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## AN EPHEMERAL MOMENT: MINIMALISM, EQUALITY, AND FEDERALISM IN THE STRUGGLE FOR SAME-SEX MARRIAGE RIGHTS

BY LAURENCE H. TRIBE<sup>†</sup> AND JOSHUA MATZ<sup>††</sup>

We live in fragile times. A Supreme Court delicately poised on Justice Anthony Kennedy's evolving vision of liberty.<sup>1</sup> A recently re-elected president who may ultimately transform that familiar, if disconcerting, balance. A public trending firmly toward support for marriage equality, yet far from the consummation of that apparent demographic destiny.<sup>2</sup> A president whose lawyers besiege the Defense of Marriage Act (DOMA)<sup>3</sup> in court, opposed by the House of Representatives.<sup>4</sup> An era of lower court opinions that (mostly) dance on eggshells, offering a national seminar in applied minimalism. A year in which our highest court may chart the future of constitutional litigation for "the defining civil rights issue of our time."<sup>5</sup> And a symposium in which many of our brightest thinkers debate how the Constitution does and should figure into the grand strategy of advancing human dignity so memorably condemned by Justice Scalia as the "homosexual agenda."<sup>6</sup>

Sweeping pronouncements rest awkwardly on ephemeral moments—an unavoidable fate, perhaps, for the dialogue memorialized in this symposium. For that reason, we focus on a few particularly important recent developments in

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<sup>†</sup> Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School.

<sup>††</sup> Joshua Matz received his J.D. from Harvard Law School in 2012 and is currently clerking for Judge J. Paul Oetken of the Southern District of New York.

1. See Michael J. Klarman, *Gay Rights May Get Its Brown v. Board of Education*, N.Y. TIMES (Oct. 11, 2012), <http://www.nytimes.com/2012/10/12/opinion/gay-rights-may-get-its-brown-v-board-of-education.html> ("The court consists of two relatively stable four-person blocs of liberals and conservatives, with Anthony M. Kennedy hovering between them, usually casting the deciding vote.").

2. *Id.* ("Support has increased from less than 25 percent in 1990 to . . . over 50 percent today. At the current rate, a substantial majority of Americans will support gay marriage within the next dozen years."). See also Michael Klarman, Op-Ed., *Why Gay Marriage Is Inevitable*, L.A. TIMES, Feb. 12, 2012, at A27.

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

4. See Abby Goodnough, Appeals Court Hears Arguments on Gay Marriage Law, N.Y. TIMES, Apr. 5, 2012, at A12 ("The House of Representatives' Bipartisan Legal Advisory Group stepped in, hiring Paul D. Clement, a former United States solicitor general, to argue the appeal."); Press Release, U.S. Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

5. Brief in Opposition at 2, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Aug. 24, 2012) (No. 12-144).

6. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

LGBT rights litigation and adjudication that may be called into question when the Court rules on *United States v. Windsor* and *Hollingsworth v. Perry* in its 2012 Term.<sup>7</sup> Specifically, we examine the shifting role of minimalism, the use of liberty- and equality-based arguments, and a fickle romance with federalism.

I.  
BICKEL'S TRIUMPH

Professor Alexander Bickel famously preached the wisdom of “passive virtues” in constitutional adjudication.<sup>8</sup> Minimalism, the most recent incarnation of that view, provides critical mood lighting for any discussion of LGBT rights. Calls for the Court to embrace same-sex marriage rights as a “natural” consequence of its precedents seem almost passé.<sup>9</sup> As we rest secure in a soft legal realism that nods to doctrine while recognizing its plasticity, especially at the Supreme Court, questions of history, political science, and cultural change take center stage in arguments over whether, how, and when the courts should invoke the Constitution to secure civil rights.<sup>10</sup> To that mentality, the main value of doctrinal work is its capacity to produce compelling, or at least highly plausible, justifications for the adjudicative timing and outcomes independently deemed most effective for the advance of marriage equality.<sup>11</sup>

DOMA and California's infamous Proposition 8 (“Prop 8”) play a critical role in this tale. Challenges to both laws, especially Prop 8, have afforded courts ample opportunities to address same-sex marriage rights in broad terms: Under the Due Process Clause, is there a fundamental liberty interest in marriage that covers same-sex marriage? Under the Equal Protection Clause, do laws that ban

7. Recognizing, of course, that the Court's introduction of several justiciability questions into the litigation may forestall merits rulings on DOMA and Prop 8.

8. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–272 (1962).

9. Disclaimer: We have recently published a piece of that sort. See Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012).

10. See, e.g., MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–419 (2d ed. 2008); William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273 (2009); Richard A. Posner, *Should There Be Homosexual Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578 (1997) (book review); William Eskridge, *Same-Sex Marriage Symposium: The Protean Case Against Same-Sex Marriage*, SCOTUSBLOG (Sept. 20, 2012, 11:42 AM), <http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-the-protean-case-against-same-sex-marriage>; Charles Fried, *The Courts, the Political Process, and DOMA*, SCOTUSBLOG (Aug. 25, 2011, 12:23 PM), <http://www.scotusblog.com/2011/08/the-courts-the-political-process-and-doma/>; Andrew Koppelman, *Same-Sex Marriage Symposium: Certiorari and Perry*, SCOTUSBLOG (Sep. 18, 2012, 1:31 PM), <http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-certiorari-and-perry>.

11. Of course, not all scholars write with such a cynical attitude toward doctrine. See, e.g., Tribe & Matz, *supra* note 9, at 480–89; Martha Nussbaum, *A Right to Marry?: Same-Sex Marriage and Constitutional Law*, DISSENT, Summer 2009, at 43, 51–55.

same-sex marriage merit some form of heightened scrutiny? Do they survive mere rationality review? Courts have almost uniformly declined invitations to address these broad questions, opting instead for narrow rulings with intentionally vague implications (but a decisive trend-line). The judiciary has thus creatively redirected wide-ranging challenges into narrower crucibles, even as marriage equality is treated to intense democratic deliberation in virtually every state.<sup>12</sup>

Perhaps the most strategic variation on this theme was Judge Reinhardt's cautious ruling in *Perry v. Brown* (now styled *Hollingsworth v. Perry*).<sup>13</sup> Deftly sidestepping calls to announce a broad constitutional right to same-sex marriage, his opinion struck surgically against Prop 8 by relying on the peculiar history of that California measure and invoking Justice Kennedy's opinion in *Romer v. Evans*.<sup>14</sup> The full implications of Judge Reinhardt's reasoning for efforts in other states to withdraw marriage equality rights remain unclear, though potentially significant.<sup>15</sup> Unsurprisingly, the *Perry* opinion's legal reasoning and supposed constitutional politics have prompted heated debate.<sup>16</sup> Yet the point remains: in case after case, as in *Perry*, federal courts are moved by a powerful spirit of minimalism to concentrate their firepower on smaller targets.

We must, of course, acknowledge an important exception: the Second Circuit's ruling in *Windsor v. United States*, which broke new and significant ground by applying heightened scrutiny to sexual orientation-based classifications.<sup>17</sup> Yet this breach in the minimalist ranks occurred under narrow circumstances. Among the obvious reasons for federal courts to avoid heightened scrutiny in DOMA and Prop 8 challenges is a concern that, in so doing, they would spell the doom of state-level bans on same-sex marriage—a dramatic implication that the lower federal courts seem currently hesitant to embrace.<sup>18</sup> It is no coincidence that the Second Circuit, the only federal appellate

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12. See generally KLARMAN, *supra* note 10.

13. 671 F.3d 1052 (9th Cir. 2012), *aff'g* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *cert. granted sub nom.* *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (Dec. 7, 2012) (No. 12-144).

14. 517 U.S. 620 (1996). See *Perry v. Brown*, 671 F.3d at 1076–96.

15. See, e.g., Editorial, *Wobbly Justice*, WASH. POST, Feb. 9, 2012, at A16; David Cole, *Gambling with Gay Marriage*, NYRBLOG (Feb. 9, 2012, 11:48 AM), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/>.

16. See, e.g., William N. Eskridge Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93, 97 (2012); Robin West, *A Marriage Is a Marriage Is a Marriage: The Limits of Perry v. Brown*, 125 HARV. L. REV. F. 47, 52–53 (2012); Marty Lederman, *Understanding Perry v. Brown*, BALKINIZATION (Feb. 8, 2012, 10:54 AM), <http://balkin.blogspot.com/2012/02/understanding-perry-v-brown.html>; Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html>.

17. See *Windsor v. United States (Windsor II)*, 699 F.3d 169, 181 (2d Cir. 2012).

18. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9–10 (1st Cir. 2012) (“[T]o create such a new suspect classification for same-sex relationships would have far-

court thus far to apply explicitly heightened scrutiny, exercises jurisdiction over three states that already allow same-sex marriage (New York, Vermont, and Connecticut).<sup>19</sup> It remains to be seen whether the Supreme Court, or any other federal appellate court, will ultimately agree that heightened scrutiny applies.

The specter of at least short-term backlash, unleashed with terrible force after *Goodridge v. Department of Public Health*,<sup>20</sup> thus remains at bay. The comparative harmony of gradualism holds sway, a tense balance between the undoubted benefits of marriage equality litigation and the real danger that a boldly liberal ruling could set our country ablaze at just the wrong moment. In the interim, President Obama has been free to “evolve,” LGBT rights scored a major victory with the dramatic congressional repeal of Don’t Ask, Don’t Tell, and marriage equality has continued to progress at the state level.<sup>21</sup>

This minimalist frame of mind, so popular on the bench, also enjoys support in the legal academy. In their cert.-stage *amicus* brief in *Hollingsworth*, a number of prominent scholars represented by Stanford’s Kathleen Sullivan offered the Justices a historical tutorial on the virtues of incrementalism.<sup>22</sup> Citing Justice Ginsburg’s argument that *Roe v. Wade*’s broad holding was premature,<sup>23</sup> and ranging across the Court’s nineteen-year engagement with anti-miscegenation statutes leading to *Loving v. Virginia*,<sup>24</sup> these scholars warned against granting review in *Hollingsworth*. In their narrative, *Naim v. Naim*<sup>25</sup> becomes a model of prudence<sup>26</sup>—not a “disgraceful and widely condemned decision,” as we recently argued.<sup>27</sup> As they note, instability over the public justifications for opposition to same-sex marriage, coupled with shifting public opinion and active deliberation, arguably support the case for judicial

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reaching implications . . . . That such a classification could overturn marriage laws in a huge majority of individual states underscores the implications.”).

19. See N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012); CONN. GEN. STAT. ANN. § 46b-20(4) (West Supp. 2012); VT. STAT. ANN. tit. 15, § 8 (Supp. 2012).

20. 798 N.E.2d 941 (Mass. 2003). See KLARMAN, *supra* note 10, at 89–118.

21. See Tribe & Matz, *supra* note 9, at 471–73.

22. See generally Brief of Amici Curiae William N. Eskridge Jr., Bruce A. Ackerman, Daniel A. Farber & Andrew Koppelman in Support of Respondents, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Aug. 30, 2012) (No. 12-144) [hereinafter Brief of Amici Curiae].

23. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381–83, 385–86 (1985).

24. See Brief of Amici Curiae, *supra* note 22, at 6–12.

25. See 87 S.E.2d 749 (Va. 1955) (upholding Virginia’s anti-miscegenation statute), *vacated per curiam mem.* (due to the inadequacy of the record), 350 U.S. 891 (1955), *aff’d per curiam*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed mem.*, 350 U.S. 985 (1956).

26. See Brief of Amici Curiae, *supra* note 22, at 10–11. See also *id.* at 6 (“Under the circumstances, it would be institutionally wise to follow the prudential approach this Court took in the different-race marriage cases, rather than the hasty approach followed in *Bowers*. Cf. Ginsburg, 63 N.C. L. Rev. at 381–83, 385–86 (opining that this Court’s disposition in *Roe v. Wade* was, likewise, premature and needlessly broad).”).

27. Tribe & Matz, *supra* note 9, at 478.

hesitation.<sup>28</sup> This *amicus* brief builds on a wave of scholarship that blends history and political science into grand narratives that preach the comparative merits of legal gradualism, especially when pegged to shifting public opinion and a Court keen to conserve its nebulous institutional capital.<sup>29</sup>

There is, no doubt, much to commend such minimalism. Given genuine uncertainty about how the Court would rule on a challenge to state-level same-sex marriage laws, and the real danger of backlash, it would be foolish to disregard tactical questions aimed at discerning the maximally rights-expanding approach to these issues across the many fronts on which civil rights battles are waged.<sup>30</sup> But it is critical to note that minimalism is not a cost-free strategy. Rather, it is a gamble on an uncertain future—a bet that the Court will not tilt irretrievably conservative, that state-level constitutional bans on same-sex marriage can be overcome through political process, and that we are learning (but not overlearning) the right lessons from our complicated past. A measure of modesty in addressing these questions—whether we should be minimalist in litigation and in the goals of adjudication and, if so, how—will remain critical as LGBT rights advocates move forward.

We have elsewhere argued for a more aggressive approach,<sup>31</sup> but the key point here is that the conditions of possibility for plausible minimalist constitutional adjudication may soon dissipate. DOMA and Prop 8 have afforded useful way-stations. If the Court upholds DOMA or Prop 8, it may do so in terms that functionally foreclose most federal constitutional litigation about marriage equality and related issues for the foreseeable future. If the Court invalidates DOMA, it will likely arrive at that result along a path too narrow to be of much relevance to many other matters involving LGBT rights.<sup>32</sup> So too a ruling that

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28. See Brief of Amici Curiae, *supra* note 22, at 17–19.

29. See sources cited *supra* note 10.

30. See Tribe & Matz, *supra* note 9, at 480 n.31 (“There is, of course, a close connection between our argument that the Court should not hesitate to address [the question of same-sex marriage rights] when fairly presented with it and our argument that the Court should reach a particular result. If a Justice on the Court knew with certainty that he or she were the ‘swing Justice’ on the matter and were simply unpersuaded by the case for same-sex marriage as it currently stands or unwilling to sign such an opinion until public opinion more firmly coalesced around marriage equality, he or she might reasonably decide to rule on the narrowest possible grounds in order to preserve room in the future for a pro-same-sex marriage rights opinion (or to at least keep the Court’s options open). In that event, although use of the passive virtues can be troublingly rights-contracting where it forestalls a rights-expanding decision, the passive virtues may also be rights-expanding where they leave the issue open for further rights-favorable rulings.”).

31. See generally Tribe & Matz, *supra* note 9.

32. See *id.* at 477 (“A decision invalidating DOMA’s blatantly discriminatory singling-out of same-sex couples from the normal deference federal law gives to state definitions of marriage might constitute a useful stepping stone toward a later decision broadly invalidating state laws that deny same-sex couples the right to marry—and, importantly, this stepping stone might fall either some significant distance or mere micrometers away from the destination toward which the Court is stepping, all depending on how broadly the Court chooses to rule and under which theory it

invalidates Prop 8, the scope of which could be cabined to the subset of cases that involve withdrawal of previously conferred same-sex marriage rights. Although these cases may suggest the need for the Court to clarify a level of scrutiny, there is much to be said for the view that it should resist that temptation by explaining that DOMA and Prop 8 fail even rationality review and thus present no need to address heightened scrutiny.<sup>33</sup>

In all likelihood, if the Court decides *Hollingsworth* and *Windsor* on justiciability grounds, the clock merely gets wound back a few years. Eventually, inevitably, these issues will once again demand the Supreme Court's attention. That is, of course, if these discriminatory laws are not wiped out in the political process before the Court has a chance to weigh in.

Hard questions thus await the LGBT rights movement as its heaviest artillery pivots from laws like Prop 8 and DOMA toward a diverse and shifting array of other legal challenges—including, but not limited to, state-level bans on same-sex marriage (not including bans imposed after an initial judicial or legislative grant of marriage rights, as in Prop 8). For marriage equality advocates, the choice may well involve an all-or-nothing decision: assail bans at the state level or retreat from the courts entirely. Minimalist outcomes, however ingenious their doctrinal underpinning, are not always possible, nor are they always desirable. In that respect, the future is wide-open.

## II.

### EQUALITY RESURGENT

Among the most intriguing turns in constitutional adjudication addressing same-sex marriage rights has been the starring role recently awarded to equality.

The debate over liberty- versus equality-based approaches to LGBT rights, best exemplified by a dialogue between Heather Gerken and Kenji Yoshino a few years ago, rests on an admittedly artificial divide.<sup>34</sup> As one of us has noted, the ideal strategy “resists rigid compartmentalization and . . . reaches across the liberty/equality boundary to recognize the ultimate grounding of both in an expanding idea of human dignity.”<sup>35</sup> That point, which dates back at least as far

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invalidates the disputed provisions of DOMA.”).

33. *But see* Ruthann Robson, *Online Same-Sex Marriage Symposium: Toward a More Perfect Analysis*, SCOTUSBLOG (Sept. 19, 2012, 9:57 AM), <http://www.scotusblog.com/2012/09/online-same-sex-marriage-symposium-toward-a-more-perfect-analysis/> (“The Court should also attempt to provide future guidance in the form of clearly articulated constitutional standards.”).

34. *See* Heather K. Gerken, *Larry and Lawrence*, 42 *TULSA L. REV.* 843, 849–55 (2007); Kenji Yoshino, *Tribe*, 42 *TULSA L. REV.* 961 (2007); Deborah Hellman, *Marriage Equality: A Question of Equality Rather than Liberty*, SCOTUSBLOG (Aug. 26, 2011, 10:35 AM), <http://www.scotusblog.com/2011/08/marriage-equality-a-question-of-equality-rather-than-liberty/>.

35. Laurence H. Tribe, *Larry Tribe on Liberty and Equality*, BALKINIZATION (May 28, 2008, 11:22 AM), <http://balkin.blogspot.com/2008/05/larry-tribe-on-liberty-and-equality.html>.

as the canonical case of *Skinner v. Oklahoma*,<sup>36</sup> remains critically important.<sup>37</sup> Yet even if the constitutional *principles* of liberty and equality share at least some common sources, the *doctrines* of liberty and equality are different in important ways. In cases addressing DOMA and Prop 8, equality has afforded the flexibility necessary to achieve complex adjudicative aims.

In some largely superficial respects, this focus on equality represents a turn from the liberty-leaning rhetoric of *Lawrence v. Texas*.<sup>38</sup> Justice Kennedy wrote for a Court majority that invalidated the Texas anti-sodomy statute with a potent mixture of liberty-, equality-, and dignity-based reasoning, all unified doctrinally under an analytic frame that commentators widely agreed fell closest to liberty's domain.<sup>39</sup> Even as that decision broke away from rigid categorizations, it suggested a strong focus on libertarian ideas—at least for the Kennedy Court (which remains the proper description for the Supreme Court on civil rights issues).<sup>40</sup> Since *Lawrence*, some scholars have argued that the future of equality resides within liberty's compass. Yoshino, the most eloquent academic champion of this strategy, calls it the "New Equal Protection."<sup>41</sup> In *The Constitution in 2020*, Reva Siegel and Jack Balkin similarly argue in favor of using liberty to promote equality, pointing to the utility of a "liberty framework" for LGBT rights.<sup>42</sup>

Yet for all of equality's limits, lower court rulings on DOMA and Prop 8 have allowed it pride of place. Decalcifying familiar doctrine, which crudely divides people into "protected" and "unprotected" classes, judges have generally applied variants of what law professors like to call "rational basis with bite."<sup>43</sup> Writing for the First Circuit, Judge Boudin recently offered a particularly careful and analytically precise account of this standard, noting that, "[w]ithout relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications."<sup>44</sup> He linked

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36. 316 U.S. 535 (1942).

37. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1463–65 (2d ed. 1988).

38. 539 U.S. 558 (2003).

39. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 99 (2003).

40. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21 (2003).

41. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747 (2011).

42. Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 93, 99–101 (Jack M. Balkin & Reva B. Siegel eds., 2009).

43. See Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, SCOTUSBLOG (Aug. 23, 2011, 8:38 AM), <http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/>.

44. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012).

this equality basis for rationality with bite to a federalism basis that looks askance at DOMA's federal footprint on state control of marriage.<sup>45</sup>

In certain respects, current Equal Protection Clause doctrine perfectly suits the needs of litigators and judges alike. Liberty avoids the "pluralism anxiety" at the center of Yoshino's account,<sup>46</sup> but at the expense of debates over levels of generality and judicial reluctance to create broad, unlimited rights.<sup>47</sup> Equality, in contrast, affords the kind of flexibility our historical moment is thought to demand. It can strike against DOMA while leaving state marriage laws undisturbed,<sup>48</sup> advance the cause of marriage equality without spilling into other social contexts, and offer a balancing test that captures a wide range of relevant socio-political factors.<sup>49</sup> It can even invalidate Prop 8 without directly posing the question whether states can simply ban same-sex marriage from the get-go.<sup>50</sup> If we judge doctrine by its utility as a vehicle through which we express constitutional principles, tactical goals, institutional concerns, and social meanings, it can be no surprise that courts everywhere are now speaking the language of equality.

Yet the story is far from over. In LGBT rights litigation, liberty and equality will often flow together—a hybrid dignity claim disaggregated by doctrine into something less than the sum of its parts.<sup>51</sup> This year, the Court might assess DOMA's constitutionality. In so doing, it may follow the path marked by *Lawrence* and further blur the boundaries between liberty and equality. Or it may expressly embrace rationality "with bite."<sup>52</sup> Or—we think this outcome unlikely but not impossible—it may uphold DOMA while gutting equality doctrine as a useful tool for the LGBT rights movement by invoking the barebones rationality review canonically exemplified by *Williamson v. Lee Optical Co.*<sup>53</sup> The future is unstable; we can easily imagine a shifting flow of liberty- and equality-based arguments for different outcomes. But it is nonetheless remarkable that we have reached our present inflection point through a series of lower court rulings that spoke the language of equality in service of progressive results with minimalist orientation.

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45. *Id.* at 11–13.

46. Yoshino, *supra* note 41, at 751–54.

47. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73–80 (1991); Gerken, *supra* note 34, at 844–48.

48. In contrast, the recognition of LGBT people as a suspect class could overturn marriage laws in a number of states. *Massachusetts*, 682 F.3d at 9–10.

49. Gerken, *supra* note 34, at 851.

50. See *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (Dec. 7, 2012) (No. 12-144).

51. See sources cited *supra* notes 34–35.

52. See Yoshino, *supra* note 43.

53. 348 U.S. 483 (1955).



## III.

## FICKLE FEDERALISTS

When it comes to civil rights, progressives experience a relationship with federalism best described as complicated.<sup>54</sup> On the one hand, states and local governments can serve as vital laboratories of experimentation for new visions of liberty and equality.<sup>55</sup> As Balkin and Siegel remind us, “much of the early progress in civil rights for African Americans came from enlightened state laws and judicial decisions . . . [and m]any of the equality issues of the future will be worked out in state and local governments first.”<sup>56</sup> State legislatures, executives, and courts may be more receptive to progressive arguments than their federal counterparts, and changes in a small number of states may seem less threatening than national change (although *Goodridge* demonstrates that even state-level rulings can rock the nation).<sup>57</sup> In some parts of the country, the structure of local political institutions and party coalitions may allow progressives to enjoy the diverse benefits of greater political power at the state and local levels.<sup>58</sup>

On the other hand, states can also generate new and creative forms of injustice.<sup>59</sup> Allowing too much state-to-state diversity can result in extreme policies, some of which may ultimately be deemed repugnant by national majorities.<sup>60</sup> These laws can inflict horrible injustice on individuals who lose out in the geographic lottery and, for any number of reasons, are unable or unwilling to move to states whose civil rights laws treat them with something closer to genuine dignity.<sup>61</sup> Constitutional law, of course, is a key mechanism through which national majorities police outlier states on civil rights issues.<sup>62</sup>

54. See Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, at 37, available at <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all>.

55. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

56. Balkin & Siegel, *supra* note 42, at 103.

57. See KLARMAN, *supra* note 10, at 89–118.

58. See generally Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

59. See, e.g., Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1746 (2004) (“At [a certain] point, the states have begun to appear as laggards, no longer serving any beneficial purpose by maintaining their differences, but only depriving their citizens of the greater good.”).

60. See *id.* at 1747 (noting that too much state-to-state diversity can lead to state laws that violate constitutional rights).

61. Cf. Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, in NOMOS (James Fleming & Jacob Levy, eds., forthcoming 2013) (on file with author) (noting that the direct cost of moving and the prospects of parting with employment, family members, and social networks can discourage people from “voting with their feet”).

62. See Klarman, *supra* note 1.

For some, these concerns may fuse to create a general skepticism of the Supreme Court's so-called "federalism jurisprudence," which has dramatically expanded state sovereign immunity,<sup>63</sup> limited Congress's power to interpret and implement the Constitution,<sup>64</sup> and invalidated portions of several federal regulatory schemes<sup>65</sup>—all in the name of a highly oversimplified and, at times, one-dimensional account of how "federalism" can protect a particular conception of individual liberty.<sup>66</sup> *The Healthcare Cases*<sup>67</sup> have recently directed a fair bit of attention to the nature and merits of this federalism jurisprudence, much of it understandably unflattering.<sup>68</sup>

Yet federalism is too attractive a principle simply to ignore in anti-DOMA litigation. It is thus unsurprising that the cert.-stage brief filed on Nancy Gill's behalf urging Supreme Court review and affirmance of Judge Boudin's opinion cites *Bond v. United States* to argue that "federalism also protects individuals"—and then quotes *NFIB v. Sebelius* for the proposition that federalism "secures to citizens the liberties that derive from the diffusion of sovereign power."<sup>69</sup> On this view, DOMA's status as a federal law contributes to the case for "rationality with bite."<sup>70</sup> It does so for three reasons.

First, even insofar as there might exist rational bases for state-level bans on same-sex marriage, these rationales grow notably weaker when invoked to defend a federal law that selectively abandons state definitions of marriage in the singular case of same-sex couples. As Judge Jones of the Southern District of New York explained, "because the decision of whether same-sex couples can

63. *E.g.*, *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

64. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997). Even though *Boerne* was not unanimous, it did not generate dissent on the core question of Congress's institutional authority to give the Fourteenth Amendment's terms a more generous reading than that endorsed by the Supreme Court—leading to a position far less pluralistic than that implicit in cases like *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

65. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

66. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 858–60 (3d ed. 2000).

67. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

68. *See, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* 138–82 (2011); Neal K. Katyal, Op-Ed., *A Pyrrhic Victory*, N.Y. TIMES, June 29, 2012, at A25; Jason Mazzone, Op-Ed., *Can Congress Force You to Be Healthy?*, N.Y. TIMES, Dec. 17, 2010, at A39; Rick Hills, *The Healthcare Decision and the Revival of the Taxing Power: The Costs and Benefits of Formalism in Federalism*, PRAWFSBLAWG (June 28, 2012, 11:03 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-healthcare-decision-and-the-costs-and-benefits-of-formalism-in-federalism.html>; Michael Ramsey, *The Health Care Case and the Challenges of Judicial Federalism*, THE ORIGINALISM BLOG (July 2, 2012, 7:00 AM), <http://originalismblog.typepad.com/the-originalism-blog/2012/07/the-health-care-case-and-the-challenges-of-judicial-federalismmichael-ramsey.html>.

69. Brief in Response of Nancy Gill et al. at 21–22, *Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill*, 81 U.S.L.W. 3006 (U.S. Aug. 2, 2012) (No. 12-13).

70. *See id.* at 22.

marry is left to the states, DOMA does not, strictly speaking, ‘preserve’ the institution of marriage as one between a man and a woman.”<sup>71</sup>

Second, a long tradition of state control over marriage in virtually every respect renders federal displacement of state definitions of marriage only when marriage equality is at stake inherently suspect. As the Second Circuit *Windsor* opinion explains, because DOMA creates “an unprecedented intrusion ‘into an area of traditional state regulation,’”<sup>72</sup> it should be viewed with “a cold eye.”<sup>73</sup> This claim borrows concepts from *Carolene*’s famous footnote 4 to sound in the general register of the Tenth Amendment.<sup>74</sup>

Finally, a dynamic interaction between liberty-protective federalism and the Equal Protection Clause further undercuts DOMA. It is for this claim that the cert.-stage brief in *Gill* cites *Bond* and *NFIB*.<sup>75</sup>—as well as a concurring opinion from 1959 in which Justice Brennan explained that “the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism . . . [and] as an instrument of federalism.”<sup>76</sup> This third point is not about arguments growing weaker at the federal level or about tradition-based skepticism of some federal actions; it is about liberty, equality, federalism, and their complex, mutually-reinforcing interaction.

Through these arguments, LGBT rights advocates seek to fuse certain Justices’ visions of constitutional federalism to marriage equality vis-à-vis DOMA. The essence of the claim is that liberty and equality are protected by the Constitution *directly* under the Equal Protection Clause and *indirectly* through the sphere of tradition-based decisional autonomy on issues like marriage that the structure of federalism reserves to state governments.<sup>77</sup> The tactics are clear: Justice Kennedy, and perhaps Chief Justice Roberts or others, may be more effectively drawn to the anti-DOMA view by federalism considerations.

These arguments are brilliant, but slippery—especially the third argument, which posits that federalism and the Equal Protection Clause act in tandem to protect liberty. It almost goes without saying 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

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71. *Windsor v. United States (Windsor I)*, 833 F. Supp. 2d 394, 403 (S.D.N.Y. 2012), *aff’d*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

72. *Windsor II*, 699 F.3d at 186 (quoting *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1,13 (1st Cir. 2012)).

73. *Id.*

74. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

75. See Brief in Response of Nancy Gill et al., *supra* note 69, at 21–22.

76. See *id.* at 22 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring)).

77. See *id.* (“[T]his Court has repeatedly recognized that federalism also protects individuals . . .” (citation omitted)).

government in certain policy domains.<sup>78</sup> And apart from its historical underpinnings, the Court's doctrine necessarily hinges on assumptions about the merits of political process at the state rather than the federal level. Yet while states may do more to protect liberty than the national government, they may also do a lot less. When that happens, should the same historically grounded traditions of deference to state control and respect for subnational political process that are invoked to undermine DOMA militate *against* federal intervention? Does part of the federalism-based case against DOMA indirectly undermine the grounds for a future federal constitutional ruling that requires state-level marriage equality?

The better answer is "no." The Court's doctrinal expression of federalism favors freedom *from* federal government intrusion rather than a right *to* federal government protection. Equal protection scrutiny of certain *federal* laws grows stricter when those laws touch on areas of traditional state control and burden rights said to enjoy better protection in state-level political process. But the virtues of state-level decision making do not, as a matter of formal doctrine, lead to greater-than-usual judicial deference to comparable *state* laws facing equality challenges. For marriage equality, federalism-based principles of respect for traditional state autonomy and sub-national political process provide a sword against regressive federal laws (such as DOMA) without affording a shield to regressive state laws (such as same-sex marriage bans).

We are thus dealing with a rather particular federalism: one that does not respect states' choices about *whether* to expand liberty, but only state choices that actually *do* so; that limits federal *legislative* power when it intrudes upon comparatively liberty-enhancing state policy, but does not limit federal *judicial* power that intrudes upon comparatively regressive state policy. At least in this context, federalism is a one-way ratchet toward liberty (or at least a certain kind of liberty). A civil rights advocate is tempted to think, *Vive la Fédéralisme!*

Two cautions are in order.

First, if LGBT litigation strategies result in a more robust articulation of the Court's federalism doctrine, negative consequences may follow in other contexts that LGBT advocates (and other progressives) consider important, including seemingly far afield issues of regulatory and economic policy that are, in truth, critical to any meaningful account of a progressive agenda. Federalism is thus a double-edged sword. This might not be a serious concern, since judges and Justices who embrace this picture of constitutional federalism do not need briefs filed by marriage equality advocates to confirm their preexisting views. But mightily clever efforts at coopting the conservative Justices' federalism doctrine in service of progressive results pose at least some risk of collateral damage.

Second, as noted above, certain premises of federalism-based arguments

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78. See generally *TRIBE*, *supra* note 66, at 789–1020.

against DOMA are in some tension with the case for federal judicial intervention against state-level same-sex marriage bans. This is because not all judges (or even Justices) may appreciate the unidirectional nature of the Court's "particular federalism." And they might be forgiven that lapse, given the questions one might ask about a federalism that seems to tip the scales only one way. All this talk about respect for centuries of state-level decisions, the brilliance of state-level political process, and the dignity of the sovereign states, especially when layered atop principles of constitutional avoidance and respect for democratic deliberation, readily points toward a federalism-based case for judicial inaction (or, worse, a judicial decision validating state-level control over the decision whether to permit same-sex marriage).

This concern may seem trivial to those who are fine with the Court waiting a while longer before tackling state-level laws. It may seem naïve to those who view the Justices (or believe the Justices view themselves) as policymakers interested in doctrine only instrumentally. And it may seem overstated in light of the fact that the Court may, in the not too distant future, experience a foundation-shaking change in membership.

All the same, it would be foolish to trivialize the fact that many recent constitutional rulings on marriage equality claims have relied, in part, on federalism-based analysis. It is in this spirit that we have offered a few thoughts about the potential significance of LGBT equality advocates' recent romance with federalism.<sup>79</sup>

In any event, we suspect this romance is not long for the world. Once Section Three of DOMA falls—as we believe it surely will, whether in Congress or in the Court—there will be relatively few remaining federal targets (especially now that Don't Ask, Don't Tell has been repealed). Significant energies at the federal level will likely turn from their current focus (calls to repeal or invalidate discriminatory policies) to demands for bolder executive action and new legislation aimed at anti-gay discrimination in the workplace<sup>80</sup> and elsewhere—bolstered by a rapidly-emerging public consensus (or at least a growing majority) favoring certain parts of the LGBT rights agenda.<sup>81</sup>

Meanwhile, at the state level, struggles will continue over marriage rights,<sup>82</sup> many other family law policies,<sup>83</sup> employment discrimination, hate crimes,

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79. Other scholars have also noted potential complications in progressives' embrace of federalism-based reasoning to support marriage equality. See, e.g., Jason Mazzone, *DOMA & Federalism*, BALKANIZATION (Dec. 9, 2012, 11:08 PM), <http://balkin.blogspot.com/2012/12/doma-federalism.html>.

80. See Editorial, *The Rights of Gay Employees*, N.Y. TIMES, Sept. 13, 2009, at WK15.

81. See generally WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 331–59 (2008) (discussing the future of American public law with respect to LGBT rights issues).

82. See KLARMAN, *supra* note 10, at 156–219.

83. See generally CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE

religious liberty, LGBT issues in educational curricula, access to HIV testing and medication, and a wide range of related issues. Further disputes will arise over recognition of out-of-state same-sex marriages. And attention may turn even more heavily toward the influence that private actors—particularly large corporations—wield in shaping the lived experience of LGBT liberty and equality.<sup>84</sup>

Inevitably, calls for federal action against intransigent states will echo even louder. Congress will be pressured with greater urgency to legislate. The President may order his attorneys to file suit against hold-out states under new civil rights laws. The judiciary will be asked to assume its traditional role of using constitutional law to police outlier states on civil rights issues supported by a maturing national consensus—or to go further and actively pave the way for social change. Eventually, even in the teleology presupposed by at least some minimalist arguments, we will have evolved far enough toward the *telos* that the appropriate strategy will, in fact, be to abandon minimalism in constitutional litigation and adjudication, and to instead insist upon federal judicial action.

If and when that day comes, we have little doubt that a now-faddish embrace of federalism and the virtues of state-level political process will be moderated, if not altogether left in the dust, by LGBT rights advocates, and for good reason. It is an argument that serves a useful (if contested) purpose for the moment, but that ultimately may become an impediment.

#### IV.

#### CONCLUSION

At the beginning of this brief contribution, we referred to the present as an “ephemeral moment.” For that reason, rather than offer sweeping claims, we have endeavored to identify important recent developments in marriage equality litigation and adjudication that may soon come to be seen as reflections of our particular time and place.

Express recognition of the contingency of our moment is at once both thrilling and terrifying. One of the critical upshots of that awareness is recognition of the need to remain flexible in adapting to circumstances built on quicksand. In many ways—the prevalence of minimalist jurisprudence, the related rise of equality-based reasoning, and the invocation of federalism to assail DOMA—we stand at an inflection point.

It would therefore be futile to carve our arguments in stone. Nonetheless, we can at least move forward with sensitivity to the need for ongoing dialogue,

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TRANSFORMATION OF PARENTHOOD (2012).

84. See Kenji Yoshino: *How Corporations Are Leading the Way in Civil Rights*, THE LAVIN DAILY (May 26, 2011), <http://www.thelavinagency.com/blog-kenji-yoshino-civil-rights-inc-keynote.html> (explaining that Yoshino’s current project, which he calls “Civil Rights, Inc.,” focuses on how corporations shape civil rights).

modesty in our claims to certainty, and awareness that many recent developments in constitutional law and argumentation truly say more about our journey than about our final destination.