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SOMETHING TO (*LEX LOCI*) *CELEBRATIONIS*?

MEG PENROSE*

ON June 26, 2013, the United States Supreme Court issued two opinions relating to same-sex marriage.¹ In neither case did the Court issue the revolutionary decision granting a federal constitutional right to marriage.² But, in the only case where the Court reached the merits of the same-sex marriage controversy, *United States v. Windsor*,³ an argument can be made that the Court planted the seeds for enshrining a future constitutional right to marriage based either on equal protection or substantive due process grounds.⁴ Actually, the better argument might be that *Windsor* is the germinated outgrowth of the Court's previous jurisprudence relating to gay rights.⁵ Under Justice Scalia's prediction—and, to be fair, he has accurately and presciently forecasted the trajectory of this issue⁶—full-fledged gay marriage is but a constitutional season or two away.⁷

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1. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

2. The Court returned *Perry* to the lower court, essentially reinstating the federal district court's opinion, based on the majority's finding that the Court lacked standing. It is noteworthy that both gay marriage cases provided lengthy discussions relating to standing and justiciability. Avoiding the merits of such controversial and heated issues is not, however, foreign to the Court. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (dismissing an educational affirmative action case on mootness grounds).

3. 133 S. Ct. 2675 (2013).

4. See *id.* at 2694 (noting that unions treated as second-class marriages for purposes of federal law raise “a most serious question under the Constitution's Fifth Amendment”). Shortly thereafter, the Court notes that “DOMA writes inequality into the entire United States Code” and has the principal effect to “identify a subset of state-sanctioned marriages and make them unequal.” *Id.*

5. The progression toward legalizing marriage, at the Supreme Court level, had previously begun first with overturning the criminality of intimate acts between consenting individuals. See generally *McLaughlin v. Florida*, 379 U.S. 184 (1964) (overturning laws that prohibited intimate relations between interracial couples). Then, once the underlying intimate act is found constitutionally protected, the larger relationship (marriage) is given constitutional protection. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down anti-miscegenation laws as unconstitutional).

6. See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). Justice Scalia predicted that *Lawrence*'s “reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.” *Id.* at 601. Justice Scalia returned to the gay marriage issue a few pages later when he admonished, “[a]t the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it.” *Id.* at 604.

7. See *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (predicting that the second “state-law shoe” finding all same-sex marriage prohibitions unconstitutional will be “dropped

Windsor holds Section 3 of the Defense of Marriage Act, commonly referred to as DOMA, unconstitutional. DOMA provided a federal definition of marriage as “a legal union between one man and one woman as husband and wife”⁸ After a long section regarding the prudential reasons to resolve the case, Justice Kennedy’s majority finds “that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁹ The majority conflates, however, the liberty component of the Fifth Amendment (which sounds of substantive due process) with the equal protection component of the Fifth Amendment by vacillating between liberty (substantive due process) and equality verbiage.¹⁰ The Court does not clearly use a heightened standard of constitutional review, such as intermediate scrutiny, which is usually applied to gender cases¹¹ or strict scrutiny, which is reserved for suspect classes such as race or national origin.¹² In fact, it is difficult to discern precisely what level of review the majority applies when it finds DOMA “invalid, for 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.”¹³

This language sounds of “rational basis,” the lowest form of constitutional review and least searching level of constitutional scrutiny.¹⁴ Most laws evaluated under rational basis are easily found constitutional because all that is required is a legitimate governmental purpose.¹⁵ In fact, under traditional rational basis review, courts will generally provide aid and deference to the governmental entity seeking to uphold a particular law.¹⁶ If the governmental actor is unable to provide a rational basis for the legislative classification, courts using true rational basis review will conjure up hypothetical reasons that might suffice to uphold the law.¹⁷ The majority gives no such encouragement in *Windsor*.

The other form of “rational basis” review, and the form that has been seemingly applied by the Supreme Court in the two gay rights cases is

later, maybe next Term”).

8. 1 U.S.C. § 7 (2000).

9. *Windsor*, 133 S. Ct. at 2696.

10. *See id.* The Court proclaims both that *Windsor*’s liberty and equality has been violated in three consecutive paragraphs. One wonders whether such presentation is intentionally confusing or merely careless. Constitutionally speaking, the presentation is undoubtedly lacking in precision.

11. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (seminal sex discrimination case establishing an intermediate, or “mid-tier,” level of constitutional scrutiny).

12. *See, e.g.*, Adarand Constructors v. Peña, 515 U.S. 200, 218–27 (1995). “[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 227. “In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Id.*

13. *Windsor*, 133 S. Ct. at 2696.

14. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955).

15. *See id.* at 488 (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

16. *See id.* at 487.

17. *See id.*

something scholars call “rational basis plus” review. This standard of review tolerates legislative classifications, unless the classification is based on animus or a desire to cause harm to an unpopular group.¹⁸ Perhaps Justice Kennedy is simply expanding his past writings in *Romer v. Evans*¹⁹ and *Lawrence v. Texas*²⁰ where the focus was on animus toward same-sex couples rather than clear application of a traditional standard of constitutional review.²¹ Throughout *Windsor*’s majority opinion, the Court speaks of “[t]he avowed purpose and practical effect of [DOMA which] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the [individual] States.”²²

Other rhetoric in the majority opinion condemns the “interference with the equal dignity of same-sex marriages”²³ and the principle purpose of DOMA “to impose inequality”²⁴ without valid reason. Such phrasings indicate the majority’s disapproval of the federal government’s attempt to provide tiered approaches toward marriage, one for “traditional” opposite-sex marriage and one for same-sex marriage.²⁵ So, does *Windsor* follow past precedence in giving special “rational basis plus” evaluation to same-sex issues or is the Court simply being obtuse? Reading the majority opinion does not provide an answer.

Perhaps *Windsor* is simply another step in the long march toward marriage equality. What began in *Romer* was most assuredly expanded in *Lawrence* and set the stage for *Windsor* and beyond. If Justice O’Connor’s legacy is as the Supreme Court’s “swing vote,” Justice Kennedy’s is quickly becoming that of the “gay rights” Justice. In all three cases where the Court has extended protections to members of the gay community, Justice Kennedy has written the majority opinion.²⁶ In each case, however, Justice Kennedy has advanced the right as narrowly as possible, always indicating that the Court is not yet ready to constitutionalize a federal right to same-sex marriage²⁷ as previously occurred

18. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996).

19. 517 U.S. 620 (1996).

20. 539 U.S. 558 (2003).

21. See *Romer*, 517 U.S. at 632. Justice Kennedy’s majority opinion in *Romer* indicates that the Colorado Amendment struck down was constitutionally deficient for at least two reasons:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.

22. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

23. See *id.*

24. See *id.* at 2694.

25. See *id.* at 2693–94.

26. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer*, 517 U.S. 620 (1996).

27. See *Lawrence*, 539 U.S. at 578. In distinguishing *Lawrence* from *Bowers v. Hardwick*, the case directly overruled by *Lawrence*, Justice Kennedy clearly indicates what the case is *not* about:

The present case does not involve minors. It does not involve persons who might

for interracial couples in *Loving v. Virginia*.²⁸ Justice Scalia and other observers have been quick to criticize Justice Kennedy for his lack of clarity, if not fidelity, to constitutional review and applications of constitutional levels of scrutiny in each of these three cases.²⁹

Rather than enter the debate as to Justice Kennedy's draftsmanship in the gay rights opinions, I would like to simply observe that *Windsor* leaves a pivotal question unanswered. This question merits immediate attention and will undoubtedly serve as the next vehicle for advancing same-sex marriage. While *Windsor* clearly extends federal marital benefits (and burdens)³⁰ to persons whose marriage is lawful both within the *lex loci celebrationis*³¹ and the *lex loci domicilii*,³² *Windsor* actively sidesteps the follow-up and equally important question of whether federal marital benefits (and burdens) extend to all persons married, but not domiciled, in a state where same-sex marriage is lawfully recognized.

The next "big" question regarding same-sex marriage will be whether marriages that are *performed* in a state permitting same-sex marriage but where the spouses then return, or move, to a state that does not permit, much less sanction, same-sex marriage, qualify for federal marriage benefits. This scenario can occur in one of two ways: first, you can have a couple that travels to a location for a "destination wedding" to intentionally avoid their home state's marriage laws,³³ or, second, you can have a couple that was originally domiciled *and* married in a state permitting same-sex marriage, only later to

be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Id. Justice Kennedy's cautious approach was echoed in Justice O'Connor's concurring opinion. *See id.* at 585 (O'Connor, J., concurring).

28. 388 U.S. 1 (1967).

29. *See Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (criticizing "rootless and shifting" nature of majority's justifications for its holding in *Windsor*). "The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role." *Id.* at 2707. The majority opinion notes the criminal law protections, bankruptcy, taxes, health care, and ethics issues that lawfully married same-sex couples are denied under DOMA. *See id.* at 2695 (majority opinion).

30. *See id.* at 2695. ("DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force.").

31. *Lex loci celebrationis definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/lex%20loci%20celebrationis> (last visited Sept. 8, 2013) ("[T]he law of the place where a contract, esp. of marriage is made."). Literally meaning the law of the place of the ceremony. *See id.* The Oxford Reference defines this phrase as "[t]he law of the place of celebration of marriage." *Lex loci celebrationis definition*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100103412> (last visited Sept. 8, 2013).

32. Literally, the place of domicile.

33. An example under this scenario would be a Texas couple flying to New York, waiting the requisite twenty-four hour period under New York law, and then obtaining a lawful marriage under New York state law.

move to another state where such marriages are not recognized.³⁴ These two scenarios are factually distinguishable and may—but should not—result in distinct legal holdings. The reason that these scenarios are legally indistinguishable is that the benefits at stake are based on *federal*, rather than state, citizenship. Read fairly, *Windsor* extends federal benefits to legally married same-sex couples.

Reviewing courts should adopt the *lex loci celebrationis* approach to awarding federal marriage benefits for all purposes. In fact, the federal government already adopts the *lex loci celebrationis* approach for other marriages that were legal where conducted, such as common law marriages or varying age and consanguinity restrictions.³⁵ Further, early interpretive pronouncements from varying federal agencies such as the Department of Defense, the Office of Personnel Management, and the Internal Revenue Service are all unequivocally adopting the *lex loci celebrationis* approach for determining which marriages qualify for federal benefits. If the marriage was legal where celebrated, same-sex couples will receive federal benefits. Well, at least from these federal agencies. Further, though these federal agency articulations are critical, they appear as secure—or fleeting—as the next presidential administration. Nothing prevents a change in policy or interpretation. The marriage recognition issue should ultimately be determined by an Article III Court rather than through agency interpretations. The marriage recognition issue is not one of policy but, rather, one of constitutional magnitude.

While scholars and legislators may strive to differentiate between *Windsor* in its pure state—only permitting the federal government to recognize same-sex marriages where the marriage is both conducted in a state, or country, that permits same-sex marriage and the couple continues to reside in a state that recognizes same-sex marriage—and the more generic question of which marriages should be federally recognized, the factual distinctions should not impact the legal outcome.

It is notable that the marriage in *Windsor* was performed in Canada, a country that permits same-sex marriage, and the couple resided in New York, a state that recognizes same-sex marriage. In the most literal sense, *Windsor* involved a destination wedding for the couple who, when they were initially wedded, were required to leave the country to find acceptance for their union. Only because New York, their home state, later acceded to their view of same-sex marriage does *Windsor* become an easy case—legal at the time of marriage and legal in the place of domicile.

Windsor's tone, though not its intentionally cautious language, suggests

34. An example under this scenario would be a New York couple marrying in New York while legally domiciled in New York, only to be transferred for work or family purposes to Texas.

35. See *Windsor*, 133 S. Ct. at 2691 (observing that the marital age of consent varies among the states—the minimum age is thirteen in New Hampshire versus sixteen in Vermont). *Windsor* also speaks about the oft-mocked right to marry one's cousin, available in most states. See *id.*

there should not be tiers of marriages for federal law purposes.³⁶ The flip side of the *Windsor* coin, this author believes, is the exact same currency. *Federal* benefits should be based on *federal* law.³⁷ In other words, the federal interpretation of marriage benefits should be determined under the *lex loci celebrationis* concept. That is the current state of affairs for opposite-sex marriages, regardless of whether the marriage is legal in the place of domicile.³⁸ If destination weddings are federally recognized for opposite-sex couples that travel to Toronto, Canada, or New York City to marry, then the same federal consideration should be given to same-sex couples who make the exact same journey. Anything less would appear to be a violation under *Windsor*'s governing principles, including the Fifth Amendment's implicit equal protection guarantee.³⁹

The application of federal law, as it applies to marital benefits and burdens, does not interfere in any meaningful fashion with state sovereignty.⁴⁰ Legal concepts repeatedly note that American citizens live under notions of dual sovereignty and dual citizenship—both state and federal. The two forms of citizenship are, in fact, legally distinct. Take, for example, income taxes and criminal law. One can live in Oklahoma, a state mandating state income taxes, and be liable for both federal and state income taxes. When that individual moves to Texas, he or she cannot avoid paying federal income taxes just because their new home state, Texas, does not recognize state income taxes. Likewise, if an individual commits a death-eligible crime in Massachusetts, a state without the death penalty, the federal government still reserves the right to bring federal charges—including charges that carry the death penalty—without infringing on the state's sovereign right to choose its own criminal penalty system.⁴¹

Surely marriage is not drastically different than taxes or criminal law under the dual sovereignty doctrine. When it comes to *federally* recognizing marriage, the federal government can most assuredly have a different standard than each individual state—just like income taxes and criminal penalties.⁴² In

36. *See id.* at 2693–94.

37. *See id.* at 2693. “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.” *Id.*

38. *See, e.g., Obergefell v. Kasich*, 1:13-CV-00501, slip op. at *4 (S.D. Ohio July 22, 2013) (“[I]t is absolutely clear that under Ohio law . . . the validity of an opposite-sex marriage is to be determined by whether it complies with the law of the jurisdiction where it was celebrated.”).

39. *See Windsor*, 133 S. Ct. at 2693 (acknowledging that DOMA’s purpose was to ignore more liberal state laws embracing same-sex unions, ensuring “those unions will be treated as second-class marriages for purposes of *federal law*”) (emphasis added).

40. *See id.* As Justice Kennedy’s majority opinion notes, “DOMA writes inequality into the entire United States Code,” impacting well over 1,000 federal marital benefits. *Id.* at 2694.

41. *See, e.g., United States v. Lanza*, 260 U.S. 377 (1922).

42. *See Windsor*, 133 S. Ct. at 2690 (“[W]hen the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt.”).

numerous ways American citizens have separate responsibilities to their state and federal governments. This is to be expected with dual sovereigns. But, what the Fifth Amendment prohibits, and rightfully so, is any distinction in receipt of *federal* benefits based on state residency or state law.⁴³ National citizenship must confer the same federal benefits for all legally married persons.⁴⁴ Otherwise, there will be vacillating tiers of national citizenship based, ironically, on state residency. Such incongruity runs afoul of both logic and law. Such incongruity should be unconstitutional.⁴⁵

Further, extending federal marital benefits to the Texas couple traveling to New York should not be dependent on the gender of the couple or spouses. Were there to be such fluctuation in the receipt of federal benefits, another possible violation would occur under the constitutionally-recognized right to travel⁴⁶—opposite-sex couples can partake in a destination wedding and still receive federal benefits but same-sex couples cannot partake in such destination weddings.⁴⁷ There appears no rational basis for federally drawing the line at a state's border.⁴⁸ If DOMA's federal definition of marriage is unconstitutional for legally married citizens in New York, then so too must that definition be unconstitutional for American citizens living in Texas or Oklahoma.

To tread down a different path where the receipt of federal marital benefits depends on one's state residency, though possible, would result in the very chaos and vast expenditures that Justice Kennedy sought to avoid by extending prudential consideration to the procedural issues in *Windsor*.⁴⁹ And, one should not lightly forget that Richard and Mildred Loving themselves partook of a "destination wedding," purposefully leaving Virginia for a more hospitable venue in the District of Columbia. Fortunately for them, and all racial minorities, the Supreme Court issued a much more forceful recognition of their union when the question first came before the Court. Same-sex couples must wait a bit longer for their full inclusion.

In the final analysis, *Windsor*, but not its companion case *Perry*, is a case about federal power, federal benefits, and federal law.⁵⁰ Thus, the Supreme

43. *See id.* at 2694. "Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits." *Id.*

44. *See id.* "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are *unworthy of federal recognition*." *Id.* (emphasis added).

45. *See id.* at 2695. The Court's own language offers instruction for the next step in marriage equality: "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *Id.*

46. *See Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

47. *See Windsor*, 133 S. Ct. at 2696. "DOMA instructs all federal officials . . . that [one type of] marriage is less worthy than the marriages of others." *Id.* Such language appears to be the natural predicate for equal federal treatment of all legal marriages performed in an individual state.

48. *See Shapiro*, 394 U.S. at 637–38.

49. *See Windsor*, 133 S. Ct. at 2687.

50. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (addressing whether Proposition 8, a California state amendment, violated the Fourteenth Amendment due process

Court was well within its discretion to legally determine which marriages qualify for *federal* benefits under *federal* law. And, while Justice Scalia and Alito properly criticize Justice Kennedy and the majority's untethered opinion⁵¹—is this an equal protection case or a substantive due process case?⁵²—the more pressing and enduring concern is which marriages are federally recognized. How will the federal government resolve the destination wedding question? Or, the relocation question? And, how long before we have a case which provides a definitive answer to either or both questions? Justice Scalia forecasts one year.⁵³ For those couples whose legal status regarding their marriage remains in flux, even that may seem too long. We have but one federal government. And, under that one federal government, all legal marriages should be treated the same. Perhaps same-sex couples finally have something to *lex loci celebrationis*.

and equal protection clauses which prohibit discrimination under state law).

51. See *Windsor*, 133 S. Ct. at 2711–20 (Alito, J., dissenting).

52. See *id.* Justice Alito fairly suggests that, “[p]erhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms.” *Id.* at 2716. But, ultimately, the Court’s majority fails to resolve this question or clearly express on what basis the decision is being rendered.

53. See *id.* at 2705 (Scalia, J., dissenting).