from Nevada and Hawaii. *Sevcik v. Sandoval*, Nos. 12-17668, 12-16995, 12-16998 (9th Cir.) (consolidated appeal of *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), and *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012)). However, the Ninth Circuit has postponed oral argument in the case, after both the Carson City Clerk-Recorder and the Governor of Nevada withdrew their briefs in support of Nevada’s same-sex marriage ban, based on the heightened scrutiny holding in *SmithKline Beecham*. Lisa Keen, *Michigan Marks 9th Win in Post-Windsor Federal Challenges*, KEEN NEWS SERVICE, Mar. 21, 2014, <http://www.keennewsservice.com/2014/03/21/michigan-marks-9th-win-in-post-windsor-federal-court-challenges/> (the Ninth Circuit removed the consolidated Nevada and Hawaii cases from its docket, leaving the Utah case as the first of the post-*Windsor* cases to be argued before a federal Circuit court, on April 10, 2014); Lambda Legal, *Lambda Legal Applauds Nevada’s Governor’s Request to Withdraw Brief Defending State Marriage Ban*, Feb. 10, 2014, [http://www.lambdalegal.org/blog/20140210\\_lambda-legal-applauds](http://www.lambdalegal.org/blog/20140210_lambda-legal-applauds) (both the Governor of Nevada and the Carson City Clerk-Recorder withdrew their briefs supporting the Nevada marriage ban, in light of the ruling in *SmithKline Beecham* on heightened scrutiny on the basis of sexual orientation).

## CONCLUSION

Some truths are self-evident, and some are not. It is true that since the mid-1980s, then-Judge and now-Justice Kennedy has espoused a consistent theory of the evolving understanding of liberty and human dignity, which he understands to be rooted in the Ratifiers' own intent that subsequent generations elaborate on the basics of human liberty as conditions change.<sup>265</sup> To the frustration of the conservative Justices on the current Court, who are adherents to the tenets of textual originalism, Justice Kennedy believes that the constitutional text itself commits the evolving understanding of liberty to the people, with the states usually—but not always—having the power eventually to translate evolving understandings into law. The states are, however, “subject to certain constitutional guarantees”<sup>266</sup>—to the chagrin of the conservative Justices on the current Court, inasmuch as they are federalists, as to the issue of same-sex marriage.

Justice Kennedy's commitment to an evolving understanding of basic constitutional principles shows itself in other doctrinal areas—this Article provided his property decisions as an example.<sup>267</sup> Similar to matters of family, gender, and sexuality, property practices are low-level, widespread, and often deeply personal, and are understood and fought over as constitutive rights.<sup>268</sup> They may vary locally or regionally, and local understandings are not always coterminous with what the law says.<sup>269</sup> So it is understandable that property, like liberty, in Justice Kennedy's opinions often finds considerable leeway to evolve, to the dismay of the conservative Justices on the Court, inasmuch as they are advocates of absolute or near-absolute property rights.

A consistent commitment to process may not result in consistent, self-evident rules. Justice Kennedy's fidelity to

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265. Kennedy, Unenumerated Rights, *supra* note 15; *Kennedy Confirmation Hearing*, *supra* note 14; *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2765 (2013).

266. *Windsor*, 133 S. Ct. at 2962.

267. *See supra* Part II.B.

268. *See, e.g.*, Poirier, *Virtue of Vagueness*, *supra* note 184, at 153–55.

269. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW; HOW NEIGHBORS SETTLE DISPUTES (1991) (discussing informal and formal practices and processes of dispute resolution around cattle trespass in Shasta County, California).



evolving understanding, in at least some areas of the law,<sup>270</sup> leaves to their own devices those who seek for the law around marriage equality to be clear. For Justice Kennedy, “constitutional guarantees” appear to congeal later and be of smaller dimension, to the frustration of advocates who would like to consolidate their ideological positions by securing an authoritative ruling at the highest level.<sup>271</sup> Lower courts are likewise left prospecting for clear rules in Justice Kennedy’s opinions. Thus, they must for the time being craft their opinions in light of a mere “intimation . . . of irreversible systemic change” in *Windsor*, not a landmark case.<sup>272</sup>

At the same time, Justice Kennedy’s summary of the two sides’ positions in *Windsor*<sup>273</sup> reveals a sympathy for the plight of same-sex couples, and perhaps especially for their children.<sup>274</sup> As shown by the post-*Windsor* federal district court opinions on state DOMAs to date, Justice Kennedy’s description of the stakes in the controversy may well prime the evolutionary process, not so much in terms of *Windsor* providing precedent on issues such as standard of review or the scope of a fundamental right to marry,<sup>275</sup> but in terms of the weight to be given factual claims about dignity, respect, second-class status, and humiliation. The lower courts must weigh these claims when reaching their own conclusions as to

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270. At least much of the time. I make no assertion that Justice Kennedy is 100 percent faithful to his theory, just as I do not assert that evolutionary liberty and dignity always bend towards justice. *See supra* note 28.

271. *See* Carbone, *Marriage as a State of Mind*, *supra* note 28, at 62–65 (discussing beachhead federalism and *Kulturkampf*); Poirier, *Not the Main Event*, *supra* note 37, at 391–92 (same).

272. Nathan Goetting, *Gay Marriage is a Fundamental Right*, 70 NAT’L LAW. GUILD REV. 137, 137 (2013).

273. As ably boiled down in *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at 18–19 (N.D. Okla. Jan. 14, 2014).

274. *Windsor*, 133 S. Ct. at 2964 (unavailability of marriage to same-sex parents humiliates tens of thousands of children); *see also Perry Transcript*, *supra* note 48, at 21 (Justice Kennedy says, “On the other hand, there is an immediate legal injury . . . —what could be legal injury, and that’s the voice of these children. There are some 40,000 children in California, according to the Red Brief, that live with same-sex parents, and they want their parents to have full recognition and full status. The voice of those children is important in this case, don’t you think?”).

275. *Loving* establishes a fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). But does the right to marriage envisioned by *Loving* encompass same-sex couples, in light of traditional practices and understandings? *See, e.g.*, Poirier, *The Cultural Property Claim*, *supra* note 115, at 352–59 (discussing the problem with invoking a “right to marry,” given the competing definitions of marriage).

whether state DOMAs are justified, under whatever standard of review the courts apply. *Windsor* seems to be functioning as “factual precedent,”<sup>276</sup> in the lower courts and in popular opinion as well, in a way that is likely to accelerate the Court’s eventual finding of a “constitutional guarantee” that constrains state DOMAs, perhaps via the pen of Justice Kennedy himself.

Justice Kennedy’s dignity opinions sometimes paradoxically manifest the “dictates of judicial restraint”<sup>277</sup> by striking down legislation. Both *Romer* and *Windsor* remove a higher-level imposition of uniformity that would have shut down the evolutionary process occurring at lower levels of government, as well as informally at the local and micro levels of social interaction.

I have perhaps taken advantage of Justice Kennedy’s lack of explicit detail as to how the evolution of the understanding of liberty and dignity occurs, inserting my own views on the importance of microperformances and suggesting the relevance of postmodern theories of identity, power, and transformation articulated by Michel Foucault, Judith Butler, and Michael Warner, with supporting theory from a generation earlier by Erving Goffman.<sup>278</sup> But what I argue is consistent with Justice Kennedy’s opinion in *Windsor* and reflects what Janet Halley has called an “uncanny proximity” between Justice Kennedy’s *Romer* opinion and the theory of diffuse power by Michel Foucault.<sup>279</sup> Justice Kennedy’s account throughout sets out not just “dignity” in the abstract, but dignity as experienced concretely, by same-sex couples and their children in their daily lives.<sup>280</sup> Two aspects of dignity—autonomy and relationality<sup>281</sup>—cannot be separated in *Windsor*, any more than in *Lawrence*.<sup>282</sup> Also, as Justice Kennedy recognizes,

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276. See Larsen, *supra* note 245 (introducing the concept of Supreme Court cases serving as “factual precedent”); see also *supra* text accompanying notes 142–56 (discussing how the factual background and discussion in *Windsor* may be serving as a factual precedent for other courts).

277. That is part of the very title of Justice Kennedy’s 1986 address to Canadian jurists coming to grips with their new Charter of Rights and Freedoms. Kennedy, Unenumerated Rights, *supra* note 15.

278. See *supra* Part I.B.

279. Halley, *supra* note 75, at 450.

280. See *supra* text at notes 142–56.

281. See, e.g., Rao, *Three Aspects of Dignity*, *supra* note 129; text *supra*, at notes 129–36.

282. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (constitutional respect for the autonomy of the person includes “the most intimate of personal choices a person

though not so often explicitly, visibility at the everyday level distills into practices that shift the understanding of dignity, in a piecemeal fashion, sometimes informally, then recognized by some local governments (as in *Romer*) or some states (as in *Windsor*), eventually perhaps to congeal into “constitutional guarantees.” Federalism is but one modality of this differential expression and recognition of evolving understandings of liberty and dignity. For Justice Kennedy, I submit, because of his concern about evolving understandings of human dignity and liberty, as rooted in quotidian events and local and state recognitions, localism is the more important concept, for it is closer to the underlying process. Federalism, in *Windsor*, as in the *Kulturkampf* generally, is still not the main event.<sup>283</sup>

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may make in a lifetimes, central to the liberty protected by the Fourteenth Amendment” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992)). And in *Windsor* crucial government benefits are also at stake. That is Rao’s third aspect of dignity. Rao, *supra* note 129, at 222, 235–41.

283. See generally Poirier, *Not the Main Event*, *supra* note 60 (discussing the centrality of micro level encounters and local mediations of those encounters to the progress of the *Kulturkampf*).