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QUERYING EDITH WINDSOR, QUERYING EQUALITY

JEFFREY A. REDDING*

IN this short essay, I want to sound some skepticism about U.S. Supreme Court Justice Anthony Kennedy’s majority opinion in *United States v. Windsor*,¹ and especially the vision of equality articulated by it. I will assume that the reader of this essay has read *Windsor* and is otherwise familiar with the essential facts of this case concerning the constitutionality of Section 3 of the Defense of Marriage Act (DOMA).² I will not assume a familiarity, however, with the factors that propel my skepticism towards Kennedy’s opinion, two of which I will detail from the outset.

The first such factor revolves around the real and profound divisions within the LGBTQ “community,” both domestically and internationally. These divisions concern a number of debates including (but not limited to) the “nature” of sexuality and gender—for example, are gender and sexuality innate or socially constructed?; if they are socially constructed, can they be changed?—but also the character of the American state—for example, is it fundamentally fair or is it mostly in the service of predatory power? Ultimately, as we will see, these intra-LGBTQ divisions, some of which seem zero-sum, help propel skepticism towards any vision of equality, such as that articulated in *Windsor*, which claims to speak for or help *everyone*.

The second such factor derives from a view of equality, which sees this idea as a socially contextual and politically constructed one. In other words, equality does not mean the same thing for all people everywhere, whether in the United States or elsewhere. Moreover, equality’s meaning and implications emerge through dynamic social and political processes, which court cases contribute to (and react against). Furthermore, as prominent participants in these social and political processes surrounding equality, the various protagonists—for example, plaintiffs, defendants, *amici*, and judges—of legal dramas concerning equality all contribute to the shape of it. As a result, we will also see in this essay how especially dubious plaintiff-protagonists can give rise to especially dubious articulations of equality.

This essay, then, discusses one such dubious plaintiff-protagonist, Edith Windsor, as well as the dubious shape of equality that emerges from her eponymous Supreme Court case. In expressing skepticism vis-à-vis the

* Associate Professor, Saint Louis University School of Law. This short essay is an expansion and refinement of a previous set of thoughts that I offered on the *Windsor* litigation for The Faculty Lounge blog (<http://www.thefacultylounge.org>). I would like to thank the (mostly anonymous) commentators there for their questions and critiques, as well as Seval Yildirim for not only facilitating this essay but also her comradeship more generally. Leslie Dunlap and Heather Slawson provided very helpful research assistance for this essay. Finally, this essay is dedicated to Ryan Conrad and Yasmin Nair, because the world would be much more flat and equal without their disruptions.

1. 133 S. Ct. 2675 (2013).
2. See generally Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

articulation of equality that results from *Windsor*, the suggestion, however, is not that everyone fares equally poorly after it. Rather, some people will do quite well after this case, while others will not. And, indeed, that is one of the essential takeaways in highlighting, from the outset, the social and political character of ideas like equality: with equality, as in society and in politics, some people win and some people lose (if not always permanently).

As to winners, if there was one real person who really benefited from *United States v. Windsor*, it would have to be Edith Windsor herself—to the tune of the \$363,053 that the Supreme Court awarded her when it determined that she, as a married person, should not have had to pay the federal estate taxes that the IRS demanded from her as a result of DOMA. As to losers, the defendant United States was not the most salient one here. Rather, as I see it, it was queer people, as well as the possibility of an American legal system that respects them.

How can a win for same-sex marriage hurt queer people? Didn't the U.S. Supreme Court strike a progressive vision for society and politics in striking down a hateful DOMA? In beginning to answer these questions, it is worth remembering (and stating again) that the LGBTQ community is neither monolithic nor one without its own serious internal conflicts. And in these internal conflicts, poorer T and Q voices often get drowned out by hyper-funded LGB groups such as Human Rights Campaign, Freedom to Marry, and Lambda Legal. Yet, despite all their resources, and the sophisticated thinking that those resources could muster, these organizations (and others) commonly make highly simplistic and highly regressive arguments for same-sex marriage rights. These kinds of arguments were made in the course of litigating *Windsor*, and they were largely accepted by the Supreme Court's majority opinion in this case. As a result, there are many reasons to be skeptical that *Windsor* actually advanced progressivism or the welfare and interests of queer people.

By way of example, much (mainstream LGB) "liberal" argumentation for same-sex marriage has followed conservative argumentation about marriage in stressing a connection between marriage and children's welfare. And indeed, in his majority opinion in *Windsor*, Justice Kennedy stressed how so-called "second-tier [DOMA-disadvantaged] marriage. . . . [M]akes it even more difficult for the children [of these relationships] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."³ At one level, this kind of statement is almost comedic, assuming as it does that children are pre-programmed robots whose Microsoft engineers forgot to include the expression "domestic partner" in their factory-loaded spell checks. At another level, however, such a statement is frightening in its implicit disregard for (family) diversity and the importance of teaching tolerance and an understanding of difference to children. To my ear then, this kind of "marriage equality" rhetoric does not strike a blow for either social progressivism or those who are especially socially marginalized (e.g., Ts and Qs).

3. *Windsor*, 133 S. Ct. at 2694.

While I am skeptical of mainstream LGB groups' mode of argumentation for same-sex marriage in the United States—as well as that of the judges and Justices who agree with these groups—I should emphasize that I am not irrevocably opposed to same-sex marriage itself. As I have argued elsewhere,⁴ the problem with pro-same-sex marriage argumentation in the contemporary United States is not “marriage” per se—nor “same-sex”!—but the kinds of regressive and hegemonic arguments made in this debate emphasizing the alleged importance of marriage for everyone, everywhere, and for all time.

In contrast to these mainstream LGB organizations' homogeneous vision for the nation, it is worth highlighting that different American states have different overall political compositions, different LGBTQ communities, and different histories of marriage, as well as the rights and disabilities legally attendant to marriage. As a result, there are real worries—especially in highly conservative, marriage-idealizing, divorce-hating, polyamory-penalizing states—that members of minority sexualities could be entrapped by the majoritarian politics of a given state's marriage system if other, alternative formal relationships (e.g., domestic partnerships and civil unions) are not available to these minorities. Consequently, in advocating marriage for everyone, mainstream LGB groups are leading us towards a system of pan-continental, marital mediocrity (or worse) in how we formally recognize and define relationships.

Given this view of things, one might say then that the problem with *Windsor* is not that it is a *same-sex marriage-affirming opinion*, but that it is a *Human Rights Campaign et al. argued* and a *conservative Justice Kennedy authored* marriage-affirming opinion. As a result, we have an opinion that is not only, first and foremost, a win for Edith Windsor, but also for the elite interests which fund the Human Rights Campaign and its allied organizations. Indeed, one can only imagine how the “injury” which sparked Edith Windsor's case—namely having to pay the federal estate tax—is also a grievous injury for many of the patron saints of LGB organizations like the Human Rights Campaign.

Hopefully, one can now at least begin to see how it might be that not all human lives will benefit from the “equality” that *United States v. Windsor* deigns some. For a moment though, I want to go further than that relatively cautious statement and, via a brief detour, also suggest that the majority opinion in *Windsor* is not only *not* very beneficial (for many), but that elements of it border on dangerous (for many). To see this danger, one has to know a bit about the precedential backdrop of this case, which includes the important 2003 precedent of *Lawrence v. Texas*⁵ concerning the constitutionality of Texas's sodomy criminalization. Justice Kennedy also authored the majority opinion in *Lawrence* and, unsurprisingly, cites to it in the *Windsor* opinion.⁶ And herein

4. See, e.g., Jeffrey A. Redding, *Proposition 8 and the Future of American Same-Sex Marriage Activism*, 14 NEXUS 113 (2009); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791 (2010).

5. 539 U.S. 558 (2003).

6. See *Windsor*, 133 S. Ct. at 2690.

lies a major danger of *Windsor*.

Others before have noted how Kennedy, in *Lawrence*, transformed and sanitized the right to anal and oral sex presumably at issue in that case into a right to create “element[s] in a personal bond that is more enduring.”⁷ In short, such a read on *Lawrence* has skeptically viewed Kennedy’s majority opinion in this case as *not* primarily concerned with a right to sexual play, frivolity, or momentary desire but, instead, very much a pre-opinion about the right to sexual seriousness, loyalty, and servitude—or, to put it more bluntly, that Kennedy’s *Lawrence* opinion is not about the right to do something like Manhunt,⁸ but rather the right to do something like majoritarian marriage.⁹

In *Windsor* then, Kennedy appears to confirm this interpretation of the “personal bond” language from *Lawrence*, noting how New York, in “authorizing same-sex unions and same-sex marriages . . . sought to give further protection and dignity to that [*Lawrencian*] bond.”¹⁰ Put another way, after *Windsor*, *Lawrence* seems more and more now a case concerning the right to get engaged, while *Windsor* is about the right to marriage (and estate tax avoidance) proper. On this view of things then, it appears that after *United States v. Windsor*, Edith Windsor got a tax deduction, while the rest of us (or, at least, those of us who are sexually active) got a dangerous rights reduction. Equality then may not only be unequal in its implications, but it may come, dangerously, at the expense of important liberties—at least in the allegedly progressive world that Justice Kennedy is making out for us.

Yet some readers here will surely protest that Justice Kennedy’s majority opinion in *Windsor* ultimately relied on the U.S. Constitution’s Fifth Amendment—and its protection of *liberty*—to invalidate Section 3 of DOMA.¹¹ How then can this not be an opinion just as much about liberty as it is equality?

It may be. But if Justice Kennedy’s opinion is just as much about liberty as it is equality,¹² it is worth observing that there are just as many reasons to be skeptical of Justice Kennedy’s understanding of liberty as there are to be skeptical of his understanding of equality. At the very least, Kennedy’s understanding of liberty appears to rely on a peculiar notion of dignity, which DOMA’s Section 3 purportedly demeaned.¹³ However, many of the examples

7. See *Lawrence*, 539 U.S. at 567; see also Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After Lawrence v. Texas?*, 23 SOC. TEXT 235 (2005).

8. A social networking site that facilitates male same-sex introductions.

9. This is despite Kennedy’s protestations, in *Lawrence*, that this case was in no way a precedent about the right to same-sex marriage. See *Lawrence*, 539 U.S. at 578.

10. *Windsor*, 133 S. Ct. at 2692.

11. See *id.* at 2697.

12. Justice Kennedy’s opinion is quite confusing in its easy conflation of liberty, dignity, and equality, noting as it does that “[w]hile the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way [DOMA] 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.*

13. See *id.*

of this DOMA-dignity-demeaning that Justice Kennedy provides sound more like cut-and-paste clichés rather than soundly reasoned or evidenced examples of how LGBTQ dignity is demeaned by this contentious federal statute.

For example, and going to the heart of the facts underlying *Windsor*, that Edith Windsor had to pay substantial (for the United States) federal taxes on the estate she inherited does not sound much like a dignity issue per se. However, I imagine that some readers may fault me for failing to see the connection between asking “unmarried” gay people to pay estate taxes while letting married straight people avoid such reasonable taxes—which, lest we forget, are also progressive in both the social and economic sense of this word—and dignity (or is it liberty, or equality, or all three?).

Other examples that Justice Kennedy provides of DOMA’s alleged indignities¹⁴ are equally problematic and unconvincing, if not also incoherent. As to this incoherency, Kennedy laments in his opinion how “[u]nder DOMA, same-sex married couples have their lives *burdened*, by reason of government decree, in visible and public ways.”¹⁵ Yet very soon thereafter, we see Kennedy lamenting how DOMA “*divests* married same-sex couples of the duties and responsibilities that are an *essential* part of married life.”¹⁶ One might very well wonder then whether, with DOMA, same-sex married couples experience more, or fewer, burdens? Moreover, examples which Kennedy provides of his so-called essentialities (of married life), and which DOMA allegedly divests same-sex married couples of, include being bound by prohibitions—as a recognized “spouse” of a Senator—from accepting “high-value gifts from certain sources”¹⁷ and also—as a recognized “spouse” of any one of “numerous high-ranking officials”¹⁸—from being required to make extensive and burdensome official filings as to one’s financial situation.

If these examples of DOMA’s indignities are unconvincing—which they seem to be—Justice Kennedy assures us that “[f]or certain married couples, DOMA’s unequal effects are even more serious.”¹⁹ He then goes on to note how same-sex spouses, because of DOMA, are not comprehended by Title 18, Section 115(a)(1) of the United States Code, the part of the federal code making it a crime to “assault[], kidnap[], or murder[] . . . a member of the immediate family of a United States official . . . with intent to impede, intimidate, or interfere with such official . . . while engaged in the performance of official duties.”²⁰

Imagine, however, that Edith Windsor had not been a mathematician heiress in her lifetime but, rather, had served as a United States civil servant. Imagine as well that Edith Windsor’s spouse, Thea Spyer, had been criminally

14. I use this word following Kennedy’s observation that “this Court [must] now . . . address whether the resulting injury and *indignity* [of DOMA] is a deprivation of an essential part of the liberty protected by the Fifth Amendment.” *Id.* at 2692 (emphasis added).

15. *Id.* at 2694 (emphasis added).

16. *Id.* at 2695 (emphasis added).

17. *Id.*

18. *Id.*

19. *Id.* at 2694.

20. 18 U.S.C.A. § 115(a)(1) (West 2008).

targeted in an attempt to influence U.S. Officer Windsor's official actions yet, because of DOMA, Thea Spyer's attacker had not been prosecuted under Section 115(a)(1). Would Edith Windsor have been a sympathetic, dignity-demeaned plaintiff in this instance, much less a coherent one?

My skeptical response is: No, not really. For one, it is far from clear that the aggrieved party here would be Edith Windsor, rather than the U.S. government, whose decisions and actions were arguably the real target of the criminal activity perpetrated against (a hypothetical) Thea Spyer. More fundamentally, however, Kennedy's opinion here traffics in the false premise that all or most queer people have faith in the fairness of the American criminal-prosecution system and—where that underlying fairness is lacking—this system's desire to prosecute any harm in exponential (and increasingly unfair) ways.²¹

In other words, even assuming that our hypothetical Thea Spyer has an interest in criminally prosecuting her victimization—I assume that, in several instances, she would—it is far from clear that either she or Edith has an independent “dignity” interest in seeing Thea's victimization prosecuted *at the federal level* under Section 115(a)(1). Indeed, Thea may view the prospect of sending any person found guilty of her attack to spend their life in a federal penitentiary a grievous assault itself on human dignity. As to our hypothetical Edith, she would not be Thea's owner and, even if she were, our hypothetical Edith may also find the prospect of activating the federal criminal-prosecution system horrifying.

Such a reaction to the state is not one that mainstream LGB organizations, much less members of the U.S. government (e.g., Supreme Court Justice Anthony Kennedy), are generally comfortable with. Yet in veering away from these very human reactions to the state, I fear that these LGB organizations, and Justice Kennedy, stray into both logical and moral incoherency.

By way of concluding, let me note that the “horror” towards the state which I am making out here is a volatile—although all too human—emotion. I mention this because, to my mind, not only *United States v. Windsor*, but so many “marriage equality” cases over the years have been devoid of vivid and human emotionality. Indeed, instead of talking about relationships as complicated, fun, and wrenching messes of sex, power, and all-too-common failure, we see them analyzed in mainstream (liberal) legal circles as repositories of plug-and-chug ideals of liberty, equality, and dignity.

In many ways, the robotic (affect of the) values which are being articulated in these cases is, I suspect, the consequence of the particular plaintiffs and issues which mainstream LGB organizations are recruiting for and representing in these marriage equality cases. This is not to say that Edith Windsor is a robot, but it is to say that mainstream LGB organizations were likely attracted to her as a plaintiff because of the ease in which her federal estate tax issues could be fit within the two-dimensional, cartoonish idea of equality—“straight

21. Such queer concerns have, in fact, motivated the latest edited collection by the group Against Equality. See *generally* AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU (Ryan Conrad ed., 2012).

people get to do this, gay people should too”—that these mainstream organizations are making out and which judges and Justices are agreeing to.

Is there a way out of this reductive sterility? In other words, is there a way to get courts to talk about equality in a way more attuned to the complexity of this idea in the real world, as well as the complexity of the LGBTQ community? Once upon a time, courts understood democracy as involving much more than simple majoritarianism; is it possible to now get them to understand equality as something more than just a mean formality?

Put another way altogether, is there a way to conjure a *queer* Edith Windsor, in the hope that this kind of plaintiff will allow for a more human(e) articulation of equality to emerge from American courts and their resolutions of various same-sex marriage controversies? In posing the question this way, let me first note that Edith Windsor was “queer” in one important way, namely that she was in a childless marriage. As a result, it was arguably harder for Justice Kennedy to make *Windsor* all about children.²² But I believe that one can dig even deeper into this opinion to find our queer Edith.

And indeed, six feet under the surface of Justice Kennedy’s opinion, there might be something. In a somewhat throwaway example, Kennedy mentions how DOMA prevents same-sex couples “from being buried together in veterans’ cemeteries.”²³ Might there be something queer in this necropolitics? Put another way, might Justice Kennedy’s opinion here open up a politics of marriage that does not reduce it to reproduction, nation-building, and a forever happiness?

While I read *Windsor* with much caution and skepticism, let me conclude this essay by very briefly suggesting two ways in which Justice Kennedy’s invocation of the veterans cemetery could possibly (and totally unintentionally) open up a queer politics of marriage (equality) in the United States.

The first way derives from viewing the cemetery as a repository of death. This death reference in an opinion about marriage is noteworthy because Justice Kennedy’s opinion, read more generally, is all about celebrating marriage as life²⁴ and, in particular, the kind of *dignified* life presumably worth living. Moreover, if marriage equals life, then presumably divorce equals death. Perhaps then, if marriage equality could be fundamentally about *divorce* equality—in other words, if our next Edith Windsor could be a divorcée, perhaps claiming Social Security benefits due her as an ex-spouse²⁵—we might find an escape from an all-too-blinding rhetoric about marriage and all the good it brings everyone, everywhere. While some might see the prospect of this kind of plaintiff-protagonist as unrealistic, it is worth noting that divorce rights are integral to future arguments about the surviving section of DOMA, namely Section 2, and the way certain states have used this section to justify their

22. See *supra* note 3 and text accompanying, however, for how some of Kennedy’s observations about children were nonetheless quite simplistic.

23. *Windsor*, 133 S. Ct. at 2694.

24. This in the context of a situation where one of the marital spouses relevant to the case, namely Thea Spyer, had died.

25. See *generally Retirement Planner: If You Are Divorced*, SOC. SEC. ADMIN., <http://www.ssa.gov/retire2/divspouse.htm> (last visited Sept. 3, 2013).

refusal to issue divorces for other states' same-sex marriages as a consequence of these states' a priori refusal to recognize these other states' same-sex marriages in the first instance.²⁶

The second way derives from thinking about the deadly wars which have caused those veterans cemeteries in the United States, that Justice Kennedy references, to greatly grow in size over the past decade. Many have wondered how it might be possible to abate the seemingly constant cravings of the U.S. government for war. International and domestic law penalizing acts of aggression against foreign states and their citizens do not seem to work in deterring American governmental officials from war-making. What might work, however, in this domain—and what might actually be working in the aftermath of Iraq, Afghanistan, and the 2008 economic meltdown—is financial starvation of the federal government, whether that happens through financial crisis or financial exhaustion. Another way of imagining Edith Windsor, then, might be to see her (queerly) not only as an heiress avoiding federal estate taxes, but also as a *conscientious* tax evader, using marriage to make it harder for the U.S. government to make war against our global peers.

That being said, such queer Edith Windsors, nor such queer articulations of equality, are ones that *United States v. Windsor* easily offers up. I thus remain skeptical.

26. The text of this (surviving) section of DOMA reads:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996).