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Windsor, Federalism, and Family Equality

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WINDSOR, FEDERALISM, AND FAMILY EQUALITY

*Courtney G. Joslin**

INTRODUCTION

On June 26, 2013, the Supreme Court issued its opinion in *United States v. Windsor*.[1] In a 5-4 decision authored by Justice Kennedy, the Court held that section 3 of the Federal Defense of Marriage Act (DOMA)[2] is unconstitutional.[3] Advocates had attacked section 3[4] on two primary grounds.[5] The principal

* Professor of Law, UC Davis School of Law. I thank Professors Max Eichner, Katherine Florey, Doug NeJaime, Rose Cuison Villazor, and Deborah Widiss, and my research assistant Miles Prince, for helpful feedback and guidance on this Essay. I also thank UC Davis School of Law, especially Dean Kevin Johnson and Associate Dean Vikram Amar, for generous financial support for this project. Finally, I thank Kevin Hu and the other editors of the *Columbia Law Review* for their careful editorial assistance.

1. United States v. Windsor, No. 12-307, 2013 U.S. LEXIS 4921 (U.S. June 26, 2013).

2. Section 3 of DOMA provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2012).

As a result of section 3, married same-sex spouses were denied over 1,000 federal marital benefits. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at http://www.gao.gov/new.items/d04353r.pdf (on file with the *Columbia Law Review*).

3. *Windsor*, 2013 U.S. LEXIS 4921, at *47.

4. In addition to *Windsor*, there were a number of other cases challenging section 3 of DOMA. See, e.g., Gay & Lesbian Advocates & Defenders, Top Ten Things You Should Know About DOMA and the U.S. Supreme Court 1–2 (2012), available at http://www.glad.org/uploads/docs/publications/doma-top10-faq.pdf (on file with the *Columbia Law Review*) (listing such cases).

5. Edie Windsor only brought an equal protection claim. Amended Complaint ¶¶ 82–85, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435 (BSJ)(JCF)), 2011 WL 1302444, at 10. Parties in other challenges to section 3, however, raised additional claims, including Tenth Amendment and Spending Clause claims. E.g., Complaint ¶¶ 80–98,

argument leveled at section 3 was that it violated principles of equal protection by denying one class of married spouses—lesbian and gay spouses—all federal marital benefits.[6] Section 3 was also attacked on a number of federalism-based grounds.[7] This Essay focuses on the latter. Specifically, this Essay considers the extent to which the Court's decision in *Windsor* turns on any of these federalism-based arguments. It also explores what acceptance of these arguments might mean for same-sex couples and other families.

As the section 3 cases wound their way through the court system, commentators debated the strength of various federalism arguments from a doctrinal perspective.[8] Some advocates also reflected on whether these arguments were prudent from a long-term strategic perspective.[9] And since the Court announced its opinion in late June 2013, many have considered the extent to which the majority's opinion turns or relies on principles of federalism.[10]

As is true of Justice Kennedy's prior gay rights decisions,[11] the opinion in *Windsor* does not neatly fit into any previously established analytical scheme.[12]

Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT), 2009 WL 1995808, at 22–24.

6. Brief on the Merits for Respondent Edith Schlain Windsor at 14–15, *Windsor*, 2013 U.S. LEXIS 4921 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 997, at *26–*27 ("DOMA's discriminatory treatment of married gay couples violates Ms. Windsor's right to the equal protection of the laws as guaranteed by the Fifth Amendment.").

7. See supra note 5 (noting State of Massachusetts raised two claims: Tenth Amendment claim and Spending Clause claim).

8. See, e.g., Jack M. Balkin, Be Careful What You Wish For Department: Federal District Court Strikes Down DOMA, Balkinization (July 8, 2010, 6:35 PM), http://balkin.blogspot.com/2010/07/be-careful-what-you-wish-for-department.html (on file with the *Columbia Law Review*) (arguing overturning DOMA on Tenth Amendment grounds could lead to attacks on federal programs); Jason Mazzone, DOMA & Federalism, Balkinization (Dec. 9, 2012, 11:08 PM), http://balkin.blogspot.com/2012/12/doma-federalism.html (on file with the *Columbia Law Review*) (arguing two approaches to federalism could lead to unexpected conclusions about DOMA).

9. See, e.g., Linda Greenhouse, Trojan Horse, N.Y. Times: Opinionator (Apr. 3, 2013, 9:00 PM), http://opinionator.blogs.nytimes.com/2013/04/03/trojan-horse/?_r=0 (on file with the *Columbia Law Review*) (arguing "striking down DOMA on federalism grounds is a truly bad idea, and the campaign for marriage equality would be worse off for it"). But see, e.g., Mary Bonauto & Paul Smith, Who's Afraid of Federalism?, ACSblog (Apr. 17, 2013), http://www.acslaw.org/acsblog/who's-afraid-of-federalism (on file with the *Columbia Law Review*) ("We have always felt that this limited federalism aspect of the DOMA litigation is also helpful on the equal protection challenge.").

10. See infra notes 49–50 and accompanying text (discussing views of academics and Justices).

11. Cf. Nan D. Hunter, Living with *Lawrence*, 88 Minn. L. Rev. 1103, 1103 (2004) ("The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down." (footnote omitted)).

12. See, e.g., Neomi Rao, The Trouble with Dignity and Rights of Recognition, 99 Va. L. Rev. Online 29, 31 (2013), http://www.virginialawreview.org/sites/virginialawreview.org/files/Rao.pdf (on file with the *Columbia Law Review*) ("The particular constitutional guarantee in *Windsor* is hard to identify amidst the various rationales."); Randy Barnett, Federalism Marries Liberty in the DOMA Decision, SCOTUSblog (June 26, 2013, 3:37 PM),

As a result, at least at first glance, it is difficult to pin down the basis of the decision. Justice Scalia, in his dissent, declared that despite the majority's repeated references to the historical allocation of power as between the states and the federal government, the Court's decision ultimately is not based on principles of federalism.[13] Chief Justice Roberts (arguably, at least) appears to take the opposite position.[14] Scholars likewise have reached mixed conclusions on the degree to which the opinion turns on federalism-based arguments.[15]

There were a number of distinctly different federalism-based arguments leveled against section 3. Some advocates pushed a particularly strong federalism variant, arguing that DOMA was unconstitutional because Congress lacked the authority to define or determine family status. I call this the categorical family status federalism argument. Others endorsed a more moderated claim. Under this theory, the fact that a law—here section 3 of DOMA—deviated from the historic allocation of power as between the federal government and the states was simply a basis for applying a more careful level of equal protection scrutiny. Under this theory, the federalism-based concerns were not an independent basis for striking down the law. I call this the unusualness trigger argument.

This Essay argues that civil rights advocates dodged a bullet when the *Windsor* Court declined to embrace the categorical family status federalism theory. While its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA, it also would have curtailed the ability of federal officials to protect same-sex couples and other families.

Part I of this Essay describes the different federalism-based arguments that were leveled against section 3 of DOMA. Part II considers the extent to which the Supreme Court's *Windsor* opinion turns on any of these federalism arguments. Ultimately, this Essay concludes that while the Court looked to the historical balance of power between the states and the federal government with respect to defining and determining family status, the Court declined to hold

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http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/ (on file with the *Columbia Law Review*) ("Because the logic of Justice Kennedy's opinion for the majority in *Windsor* is novel, it is likely to confuse observers as it seems to have confused the dissenters.").

13. United States v. Windsor, No. 12-307, 2013 U.S. LEXIS 4921, at *77 (U.S. June 26, 2013) (Scalia, J., dissenting) ("For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion.").

14. Id. at *52 (Roberts, C.J., dissenting) (stating "it is undeniable" majority's judgment "is based on federalism").

15. See, e.g., Ilya Somin, The Impact of Today's Gay Marriage Decision, Volokh Conspiracy (June 26, 2013, 1:07 PM), http://www.volokh.com/2013/06/26/the-impact-of-todays-gay-marriage-decisions/ (on file with the *Columbia Law Review*) ("Much of the DOMA decision's reasoning is based on federalism considerations."); see also Damon W. Root, Federalism and Liberty in the Supreme Court's Gay Marriage Cases, Reason.com: Hit & Run (June 26, 2013, 12:17 PM), http://reason.com/blog/2013/06/26/federalism-and-liberty-in-the-supreme-co (on file with the *Columbia Law Review*) ("In his majority opinion today invaliding Section 3 of the 1996 Defense of Marriage Act, Justice Anthony Kennedy employed two of the most common themes in his jurisprudence: federalism and liberty.").

that Congress categorically lacks the power to act in the area of family law generally or in the more specific area of family status determinations.[16] Finally, this Essay closes by considering whether and to what extent proposals to alleviate continued discrimination against same-sex couples in the wake of *Windsor* might have been vulnerable had the Court accepted the categorical family status federalism theory.

I. FEDERALISM CHALLENGES TO SECTION 3

Throughout the various cases challenging section 3 of DOMA, there were two primary arguments leveled against the provision that at least arguably could be described as federalism-based. While both relate in some way to the allocation of authority between the states and the federal government with regard to family status determinations, the theories are quite distinct from each other. In assessing the extent to which the Court's opinion turned on principles of federalism and the future implications of the Court's decision, it is critical to distinguish between the two.

One federalism-based argument leveled against section 3 of DOMA is the categorical family status federalism argument.[17] This phrase refers to the claim that family status determinations categorically "fall[] outside Congress's powers."[18]

Even more sweeping claims that all, or at least a broad range of, family law matters are reserved solely to the states—what Jill Hasday calls "family law localism"[19]—are not uncommon.[20] Indeed, family law localism arguments not only have been raised frequently, but have often been embraced by courts.[21] In fact, in a number of decisions in the last half-century, the Supreme Court has made rather broad statements about the lack of federal power or authority in the area of family law. For example, in *Sosna v. Iowa*, the Supreme Court declared

16. In a companion piece, I explore in more detail the historical accuracy of the categorical family status federalism argument. Courtney G. Joslin, Federalism and Family Status (forthcoming) [hereinafter Joslin, Family Status] (on file with the *Columbia Law Review*).

17. See, e.g., David B. Cruz, The Defense of Marriage Act and Uncategorical Federalism, 19 Wm. & Mary Bill Rts. J. 805, 805 (2011) (using phrase "categorical federalism argument" to refer to argument that federal government categorically lacks authority over marriage); see also id. at 809 ("The district court's categorical argument [in *Massachusetts*] that Congress cannot regulate domestic relations was perhaps stronger than its lack of enumerated power argument . . . .").

18. Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 2, *Windsor*, 2013 U.S. LEXIS 4921 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1402, at *9 [hereinafter Brief of Federalism Scholars]. The Federalism Scholars stated that this question with regard to Congress's power had to be answered prior to considering whether section 3 violated principles of equal protection. Id. at 2 ("Before this Court addresses whether DOMA denies equal protection of the laws, there is a prior question of federal *power*.").

19. Jill Elaine Hasday, The Canon of Family Law, 57 Stan. L. Rev. 825, 892 (2004) [hereinafter Hasday, Family Law].

20. Id. at 874.

21. Id. at 872–73 ("It is commonplace for courts and judges to assert that family law is, and always has been, entirely a matter of state government.").

that "domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States."[22] Likewise, in its 1992 decision affirming the so-called "domestic relations exception" to federal diversity jurisdiction,[23] the Court relied heavily on "the proposition that family law is, and has long been, exclusively a matter for the states."[24] And even more recently, the Court declared in *Elk Grove Unified School District v. Newdow* that "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'"[25]

The categorical family law federalism claim[26] pressed in *Windsor* was slightly narrower or more refined than the claims pressed in some of these earlier cases.[27] The group most strongly advocating a categorical federalism argument in the *Windsor* case was the "Federalism Scholars."[28] In their brief, the Federalism Scholars made clear they were not asserting that the whole area of family law was off limits for the federal government. "Our claim," they explain, "is not that family law is an exclusive field of state authority."[29] In fact, as the Federalism Scholars acknowledge, Congress can and long has enacted statutes that deeply

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22. 419 U.S. 393, 404 (1975). In *Sosna*, the Supreme Court upheld a state statutory provision that required a party to reside in the state for one year prior to filing a divorce petition. Id. at 395–96.

23. Ankenbrandt v. Richards, 504 U.S. 689 (1992).

24. Hasday, Family Law, supra note 19, at 872–73; see also *Ankenbrandt*, 504 U.S. at 694–95 ("[W]e are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half . . . ."); id. at 715 (Blackmun, J., concurring in the judgment) (describing "unbroken and unchallenged practice . . . of declining to hear certain domestic relations cases").

25. 542 U.S. 1, 12 (2004) (alteration in *Newdow*) (quoting In re Burrus, 136 U.S. 586, 593–94 (1890)).

Similar sentiments were also expressed in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), in which the Court struck down statutes for being beyond Congress's authority. See id. at 615–16 (rejecting petitioners' argument because their reasoning "will not limit Congress to regulating violence [against women] but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation").

26. I use the phrase categorical family law federalism to refer to the more sweeping argument that the entire area of family law is reserved to the states.

27. A number of scholars have persuasively critiqued the sweeping categorical family law federalism claim. See, e.g., Kristin A. Collins, Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights, 26 Cardozo L. Rev. 1761, 1768 (2005) ("[T]he state sovereignty paradigm is not a fixed federalism principle . . . ."); Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297, 1298 (1998) [hereinafter Hasday, Family Reconstructed] ("[E]xclusive localism in family law simply misdescribes American history . . . ."); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 1035 (2002) (interpreting history of Nineteenth Amendment to show "nation *has* intervened in matters concerning domestic relations, over claims that the family is a sphere of local self-government").

28. The Federalism Scholars' brief was signed by the following law professors: Jonathan Adler, Lynn Baker, Randy Barnett, Dale Carpenter, Ilya Somin, and Ernest Young. Brief of Federalism Scholars, supra note 18, at 1.

29. Id. at 3–4; see also id. at 26–27 ("We do not maintain that Congress may not legislate in any way touching domestic relations, and in fact many federal regulations do affect family relations.").

impact families. To note just a few of the many examples one could offer, "[f]ederal tax laws . . . establish what constitutes a family for their purposes, distribute privileges and burdens on the basis of marital status, and only recognize relationships of dependency if they exist within certain specified family groups."[30] Similarly, Social Security benefits—one of the largest and most important federal benefits programs[31]—are distributed based on a claimant's family status.[32] And federal involvement is not limited to the distribution of benefits. Congress has become increasingly involved in the establishment and enforcement of child custody and child support issues.[33]

But while the whole area of family law is not reserved to the states, the Federalism Scholars asserted that there is one particular area of family law that *is* solely within the purview of the states: the power to make determinations of family status, including marital status and status as a child.[34] To be clear, the Federalism Scholars' brief in *Windsor* was not the first brief to rely on this more narrow categorical family status federalism theory. Indeed, this argument was previously made and accepted in one of the other challenges to section 3—*Massachusetts v. United States Department of Health & Human Services*.[35] In the *Massachusetts* case, the district court held that in addition to violating principles of equal protection, section 3 also violated the Tenth Amendment. DOMA violated the Tenth Amendment, the court concluded, because it regulated an

30. Hasday, Family Reconstructed, supra note 27, at 1376.

31. Courtney G. Joslin, Marriage, Biology, and Federal Benefits, 98 Iowa L. Rev. 1467, 1483 (2013) (noting Title II of Social Security Act "was and continues to be one of the largest federal benefits programs").

32. Hasday, Family Law, supra note 19, at 876 (arguing "because the social security program creates such important rights tied to family status, the program is also concerned with regulating the creation and dissolution of the family relationships that will be legally recognized for its purposes").

33. For example, in the 1980s, Congress required all states to adopt child support guidelines. Sylvia Law, Families and Federalism, 4 Wash. U. J.L. & Pol'y 175, 189 (2000). And federal laws now govern the recognition and enforcement of child support and child custody orders. Courtney G. Joslin, Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond, 70 Ohio St. L.J. 563, 575–76 (2009).

34. Brief of Federalism Scholars, supra note 18, at 3–4 ("Our claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field—such as the power to define the basic status relationships of parent, child, and spouse—are reserved to the States."); see also id. at 27 ("This Court has frequently, and recently, echoed that determining family status remains a State power."). The Federalism Scholars' brief made other federalism-based arguments as well. For example, the brief asserted that DOMA "is also not 'plainly adapted' to an enumerated end, because it applies to more than 1100 federal statutes at once." Id. at 3 (citation omitted).

35. 698 F. Supp. 2d 234 (D. Mass. 2010) (holding DOMA unconstitutional violation of state sovereignty), aff'd, 682 F.3d 1 (1st Cir. 2012), cert. denied, 81 U.S.L.W. 3714 (U.S. 2013). The *Massachusetts* case was slightly ahead of *Windsor* in the pipeline. Petition for Writ of Certiorari, *Massachusetts*, 81 U.S.L.W. 3714 (No. 12-15), 2012 WL 2586937. Many people speculated that the Court granted certiorari in *Windsor* rather than in the *Massachusetts* case because Justice Kagan would have recused herself in the latter. See, e.g., Lyle Denniston, Kagan, DOMA, and Recusal, SCOTUSBlog (Nov. 2, 2012, 4:59 PM), http://www.scotusblog.com/?p=154714 (on file with the *Columbia Law Review*). The Supreme Court ultimately denied certiorari in the *Massachusetts* case the day after the *Windsor* decision was released. *Massachusetts*, 81 U.S.L.W. 3714.

issue—"marital status determinations"—that is an "attribute of state sovereignty."[36]

During oral argument in the *Windsor* case, Justice Kennedy seemed to be persuaded by some version of the categorical federalism claim. That is, he seemed receptive to the argument that DOMA ventured into an area—the regulation of marital status—that is reserved exclusively to the states. For example, during oral argument, Justice Kennedy repeatedly declared that the question presented by *Windsor* was "whether or not the Federal government, under our federalism scheme, has the authority to regulate marriage."[37] Justice Kennedy's questions also suggested he believed that this categorical federalism claim was an independent ground upon which to strike down DOMA. Speaking to Paul Clement, counsel for the Bipartisan Legal Advisory Group (BLAG) which was defending section 3,[38] Justice Kennedy challenged Clement's assumption that DOMA was a proper exercise of federal power.[39] A few minutes later, during the argument of Solicitor General Verrilli, Justice Kennedy added that the equal protection issue should not be considered until the Court first determined that DOMA was "otherwise valid."[40]

A qualitatively different federalism-based argument was pressed by other parties and amici. The amicus brief filed by fifteen states and the District of Columbia, for example, argued the following: Section 3 of DOMA should be subjected to more careful equal protection scrutiny because, among other things, section 3 "intrudes on the States' traditional authority to regulate marriage and family relations."[41] Here, the claim was not that Congress categorically lacked power to act in the area of family law or in the area of family status determinations, nor that federalism concerns were an independent constitutional basis for striking down the statute. Instead, the historic balance of

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36. *Massachusetts*, 698 F. Supp. 2d at 249; see also id. at 250 ("The history of the regulation of marital status determinations therefore suggests that this area of concern is an attribute of state sovereignty, which is 'truly local' in character.").

37. Transcript of Oral Argument at 76, United States v. Windsor, No. 12-307, 2013 U.S. LEXIS 4921 (U.S. June 26, 2013) [hereinafter Transcript of Oral Argument], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf (on file with the *Columbia Law Review*).

38. Douglas NeJaime, The Legal Mobilization Dilemma, 61 Emory L.J. 663, 686 n.139 (2012); Carlos A. Ball, When May a President Refuse to Defend a Statute? The Obama Administration and DOMA, 106 Nw. U. L. Rev. Colloquy 77, 94 & n.88 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/21/LRColl2011n21Ball.pdf (on file with the *Columbia Law Review*).

39. Transcript of Oral Argument, supra note 37, at 76.

40. Id. at 84 ("[W]e don't [get to equal protection] unless we assume the law is valid otherwise to begin with. And we are asking is it valid otherwise. . . . [W]hat is the Federal interest in enacting this statute and is it a valid Federal interest assuming—before we get to the equal protection analysis?").

41. Brief on the Merits for the States of New York et al. as Amici Curiae in Support of Respondent Edith Schlain Windsor at 3, *Windsor*, 2013 U.S. LEXIS 4921 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1363, at *6.

responsibility between the states and the federal government was considered solely as a means of assessing the usualness or unusualness of the law. If the law *departed* dramatically from this historic allocation, that unusualness was a trigger for more careful constitutional scrutiny or review under some other principle of constitutional law—here equal protection.[42] I refer to this theory as the unusualness trigger argument.[43] Again, to be clear, under this theory, the departure from the traditional allocation of power was not an independent ground for striking down the statute; the fact that the statute was unusual was simply a trigger for more careful review under principles of equal protection.

It was this theory—the unusualness trigger theory—that formed the basis of the First Circuit's decision in *Massachusetts*, one of the other challenges to section 3 discussed above.[44] There, the First Circuit specifically held that DOMA did not violate the Tenth Amendment.[45] The fact that section 3 was an unusually broad intrusion by the federal government into an issue—the issue of marital status determinations—on which the federal government *generally* had deferred to the states in the past was, however, a basis for applying a more careful level of scrutiny for purposes of evaluating the equal protection claim.[46]

A number of other federalism-based arguments were raised either by the parties or amici, or appeared in various decisions striking down section 3.[47] But for purposes of this piece, the focus is on the two arguments outlined above.[48]

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42. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11–12 (1st Cir. 2012) ("In our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA; but Supreme Court precedent relating to federalism-based challenges to federal laws reinforce [sic] the need for closer than usual scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily accorded.").

43. The amicus brief of the Family Law Scholars similarly focused its analysis on highlighting DOMA's unusualness. See, e.g., Brief on the Merits of Amici Curiae Family Law Professors and the American Academy of Matrimonial Lawyers in Support of Respondent Edith Schlain Windsor at 36, *Windsor*, 2013 U.S. LEXIS 4921 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1364, at *57 (explaining how "DOMA is exceptional").

44. *Massachusetts*, 682 F.3d at 11–12.

45. Id. at 12 ("These consequences do not violate the Tenth Amendment or Spending Clause . . . .").

46. Id. at 13 ("Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.").

47. A third and potential fourth federalism claim were raised in the Federalism Scholars' brief. As articulated by the brief's author Ernest Young, these arguments are as follows: that the definition of marriage in section 3 is "not 'incidental' to the accomplishment of some other enumerated end, like preventing immigration fraud or conserving revenue," and that "[b]ecause DOMA applies in shotgun fashion to over 1,100 federal statutes, it is 'plainly adapted' to none of them." Randy Barnett, DOMA and Federalism: What Are the Limits of Congress's Power to Define Terms in Federal Statutes? A Reply to Whelan and Rosenkranz, Volokh Conspiracy (Mar. 7, 2013, 6:44 PM), http://www.volokh.com/2013/03/07/doma-and-federalism-what-are-the-limits-of-congresss-power-to-define-terms-in-federal-statutes-a-reply-to-whelan-and-rosenkranz/ (on file with the *Columbia Law Review*); see also Brief of Federalism Scholars, supra note 18, at 2–3 ("DOMA falls outside Congress's powers. Marriage is not commercial activity, and DOMA is not limited to

II. *WINDSOR* AND FEDERALISM

A. *An Embrace of Federalism?*

Since the Court's decision was released in June 2013, commentators have debated whether the decision turns on principles of federalism. Some commentators have suggested that the answer is yes. For example, Ilya Somin wrote that "[m]uch of the DOMA decision's reasoning is based on federalism considerations."[49] Others disagree.[50] Indeed, the Justices themselves debated this point in their opinions. Justice Scalia in his dissent asserted that any references to federalism in the majority opinion were just a façade.[51] By contrast, Chief Justice Roberts in his dissent declared that the "judgment [was] based on federalism."[52]

Did the Court accept and embrace any of the federalism arguments in striking down DOMA? If so, which one(s), and is it accurate to describe the

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federal-benefit programs that might rest on the Spending Clause. . . . DOMA's definition of marriage is not 'incidental' to an enumerated power . . . .").

The district court decision in the *Massachusetts* case also concluded that section 3 violated the Spending Clause "by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with two joint federal-state programs." Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

48. Notably, at oral arguments both the Solicitor General and counsel for Edie Windsor disclaimed reliance on the first variant—categorical family status federalism—but embraced the second—the unusualness trigger theory. For example, both attorneys were asked repeatedly whether principles of federalism were an independent ground for striking down section 3. Both counsel suggested that the answer to that question was no. See, e.g., Transcript of Oral Argument, supra note 37, at 81 (Verrilli, Solicitor General) (answering, in response to question from Chief Justice Roberts, "I don't think it would raise a federalism problem"); see also id. at 96–97 (Roberts, C.J.) (remarking to counsel for Edie Windsor, "You're following the lead of the Solicitor General and returning to the Equal Protection Clause every time I ask a federalism question. Is there any problem under federalism principles?"). But both counsel repeatedly suggested that DOMA's unusualness was relevant to whether the statute violated principles of equal protection. Id. at 82 (Verrilli, Solicitor General) ("Well, with respect to Section 3 of DOMA, the problem is an equal protection problem from the point of view of the United States."); see also id. at 85 (Verrilli, Solicitor General) ("[W]e don't think that Section 3 apart from equal protection analysis raises a federalism problem.").

49. Somin, supra note 15.

50. E.g., Mike Dorf, The (Ir)Relevance of Novelty as a Constitutional Criterion, Dorf on Law (July 1, 2013, 12:04 AM), http://www.dorfonlaw.org/2013/07/the-irrelevance-of-novelty-as.html (on file with the *Columbia Law Review*) (arguing "no Justice endorsed the freestanding federalism argument").

51. *Windsor*, 2013 U.S. LEXIS 4921, at *77 (Scalia, J., dissenting) ("For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion.").

52. Id. at *52 (Roberts, C.J., dissenting). As Justice Scalia points out in his dissent, whether the decision turned on principles of federalism may impact the relevance of the decision to challenges to state marriage bans. See id. at *87–*97 (Scalia, J., dissenting). If the decision is federalism-based, it may be of less relevance to such a challenge and vice versa.

opinion as one that turns on principles of federalism? First, what is clear is that the Court declined to strike down DOMA on Tenth Amendment or Spending Clause grounds; that is, it declined to formally embrace or accept the categorical family status federalism claim.[53] The Court declared: "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."[54]

Moreover, not only did the Court decline to rule on this ground, but the Court appeared to concede that at least a sweeping categorical family status federalism theory is belied by history; the federal government has *not* always deferred to state marital status determinations.[55] Justice Kennedy, speaking for the Court, explained that while the federal government *often* defers to state marital status, such deference is not and has not always been universal. Justice Kennedy pointed to one example that is frequently offered to make this point—the definition of marriage in the immigration context.[56] Immigration law provides that even if a marriage is valid for state purposes, the federal government can disregard it for immigration purposes if the marriage was entered "'for the purpose of procuring an alien's admission'" to the United States.[57] But Justice Kennedy went on to offer another less frequently cited example. With regard to the Supplemental Social Security Income Program, "Congress decided that although state law would determine in general who qualifies as an applicant's spouse," this federal program is not limited to marriages that are considered valid by a person's home state. Instead, for purposes of this program, a person is considered a "spouse" (and thus his or her income is taken into account) if the person complied with the requirements of a common law marriage, *regardless* of whether the person's home state (or any other state which the person had lived in or had contact with) would consider the person to be in a valid marriage.[58] Thus, the Court concluded, it is clear that some "federal laws that regulate the meaning of marriage" are

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53. See, e.g., Rao, supra note 12, at 31 ("Nor does the Court find that DOMA exceeds the scope of federal power.").

54. *Windsor,* 2013 U.S. LEXIS 4921, at *37.

55. See, e.g., Alberto R. Gonzales & David N. Strange, Op-Ed., What the Court Didn't Say, N.Y. Times (July 17, 2013), http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html (on file with the *Columbia Law Review*) ("[T]he ruling also explicitly affirmed Congress's power to enact laws that bear on marital rights and privileges.").

56. *Windsor*, 2013 U.S. LEXIS 4921, at *31–*32.

57. Id. (quoting 8 U.S.C. § 1186a(b)(1) (2006 & Supp. V 2011)).

58. Id. (citing 42 U.S.C. § 1382c(d)(2) (2006)). The relevant provision of the Social Security Act provides:

> (d) In determining whether two individuals are husband and wife for purposes of this subchapter, appropriate State law shall be applied; except that—
>
> . . . .
>
> (2) if a man and woman are found to be holding themselves out to the community in which they reside as husband and wife, they shall be so considered for purposes of this subchapter notwithstanding any other provision of this section.

42 U.S.C. § 1382c(d)(2).

"constitutional[]."[59] Or, stated another way, it simply is not the case that Congress always defers to state family status determinations for purposes of administering federal benefits programs.

Thus, not only did the Court decline to embrace the categorical family status federalism theory,[60] the opinion suggests that if pressed, it would reject it as being inconsistent with history and tradition.[61]

The Court did appear, however, to rely on the unusualness trigger argument. Specifically, the first half of the majority's opinion in *Windsor* described how the federal government historically "has deferred to state-law policy decisions with respect to domestic relations."[62] And, with regard to marital status specifically, the Court declared that "DOMA reject[ed] the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State."[63] But, again, while the Court suggested that Congress was not without power to act in this area, the fact that DOMA departed so dramatically from historic practice—a practice of *generally* deferring to state marital status—was grounds for applying more "'careful consideration.'"[64] Justice Kennedy declared: "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. '"[D]is-criminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"[65]

But while the Court did rely on the history of the allocation of power as between the states and the federal government as a trigger for more careful equal protection review, it is misleading to describe *Windsor* as a federalism-based opinion.

First, while it is true that what made section 3 of DOMA unusual was its departure from the tradition of deference to state marital status

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59. *Windsor*, 2013 U.S. LEXIS 4921, at *32; see also id. at *31 ("Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.").

60. Id. at *37 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.").

Judge Boudin on the First Circuit was more definitive in his rejection of the categorical family status federalism claim. In his opinion striking down section 3 of DOMA, Judge Boudin clearly stated that "neither the Tenth Amendment nor the Spending Clause invalidates DOMA." Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11 (1st Cir. 2012).

61. See supra notes 55–60 and accompanying text (outlining Court's discussion of instances in which federal government does not defer to states' definitions of marriage).

62. *Windsor*, 2013 U.S. LEXIS 4921, at *35.

63. Id. at *37; see also id. at *34 ("In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition."); id. at *36 ("The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning . . . .").

64. Id. at *37–*38 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

65. Id. (alteration in *Windsor*) (quoting *Romer*, 517 U.S. at 633).

determinations,[66] that departure itself was not what rendered section 3 unconstitutional. This deviance or departure was simply a trigger for more careful equal protection review. Ultimately, what rendered DOMA unconstitutional was that it failed equal protection review because its purpose was to mark a class of people as less worthy of dignity and respect. Or, stated another way, the problem with DOMA was not that it regulated an area of law solely reserved to the states. Instead, the ultimate problem with DOMA—and what rendered it unconstitutional—was that the law was enacted for the purpose of marking a group of people as less worthy.[67] DOMA, the Court explained, treated the marriages of same-sex couples as "second-class marriages,"[68] and thereby "wr[ote] inequality into the entire United States Code."[69] It also denied these couples "the liberty of the person protected by the Fifth Amendment of the Constitution."[70] This, the Court reaffirmed, is impermissible under principles of equal protection and due process.[71]

This conclusion—that *Windsor* is not accurately described as a federalism-based opinion—is reaffirmed when it is considered together with Kennedy's earlier opinion for the Court in *Romer v. Evans*.[72] When read together, these opinions make clear that a departure from the traditional balance of powers between the states and the federal government is not a necessary trigger for this more careful scrutiny. Instead, the two cases make clear that unusualness—*whatever its source*—can be a trigger for more careful equal protection scrutiny.[73]

In *Romer*, Justice Kennedy held unconstitutional a state constitutional amendment precluding all state and local government entities from prohibiting discrimination on the basis of sexual orientation.[74] A more careful level of equal protection scrutiny was also applied in *Romer*,[75] even though the amendment at

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66. Id. at *40 (describing "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"); see also Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11–12 (1st Cir. 2012) (holding while Congress was not without power to act in this area, fact that federal government often defers to states with regard to marital status "reinforce[s] the need for closer than usual scrutiny" for purposes of equal protection analysis).

67. *Windsor*, 2013 U.S. LEXIS 4921, at *41 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.").

68. Id. at *42.

69. Id. at *43.

70. Id. at *47.

71. Id. at *47–*49. For a rich discussion of the equal protection and due process principles that animate the Court's decision in *Windsor* and how these principles relate to and inform each other, see Douglas NeJaime, *Windsor*'s Right to Marry, 123 Yale L.J. Online 219 (2013), http://www.yalelawjournal.org/images/pdfs/1205.pdf (on file with the *Columbia Law Review*).

72. 517 U.S. 620 (1996).

73. Id. at 633.

74. Id. at 624, 635–36.

75. Id. at 633 ("The absence of precedent for Amendment 2 is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine

issue there did not alter or affect the respective roles of the states and the federal government.[76] The unusualness that triggered this more careful scrutiny was that Amendment 2 "identifie[d] persons by a single trait and then denie[d] them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."[77] And, in fact, one could, and indeed Justice Kennedy does, say the same thing about section 3 of DOMA.[78]

B. *Implications of Categorical Family Status Federalism*

As noted above, the section 3 cases were not the first ones in which categorical family law federalism claims were made. To the contrary, various permutations of categorical family law federalism claims have been made in recent decades.[79] And in some other cases, courts have seemed receptive to these claims.[80] Family law federalism arguments seem to have an enduring appeal both to advocates and to some courts. Thus, although not embraced in *Windsor*, the aftermath of the decision nonetheless provides a good moment to reflect on some of the potential implications of these categorical family law federalism claims. That is, what would the consequences be for same-sex couples, as well as for other family forms, if the Court declared that Congress lacks authority to define or determine family status?

As explained in this section, it is a good thing, in my opinion, that the Court did not embrace the categorical family status federalism claim. The upside of acceptance of this argument would have been another ground upon which to find section 3 of DOMA unconstitutional. This was what happened in the

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whether they are obnoxious to the constitutional provision.'" (alteration in *Romer*) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928))).

76. E.g., *Windsor*, 2013 U.S. LEXIS 4921, at *40 (quoting *Romer* for proposition that "[i]n determining whether a law is motived by an improper animus or purpose, [d]iscriminations of an unusual character especially require careful consideration" (second alteration in *Romer*) (quoting *Romer*, 517 U.S. at 633) (internal quotation marks omitted)); Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 778 (2011) (noting "*Romer* has been read as a 'rational basis with bite' case").

77. *Romer*, 517 U.S. at 633.

78. *Windsor*, 2013 U.S. LEXIS 4921, at *43 (noting "DOMA's principal effect is to identify a subset of state-sanctioned marriages" based on single trait, and then to deny spouses of these marriages over 1,000 federal rights ranging from "Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits," writing "inequality into the entire United States Code").

79. See, e.g., Hasday, Family Law, supra note 19, at 874 (noting "assertions of family law's exclusive localism are typical").

80. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) ("'[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" (quoting In re Burrus, 136 U.S. 586, 593–94 (1890))); Sosna v. Iowa, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.").

Massachusetts case at the district court level.[81] Furthermore, the striking down of DOMA carried with it profound tangible and symbolic benefits for lesbian and gay people in this country.[82] But, as Linda Greenhouse suggests, embracing the categorical family status federalism argument also would have brought along some less favorable consequences.[83]

To be clear, however, acceptance of the family status federalism argument would not have absolutely immunized state marriage bans from federal constitutional challenges.[84] Even when it has authority over a particular issue, a state still must act within constitutional bounds.[85] But, while state bans would not be absolutely immunized from constitutional attack, there are nonetheless some concerns that flow from acceptance of this argument. The concern that is discussed here was foreshadowed by Chief Justice Roberts during oral argument. As Chief Justice Roberts suggested,[86] if Congress categorically lacked the power to define or determine family status,[87] then this would be true both with regard

81. Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010) ("The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.").

82. See, e.g., Ian Thompson, DOMA's Defeat a Clear Victory for Same-Sex Binational Couples, Huffington Post (June 28, 2013 1:01 PM), http://www.huffingtonpost.com/ian-thompson/domas-defeat-a-clear-vict_b_3517400.html (on file with the *Columbia Law Review*) (noting on day *Windsor* decision was released, "immigration judge . . . put a halt to [a same-sex spouse's] scheduled deportation hearing").

83. Greenhouse, supra note 9.

84. See, e.g., Bonauto & Smith, supra note 9 (noting their disagreement with Linda Greenhouse's suggestion that federalism decision in Windsor would "somehow immunize from constitutional challenge those states that have chosen not to extend marriage rights to same-sex couples").

85. Thus, for example, even though it is clear that states have the power (exclusive or not) to devise the rules for entry into marriage, the Supreme Court has made clear that state marriage requirements cannot discriminate on the basis of race. Loving v. Virginia, 388 U.S. 1, 1–2 (1967) (striking down state marriage law as violative of principles of due process and equal protection).

86. See, e.g, Transcript of Oral Argument, supra note 37, at 95–96 (Roberts, C.J.) ("Do you think there would be a [federalism] problem if Congress went the other way . . . [if] Congress said, we're going to recognize same-sex couples—committed same-sex couples—even if the State doesn't, for purposes of Federal law?"); see also id. at 96–97 (Roberts, C.J.) ("With Congress passing a law saying, we are going to adopt a different definition of marriage than those States that don't recognize same-sex marriage. We don't care whether you do as a matter of State law, when it comes to Federal benefits, same-sex marriage will be recognized.").

87. As demonstrated in this piece, the Court did not reach this conclusion. Moreover, I demonstrate elsewhere that this claim is belied by history and practice. Joslin, Family Status, supra note 16.

to federal attempts to *scale back* recognition of state family status,[88] and with regard to federal attempts to *broaden* state family status recognition.[89]

Such a conclusion would limit the ability of the federal government to mitigate discrimination that lesbian, gay, bisexual, and transgender (LGBT) families still face today, even in the wake of DOMA's demise.[90] As advocates and scholars explain, in the absence of section 3 of DOMA, the rights of married same-sex couples to access federal marital benefits are not uniform.[91] Same-sex married spouses who live in states that recognize their marriage likely will be able to access all federal marital benefits to which they are otherwise entitled.[92] By contrast, for same-sex spouses who live in states that do not recognize their marriage, the *Windsor* decision does "*NOT mean . . . that [they] will be eligible for all marriage-based federal benefits*."[93] Instead, under the current state of the law, the significant number of same-sex married couples who live in nonrecognition states[94] likely will be entitled to some federal spousal benefits but not to others.[95] Whether or not they are entitled to a particular federal spousal benefit

88. See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 250 (D. Mass. 2010) (striking down section 3 of DOMA because it impermissibly intruded in "regulation of marital status determinations" which are "attribute[s] of state sovereignty" and are "'truly local' in character").

89. This conclusion is not necessarily true under the unusualness trigger argument, since, under that theory, what ultimately renders the statute unconstitutional is a violation of principles of equal protection. A statute intended to extend greater protection to a vulnerable group likely would not violate principles of equal protection.

90. See, e.g., Douglas NeJaime, Still Two Americas for Same-Sex Couples, Daily Beast (June 27, 2013, 7:45 AM), http://www.thedailybeast.com/articles/2013/06/27/still-two-americas-for-same-sex-couples.html (on file with the *Columbia Law Review*) (noting many same-sex couples continue to face discrimination in states that do not support marriage equality, despite Supreme Court's decision to overturn DOMA).

91. See, e.g., Tara Siegel Bernard, How the Court's Ruling Will Affect Same-Sex Spouses, N.Y. Times (June 26, 2013), http://www.nytimes.com/2013/06/27/your-money/how-the-supreme-court-ruling-will-affect-same-sex-spouses.html (on file with the *Columbia Law Review*) (speculating which federal benefits will be extended to same-sex spouses who live in nonrecognition states).

92. See, e.g., ACLU et al., LGBT Organizations Fact Sheet Series: After DOMA: What It Means for You: The Supreme Court Ruling on the Defense of Marriage Act: What It Means 2 (2013), available at http://www.nclrights.org/site/DocServer/Post-DOMA_General-Overview.pdf (on file with the *Columbia Law Review*) (noting now that *Windsor* decision has gone into effect, "[s]ame-sex couples who are legally married and live in a state that respects their marriage should be eligible virtually right away for the same protections, responsibilities, and access to federal programs afforded to all other married couples").

93. Id. at 1.

94. Press Release, Williams Inst., Supreme Court Rulings Strike Down DOMA and Prevent Enforcement of California's Proposition 8 (June 26, 2013), http://williamsinstitute.law.ucla.edu/press/press-releases/supreme-court-rulings-26-jun-2013/ (on file with the *Columbia Law Review*) (estimating 76,000 married same-sex couples live in states that recognize their marriages and 38,000 married same-sex couples live in states that do not).

95. See Mary L. Bonauto, Op-Ed., The State of Celebration, Advocate (July 2, 2013, 1:30 PM), http://www.advocate.com/commentary/2013/07/02/op-ed-state-celebration (on file with the *Columbia Law Review*) ("For married couples living in a 'nonrecognition' state, there will likely be a patchwork of protections available.").

depends on whether the eligibility rules for that benefit look to the law of the state in which they married—the so-called "state of celebration"—or to the law of their domicile to determine their marital status.[96] As of September 2013, a number of federal agencies have clarified that they will utilize a state of celebration rule.[97] But it is likely that many other agencies will look to the law of the parties' domicile.[98] And, currently, the vast majority of states do not permit same-sex couples to marry and purport to deny recognition of same-sex marriages entered into elsewhere.[99]

Legislators have introduced a bill—the Respect for Marriage Act—which seeks to mitigate the unfairness of this patchwork by proposing the addition of a new definitional provision to the U.S. Code.[100] The new definitional provision would state that a person is considered "married" for *all* federal purposes "if that individual's marriage is valid in the State where the marriage was entered into."[101] In effect, the Act would create a new blanket "place of celebration"

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96. For example, as William Baude points out, eligibility for spousal veterans' benefits and spousal Social Security benefits appear to depend on the law of the state of domicile. William Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 Stan. L. Rev. 1371, 1402 (2012) ("[Spousal] [v]eterans' benefits . . . are awarded 'according to the law of the place where the parties resided . . . when the right to benefits accrued.' Similarly, the Social Security Act provides that marital status determinations will be made by reference to the law of the parties' domicile." (quoting 38 U.S.C. § 103(c) (2006)) (citing 42 U.S.C. § 416(h)(1)(A)(i) (2006))).

97. See, e.g., Rev. Rul. 13-17, 2013-38 I.R.B. 201, 203 ("Consistent with the longstanding position expressed in Revenue Ruling 58-66, the [Internal Revenue] Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile."); Same-Sex Marriages, U.S. Citizenship & Immigration Servs., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD (on file with the *Columbia Law Review*) (last updated Nov. 26, 2013) ("As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.").

98. Benefits that likely will be denied to same-sex spouses who live in nonrecognition states include Social Security spousal benefits. See, e.g., ACLU et al., LGBT Organizations Fact Sheet Series: After DOMA: What It Means for You: Social Security Spousal and Family Protections 3 (2013), available at http://www.nclrights.org/site/DocServer/Post-DOMA_Social-Security.pdf (on file with the *Columbia Law Review*) (noting "[u]nder existing law, the Social Security statute uses the wage earner's 'place of domicile' as the relevant state law for assessing who is a spouse for benefits purposes").

99. Marriage Equality and Other Relationship Recognition Laws, Human Rights Campaign, http://www.hrc.org/files/assets/resources/marriage_equality_laws_072013.pdf (on file with the *Columbia law Review*) (last updated July 1, 2013).

100. The proposed amendment is known as the Respect for Marriage Act of 2013. Respect for Marriage Act of 2013, S. 1236, 113th Cong. (2013); Respect for Marriage Act of 2013, H.R. 2523, 113th Cong. (2013). Similar legislation was proposed in 2011. See, e.g., Lambda Legal, The Respect for Marriage Act of 2011: What Is It and What Will It Do? (2011), available at http://data.lambdalegal.org/publications/downloads/fs_the-respect-for-marriage-act.pdf (on file with the *Columbia Law Review*).

101. S. 1236 § 3; H.R. 2523 § 3.

choice of law rule for assessing a person's marital status for each and every federal benefit. That is, for all federal purposes, an agency would look to the law of the state in which the person married to assess his or her marital status. If the person married elsewhere, the law of the person's home state or domicile therefore would be irrelevant for purposes of federal benefits. So long as the person entered into a valid marriage in some state, the person would be entitled to federal marital benefits even if the person's home state would not recognize the marriage.

The place of celebration rule utilized in the Respect for Marriage Act is consistent with the rule previously applied for purposes of *some* federal benefits. For instance, in the past, immigration officials looked to the law of the state of celebration to determine the validity of the marriage.[102] But the place of celebration rule that the Respect for Marriage Act would implement across all federal benefits is not the way the federal government currently determines whether a person is married for purposes of a range of other federal benefits. That is, for many other federal spousal benefits, the federal government looks to the law of the state of domicile to determine eligibility.[103]

If the Court had embraced the family status federalism theory, one might claim that this new definitional provision is beyond Congress's authority.[104] Of course, even if the Court had accepted the categorical family status federalism theory, it would still be possible to argue that this amendment would be within Congress's proper authority. Specifically, one could argue that the blanket "place of celebration" choice of law rule still leaves the issue of marital status determinations to the states. Whether a person is considered married for purposes of federal benefits depends on whether the person was considered to be in a valid marriage in the state in which they entered the marriage. Thus, the argument continues, the amendment continues to leave the issue of marital status determinations to the states.

That said, by utilizing the state of celebration rule for purposes of all federal benefits, the Respect for Marriage Act would increase the number of people who were considered married for federal purposes, and the amendment would override inconsistent state laws that purport to deny recognition to same-sex

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102. See, e.g., 9 U.S. Dep't of State, Foreign Affairs Manual § 40.1, n.N1.1(c) (May 3, 2013) ("The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls (except as noted . . . [below]). If the law is complied with and the marriage is recognized, then the marriage is deemed to be valid for immigration purposes.").

103. See, e.g., Baude, supra note 96, at 1421 ("What is more, the domicile-based doctrine is consistent with the scattered statutory provisions that govern marital choice of law for veterans' and social security benefits."); see also id. at 1421–22 ("To the extent there are any congressionally imposed guideposts, they point in the direction of domicile.").

104. See, e.g., Lynn D. Wardle, Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution, 58 Drake L. Rev. 951, 984 (2010) (arguing "[i]f the purpose of federalism is to respect the profound state interests of the state most interested in the regulation of domestic relationships . . . the test provided by [the Respect for Marriage Act] . . . circumvents the interests of such a state [by treating] as marriages same-sex unions that [the state] would not").

marriages.[105] And, although I have argued elsewhere that this understanding is anachronistic,[106] the domicile state is the state that was historically understood to have the greatest interest in any particular marriage.[107] In this respect, one certainly could at least argue that adopting a place of celebration rule for purposes of all federal benefits "undermines the [domicile] States' sovereign authority to define, regulate, and support family relationships."[108] While the Respect for Marriage Act might be challenged based on the categorical family status federalism theory, ultimately this attack would be unavailing. First, of course, the Court has yet to embrace the categorical family status federalism theory and seems unwilling to do so. Moreover, even if accepted, while the place of celebration rule is not currently used for purposes of *all* federal benefits, it is and long has been used for purposes of many federal benefits, including a number of really critical ones like immigration benefits[109] and many benefits for active military members.[110] Moreover, the law still looks to and defers to state law—it just directs to which state law the federal government should defer.

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105. See, e.g., Bonauto, supra note 95 (noting in wake of DOMA, same-sex married couples living in nonrecognition states will continue to be denied many federal marital benefits, and urging enactment of Respect for Marriage Act, which would "establish 'certainty' by adopting a place of celebration rule").

106. See, e.g., Courtney G. Joslin, Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts, 91 B.U. L. Rev. 1669, 1697–711 (2011) (presenting analysis of and arguments against domicile-based jurisdictional rule for divorce); see also Susan Frelich Appleton, Destination Weddings: Domicile, Public Policy, and Inequality in Family Law, 2014 Mich. St. L. Rev. (forthcoming) (on file with the *Columbia Law Review*) (pondering whether domicile's grip on family law matters is lessening). For a more comprehensive analysis of the role of domicile in family law matters, see generally Susan Frelich Appleton, Leaving Home? Domicile, Family, and Gender, 47 U.C. Davis L. Rev. (forthcoming 2014) (on file with the *Columbia Law Review*).

107. For example, the Supreme Court has observed:

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.

Williams v. North Carolina (*Williams I*), 317 U.S. 287, 298–99 (1942).

108. Brief of Federalism Scholars, supra note 18, at 4.

109. See, e.g., Zeleniak, 2013 WL 3781298, at *2 (B.I.A. July 17, 2013) ("The issue of the validity of a marriage under State law [for purposes of a petition for a family-based visa] is generally governed by the law of the place of celebration of the marriage." (citing Lovo-Lara, 23 I. & N. Dec. 746, 748 (B.I.A. 2005))).

110. ACLU et al., LGBT Organizations Fact Sheet Series: After DOMA: What It Means for You: Military Spousal Benefits 1 (2013), available at http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_post-doma-military-spouses-2013.pdf (on file with the *Columbia Law Review*) ("Generally, the military will consider a marriage valid if it was valid in the state where the marriage took place.").

Some scholars have urged the federal government to go even further than the Respect for Marriage Act sweeps. Professor Michael Dorf, for example, suggests that the federal government could "take the position that the federal term 'marriage' and its variants applies [sic] across the board [to include not only marriages but also] . . . state-recognized same-sex civil unions and domestic partnerships that confer all or nearly all of the state law benefits of marriage."[111] A bill pending before Congress offers a more limited solution, recognizing alternative statuses for purposes of one individual federal benefit. The Social Security Equality Act of 2013[112] would extend what had previously been a marital right—the right to spousal social security benefits—to a person deemed to be in a "permanent partnership."[113] The bill would define "permanent partnership" to mean relationships that are treated as "legally valid" by the applicant's state of domicile, but which are not marriages.[114]

Relying on the categorical family status federal claim, one could try to argue that such a proposal exceeds the federal government's authority and impermissibly intrudes in a matter that is "truly local."[115] The states that allow same-sex couples the right only to enter into some *alternative legal status*, the argument might continue, made conscious decisions not to allow same-sex couples to marry. Under this theory, treating couples in domestic partnerships or civil unions as married for purposes of federal benefits would impermissibly intrude into the state's considered decision—a decision that the states alone have power to make. Again, even under a categorical family status federalism regime, there are arguments to the contrary that could be made. One could assert that

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111. Mike Dorf, If DOMA Falls, Will State Civil Unions Be Treated as Federal Marriages?, Dorf on Law (June 3, 2013, 7:00 AM), http://www.dorfonlaw.org/2013/06/if-doma-falls-will-state-civil-unions.html (on file with the *Columbia Law Review*).

112. H.R. 3050, 113th Cong. (2013). A similar status is also utilized in another pending bill, the Uniting American Families Act of 2013 (UAFA), S. 296, 113th Cong. (2013); H.R. 519, 113th Cong. (2013). The UAFA would extend what had previously been a marital right—the right of spousal sponsorship for immigration protections—to a "permanent partner."

113. H.R. 3050 § 2. Currently the bill limits this status to "an arrangement between 2 individuals of the same gender," id., but one could draft a similar bill that would cover different-sex unmarried couples as well in order to address the needs of all unmarried couples.

114. Id. Among other requirements, to be in a "permanent partnership" within the meaning of the bill, the parties to the relationship must be in a "committed, intimate arrangement," "have both attained 18 years of age," be in a relationship "which has been recognized and certified as legally valid by the State of domicile of the applicant," and be "unable to contract with each other a marriage cognizable under this title." Id.

115. See, e.g., Mike Dorf, The Federalism Argument that Should Have Been Made in the DOMA Case, Dorf on Law (Mar. 28, 2013, 12:55 AM), http://www.dorfonlaw.org/2013/03/the-federalism-argument-that-should.html (on file with the *Columbia Law Review*) ("If there is a persuasive freestanding federalism objection to DOMA, then that same objection appears to knock out [such a policy]."); see also Greenhouse, supra note 9 (arguing acceptance of categorical federalism argument "would snatch away the promise for those living [in nonrecognition states], particularly if the decision was based not only on the asserted absence of federal authority but on exaggerated notions of state sovereignty anchored in the Tea Party's favorite constitutional amendment, the 10th").

such a proposal honors the states' decisions to extend the full range of rights and responsibilities to same-sex couples who enter into these relationships. All the federal government would be doing is extending the same rights and obligations to same-sex partners in these legal statuses.[116] But while there are arguments to be made on both sides, what is clear is that these approaches would certainly be vulnerable to attack as being beyond the scope of Congress's power under the categorical family status federalism argument.[117]

Lesbian and gay advocates thus dodged a bullet when the Court declined to embrace this claim in *Windsor*. And it is not just lesbian and gay couples who would have been negatively affected. If the Court had accepted the argument, it also might have limited the ability of the federal government to extend protections to the burgeoning number of unmarried different-sex couples in the United States. As we know from the same-sex marriage litigation, married spouses are entitled to hundreds of benefits and protections that are not extended to unmarried partners.[118] Using marriage as a prerequisite to important protections disproportionately and negatively affects lesbian and gay couples who, until recently, could not marry anywhere in the United States.[119] But as Professor Nancy Polikoff explains, "[T]he injustice same-sex couples suffer [as a result of marriage-based rules] is not unique."[120] Using marriage as a prerequisite also negatively impacts the large and ever growing number of different-sex unmarried couples. In 1970, there were only about a half a million unmarried couples.[121] By 2000, the number of unmarried couples in the United States had increased ten-fold, to almost 5.5 million.[122] Moreover, cohabitation rates are increasing more quickly within certain demographic groups.

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116. Interestingly, the Social Security Equality Act of 2013 contains a provision in it stating the following:

> In prescribing such regulations [to implement the legislation], the Commissioner shall take into account the laws of the State of domicile of an applicant for benefits under this title so as to ensure that such provisions, together with the other provisions of this title as applied in accordance with this subsection, are appropriately coordinated with each other and with the laws of such State.

H.R. 3050, 113th Cong. § 2(a) (2013).

117. Again, this is assuming the Court had accepted the argument. As explained, the Court did not do so.

118. See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that 'hundreds of statutes' are related to marriage and to marital benefits.").

119. In May 2004, Massachusetts became the first state in the United States to permit same-sex couples to marry. Pam Belluck & Warren St. John, With Festive Mood, Gay Weddings Begin in Massachusetts, N.Y. Times (May 17, 2004), http://www.nytimes.com/2004/05/17/national/17CND-GAYS.html (on file with the *Columbia Law Review*).

120. Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law 123 (2008).

121. Ann Laquer Estin, Golden Anniversary Reflections: Changes in Marriage After Fifty Years, 42 Fam. L.Q. 333, 336 n.21 (2008).

122. Id. at 336.

"Cohabitation remains more common among those with less education and for whom economic resources are more constrained . . . ."[123] And there is a growing marriage gap based on race. "Blacks (32%) are much less likely than whites (56%) to be married, and this gap has increased significantly over time."[124] Thus, the reality is that couples with the fewest resources are more likely to be unmarried and therefore denied critical benefits that are tied to marital status.

As more and more couples are excluded from critical benefits—state and federal—that are intended to help people in times of family crisis, there has been a growing call to reassess the use of marriage as a gatekeeper to many of these protections. Nancy Polikoff is one of the commentators leading this charge. It is possible, Professor Polikoff argues, "to envision family law and policy without marriage being the rigid dividing line between who is in and who is out."[125] But, if the federal government sought to address Professor Polikoff's concerns by jettisoning its reliance on marriage as a prerequisite for important federal benefits, a new eligibility standard or standards would have to be adopted. Would these new standards be new family statuses? And, if so, under a categorical family status federalism regime, would Congress have the authority to create and implement these new family statuses?

An example of a "new family status" that Congress might try to implement as a means of moving away from a marriage-only eligibility rule is the standard utilized in the Uniting American Families Act of 2013 (UAFA).[126] This bill would extend what had previously been a marital right—the right to sponsor a spouse for immigration protections—to a "permanent partner."[127] Unlike the definition of permanent partnership included in the Social Security Equality Act

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123. Judith A. Seltzer, Families Formed Outside of Marriage, 62 J. Marriage & Fam. 1247, 1250 (2000).

124. Pew Research Ctr., The Decline of Marriage and Rise of New Families 2 (2010), available at http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf (on file with the *Columbia Law Review*); see also Alicia Brokars Kelly, Navigating Gender in Modern Intimate Partnership Law, 14 J.L. & Fam. Stud. 1, 21 (2012) (noting cohabitation rates are higher "among African Americans and Hispanics than non-Hispanic Whites").

125. Nancy D. Polikoff, Law That Values All Families: Beyond (Straight and Gay) Marriage, 22 J. Am. Acad. Matrimonial Law. 85, 90 (2009).

126. S. 296, 113th Cong. (2013); H.R. 519, 113th Cong. (2013).

127. The bill defines "permanent partner":

> (53) The term "permanent partner" means an individual 18 years of age or older who—
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> (A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;
>
> (B) is financially interdependent with that other individual;
>
> (C) is not married to or in a permanent partnership with anyone other than that other individual;
>
> (D) is unable to contract with that other individual a marriage cognizable under this Act; and
>
> (E) is not a first-, second-, or third-degree blood relation of that other individual.

H.R. 519, 113th Cong. § 2.

of 2013, however, under the UAFA, the parties do not need to be in any state-recognized relationship to qualify. Instead, the UAFA creates an entirely independent federal status that does not turn on the existence of a state-recognized family status.

Going beyond access to individual federal benefits, Professor Deborah Widiss advocates for the creation of an independent federal relationship registration system[128] that would entitle registered partners to "the full panoply of federal marriage rights."[129] Like the UAFA, under this proposal, couples would not need to be married or in any other state-provided or recognized family status to register.

If the Supreme Court had adopted the categorical family status federalism argument in *Windsor*, would Congress have the authority to adopt and implement a new family status to replace marriage? Or, again, had the Court embraced the categorical family status federalism argument, would this decision to extend what had been a marital right to a couple whom the states had decided to preclude from marriage impermissibly intrude into a "truly local" issue that is a core aspect of state sovereignty? Again, no one knows for sure, but an independent federal registration system certainly would be vulnerable had the Court accepted the claim that "the power to define the basic status relationships of parent, child, and spouse [is] reserved to the States."[130]

C. *Congressional Action After* Windsor

While not ultimately doomed, some post-*Windsor* proposals may have been vulnerable if the Court had embraced the categorical family status federalism argument. Are these proposals vulnerable under the Court's actual opinion in *Windsor*? The short answer is no, they are not. Even if one thinks it is accurate to describe the *Windsor* opinion as turning on federalism concerns,[131] at most, an unusual deviation from the historical allocation of responsibility between the states and the federal government is simply a basis for ratcheting up the level of scrutiny for purposes of the Court's equal protection inquiry; this deviation alone is not an independent basis for striking down a law. Under *Windsor*, to be unconstitutional, the law must violate principles of equal protection. None of the proposals described above fails under this standard.

First, a number of the proposals described above may not even be viewed as being unusual at all. For example, although the federal government currently does not *always* use a place of celebration rule for determining eligibility for federal spousal benefits, that rule is currently utilized for a significant number of federal benefits. So the place of celebration rule itself is not uncommon. Thus,

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128. Deborah A. Widiss, Leveling Up After DOMA, 89 Ind. L.J. (forthcoming 2014) (on file with the *Columbia Law Review*).

129. Id. (manuscript at 11).

130. Brief of Federalism Scholars, supra note 18, at 4.

131. As described above, it is inaccurate to describe *Windsor* as a federalism-based decision. See supra notes 66–78 and accompanying text.

one could argue that the Respect for Marriage Act would not even trigger more careful equal protection scrutiny.

One could make a similar argument about the Social Security Equality Act of 2013.[132] The Act would consider persons to be married for purposes of one federal benefit—Social Security benefits—even though no states consider them to be in valid marriages. As Justice Kennedy pointed out in the *Windsor* opinion, this is not unheard of.[133] Currently, for purposes of the Supplemental Social Security Income Program, Congress considers a group of people to be married even though no state considers them to be married—specifically, people who complied with the requirements of common law marriage even if no state considers them to be in a valid common law marriage.[134]

Moreover, even for the proposals that might be characterized as an unusual departure from the historical allocation of power between the states and the federal government with respect to family status, again, that unusualness is not a basis for finding the law unconstitutional. Under the Court's decision in *Windsor*, that unusualness simply triggers more careful equal protection analysis. Thus, even if the creation of a federal domestic partnership registration system *might* be considered sufficiently unusual,[135] this proposal would not violate principles of equal protection even under a more careful degree of review. As Justice Kennedy explained in *Windsor*, the problem with DOMA was that it sought to strip members of a group of equal dignity and to mark members of that group as less worthy. A federal domestic partner registration system would not strip anyone of dignity, and it would not single out members of any group and mark them as being less worthy. Rather, the purpose and effect of such a registration system would be to extend critical benefits to people who are in need of those protections but who currently are not receiving those protections. Thus, the purpose of such a system would be just the opposite. That is, rather than seeking to "write[] inequality into the entire United State Code,"[136] such a registry system would seek to further equality, liberty, and dignity.

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132. H.R. 3050, 113th Cong. (2013).

133. United States v. Windsor, No. 12-307, 2013 U.S. LEXIS 4921, at *31–*32 (U.S. June 26, 2013).

134. 42 U.S.C. § 1382c(d)(2) (2006) ("[I]f a man and woman are found to be holding themselves out to the community in which they reside as husband and wife, they shall so be considered for the purposes of this subchapter . . . .").

135. In a companion piece, I demonstrate that recognizing family statuses even when they are not recognized by state law is actually not that unusual. Joslin, Family Status, supra note 16. To the contrary, many federal statutes do just that and such federal provisions are not new, but rather some have been in place for decades.

136. *Windsor*, 2013 U.S. LEXIS 4921, at *43.

CONCLUSION

Those who care about families dodged a bullet in *Windsor*. During oral argument, it appeared that at least Justice Kennedy was on the brink of accepting the categorical family status federalism argument. Fortunately for same-sex couples and for many others, the Court declined to reach the issue in *Windsor*.

While acceptance of the categorical family status federalism argument would have brought along the important short-term benefit of invalidating section 3 of DOMA, the long-term consequences might have been less positive. Its acceptance might have limited Congress's ability to assist not only same-sex couples who continue to face discrimination even in the face of DOMA's demise, but also other families who remain inadequately protected under state law.

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