AMERICAN CONSTITUTIONALISM
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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Personal Freedom and Public Morality/Same-Sex Marriage

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Windsor v. U.S., 699 F. 3d 169 (2nd Cir. 2012)

Edith Windsor and Thea Clara Spyer were a same-sex couple that in 2007 married in Canada. Shortly thereafter, they moved to New York, where Spyer died in 2009. Windsor was subsequently informed that she could not take the spousal deduction for federal estate taxes because, under Section 3 of the Defense of Marriage Act (DOMA), the Internal Revenue Service did not regard her marriage with Spyer as valid. (Both federal courts that heard the case and all three judges agreed that New York treated the marriage as valid.) The relevant provision in DOMA stated, "In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife." Windsor filed suit in federal court, claiming that Section 3 of DOMA violated the due process clause of the Fifth Amendment, which has been held to require the federal government to adhere to the same standards in most instances as states must under the equal protection clause of the Fourteenth Amendment. Shortly after the suit was filed, the Obama administration endorsed Windsor's position, refused to defend against her lawsuit, and filed an amicus brief asking the court to declare Section 3 unconstitutional. The defense was taken up by the Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives. The local federal district court declared DOMA unconstitutional. BLAG, representing the United States, appealed to the Court of Appeals for the Second Circuit.

The Court of Appeals by a 2–1 vote declared Section 3 of DOMA unconstitutional. Chief Judge Jacobs's majority opinion ruled that no justification of that law met the intermediate scrutiny standard. Why did the chief judge apply intermediate scrutiny? Why did the dissent disagree? Who has the better argument on the appropriate standard? How did the United States justify DOMA? Why did the chief judge claim those justifications failed to satisfy intermediate scrutiny? Why did the dissent claim they satisfied rational scrutiny? What level of scrutiny, if any, do those justifications satisfy?

In December 2012, the Supreme Court of the United States granted a writ of certiorari in Windsor. *The justices also requested argument on whether BLAG had standing to defend the lawsuit, given that the executive branch of the government was refusing to defend Section 3. What should be the appropriate judicial response when the executive branch refuses to defend a federal law on the ground that the president believes the law unconstitutional? Should the Court appoint a special prosecutor or permit Congress to defend the law? Should the Court be as deferential to elected officials when the president maintains the law is unconstitutional? What does deference mean in this context?*

DENNIS JACOBS, Chief Judge:

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In *Baker v. Nelson* (1972), an appeal from a Minnesota Supreme Court decision finding no right to same-sex marriage, the Supreme Court issued a summary dismissal "for want of a substantial federal question." The Minnesota Supreme Court had held that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry." According to Bipartisan Legal Advisory Group (BLAG), *Baker* compels the inference that Congress may prohibit same-sex marriage in the same way under federal law without offending the Equal Protection Clause. We disagree.

. . . . The question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker:* whether same-sex marriage may be constitutionally restricted by the *states.* After all, Windsor and Spyer were actually married in this case, at least in the eye of New York, where they lived. Other courts have likewise concluded that *Baker* does not control equal protection review of DOMA for these reasons.

Even if *Baker* might have had resonance for Windsor's case in 1971, it does not today. . . . In the forty years after *Baker,* there have been manifold changes to the Supreme Court's equal protection jurisprudence.

When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. *Romer v. Evans* (1996). And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence v. Texas* (2003). These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.

. . . [W]hen it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government. Regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States." . . . Therefore, our heightened scrutiny analysis of DOMA's marital classification under federal law is distinct from the analysis necessary to determine whether the marital classification of a state would survive such scrutiny.

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[W]e conclude that review of Section 3 of DOMA requires heightened scrutiny. The Supreme Court uses certain factors to decide whether a new classification qualifies as a quasi-suspect class. They include: A) whether the class has been historically "subjected to discrimination;" B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society;" C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless." Immutability and lack of political power are not strictly necessary factors to identify a suspect class. Nevertheless, immutability and political power are indicative, and we consider them here. In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.

It is easy to conclude that homosexuals have suffered a history of discrimination. . . . Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court. *See Bowers v. Hardwick* (1986).

BLAG argues that discrimination against homosexuals differs from that against racial minorities and women because "homosexuals as a class have never been politically disenfranchised." True, but the difference is not decisive. Citizens born out of wedlock have never been inhibited in voting; yet the Supreme Court has applied intermediate scrutiny in cases of illegitimacy. Second, BLAG argues that, unlike protected classes, homosexuals have not "suffered discrimination for longer than history has been recorded." But whether such discrimination existed in Babylon is neither here nor there. BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s. Ninety years of discrimination is entirely sufficient to document a "history of discrimination." *See Pedersen,* ––– F.Supp.2d at ––––, 2012 WL 3113883, at *21 (summarizing that "the majority of cases which have meaningfully considered the question [have] likewise held that homosexuals as a class have experienced a long history of discrimination").

Also easy to decide in this case is whether the class characteristic "frequently bears [a] relation to ability to perform or contribute to society." . . . There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance.

We conclude that homosexuality is a sufficiently discernible characteristic to define a discrete minority class. This consideration is often couched in terms of "immutability." . . . But the test is broader: whether there are "obvious, immutable, *or* distinguishing characteristics that define . . . a discrete group." Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest.

Thus a person of illegitimate birth may keep that status private, and ensure that no outward sign discloses the status in social settings or in the workplace, or on the subway. But when such a person applies for Social Security benefits on the death of a parent (for example), the illegitimate status becomes manifest. The characteristic is necessarily revealed in order to exercise a legal right. Similarly, sexual preference is necessarily disclosed when two persons of the same sex apply for a marriage license (as they are legally permitted to do in New York), or when a surviving spouse of a same-sex marriage seeks the benefit of the spousal deduction (as Windsor does here).

Finally, we consider whether homosexuals are a politically powerless minority. . . . The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination. . . .

There are parallels between the status of women at the time of *Frontiero v. Richardson* (1973) and homosexuals today: their position "has improved markedly in recent decades," but they still "face pervasive, although at times more subtle, discrimination . . . in the political arena." It is difficult to say whether homosexuals are "under-represented" in positions of power and authority without knowing their number relative to the heterosexual population. But it is safe to say that the seemingly small number of acknowledged homosexuals so situated is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private—which, for our purposes, amounts to much the same thing. Moreover, the same considerations can be expected to suppress some degree of political activity by inhibiting the kind of open association that advances political agendas.

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Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment "is not sufficient to require 'our most exacting scrutiny.'" . . .

To withstand intermediate scrutiny, a classification must be "substantially related to an important government interest." "Substantially related" means that the explanation must be "'exceedingly persuasive.'" *United States v. Virginia* (1996). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."

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Statements in the Congressional Record express an intent to enforce uniform eligibility for federal marital benefits by insuring that same-sex couples receive—or lose—the same federal benefits across all states. However, the emphasis on uniformity is suspicious because Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations.

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To the extent that there has ever been "uniform" or "consistent" rule in federal law concerning marriage, it is that marriage is "a virtually exclusive province of the States." As the Supreme Court has emphasized, "the states, at the time of the adoption of the Constitution, possessed *full power* over the subject of marriage and divorce. . . . [T]he Constitution delegated *no authority* to the Government of the United States on the subject of marriage and divorce." DOMA was therefore an unprecedented intrusion "into an area of traditional state regulation." . . .

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The uniformity rationale is further undermined by inefficiencies that it creates. As a district court in this Circuit found, it was simpler—and more consistent—for the federal government to ask whether a couple was married under the law of the state of domicile, rather than adding "an additional criterion, requiring the federal government to identify and exclude all same-sex marital unions from federal recognition." . . .

. . . . Fiscal prudence is undoubtedly an important government interest. . . . But the Supreme Court has held that "[t]he saving of welfare costs cannot justify an otherwise invidious classification." As the district court observed, "excluding any arbitrarily chosen group of individuals from a government program conserves government resources." . . .

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Furthermore, DOMA is so broad, touching more than a thousand federal laws, that it is not substantially related to fiscal matters. As amicus Citizens for Responsibility and Ethics in Washington demonstrates, DOMA impairs a number of federal laws (involving bankruptcy and conflict-of-interest) that have nothing to do with the public fisc.

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Congress undertook to justify DOMA as a measure for preserving traditional marriage as an institution. . . . Similar appeals to tradition were made and rejected in litigation concerning anti-sodomy laws. *See Lawrence v. Texas* (2003). Even if preserving tradition were in itself an important goal, DOMA is not a means to achieve it. As the district court found: "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman."

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Finally, BLAG presents three related reasons why DOMA advances the goals of "responsible childrearing": DOMA subsidizes procreation because . . . only opposite-sex couples can procreate "naturally"; DOMA subsidizes biological parenting (for more or less the same reason); and DOMA facilitates the optimal parenting arrangement of a mother and a father. We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it.

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[Claims that DOMA promotes "responsible childrearing"] have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does not provide any incremental reason for opposite-sex couples to engage in "responsible procreation." Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before. . . .

DOMA's classification of same-sex spouses was not substantially related to an important government interest. Accordingly, we hold that Section 3 of DOMA violates equal protection and is therefore unconstitutional.

STRAUB, CIRCUIT JUDGE, dissenting in part and concurring in part:

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The same-sex couple in *Baker v. Nelson* (1972) argued that Minnesota's exclusion of same-sex couples from the institution of civil marriage violated the Equal Protection Clause because it was discrimination not rationally related to any legitimate governmental interest. Forty years may have passed, but Windsor makes the same claim today. . . . Whatever differences exist between Windsor's claim and those advanced in *Baker,* they are insignificant compared to the central fact that both cases present equal protection challenges to laws prohibiting the recognition of any marriage entered into by two persons of the same sex. Thus, any distinctions do not render DOMA sufficiently different from Minnesota's marriage law at the time of *Baker* such that it can be said the issues in this case were not before and decided by the Supreme Court. The relevant facts of this case are substantially similar to those of *Baker,* which necessarily decided that a state law defining marriage as a union between a man and

woman does not violate the Equal Protection Clause. *Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples under the Equal Protection Clause and thus remains binding on this Court, given that the equal protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment guarantee.

Since *Baker* holds that states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection. . . .

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In *Romer v. Evans* (1996), the Supreme Court applied rational basis scrutiny to laws that discriminated on the basis of sexual orientation. In *Lawrence v. Texas* (2003), the Supreme Court expressly stated that "[t]he present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Consequently, there are no doctrinal changes in Supreme Court jurisprudence implying that *Baker* is no longer binding authority and *Baker*'s effect therefore hinges on whether the issues in this case were presented to and necessarily decided by the Supreme Court.

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In enacting DOMA, Congress sought to explicitly recognize, for federal purposes, the biological component of the marital relationship and the legal responsibility of rearing the offspring of such a union. Numerous state high courts have accepted this as a rational basis for excluding same-sex couples, even legally recognized same-sex parents, from the institution of civil marriage. DOMA advances the governmental interest in connecting marriage to biological procreation by excluding certain couples who cannot procreate simply by joinder of their different sexual being from the federal benefits of marital status.

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The interest in recognizing the connections between marriage and childrearing by biological parents can be broken down into several components. First, DOMA expresses Congressional recognition that "responsible begetting and rearing of new generations is of fundamental importance to civil society." Because the state has an interest in children, the state is thus also interested in preventing "irresponsible procreation," a phenomenon implicated exclusively by heterosexuals. Because of these legitimate interests, reserving federal marriage rights to opposite-sex couples "protect[s] civil society," because without the inducement of marriage, opposite-sex couples would accidentally procreate, giving rise to unstable and unhealthy families. Marriage thus plays the important role of "channel[ing opposite-sex] sexual desires" which, in the absence of marriage, would result in unstable relationships, which have been documented to be harmful to children.

As stated by BLAG, "[m]arriage attempts to promote permanence and stability, which are vitally important to the welfare of the children of the marriage." That is, marriage works to combat the risk of instability which is characteristic of inherently procreative opposite-sex relationships, but absent from same-sex relationships. DOMA advances this interest, in that the state only needs to provide incentives to opposite-sex couples in the form of marriage, because only opposite-sex couples have unintended, unplanned, unwanted children. Same-sex couples, by contrast, reproduce only "deliberately choosing to do so and by devoting a serious investment of time, attention, and resources."

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Another component of the procreation and childrearing rationale for restricting federal rights to opposite-sex marriage is the Congressional desire to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide. Thus, BLAG contends that DOMA "offer[s] special encouragement for relationships that result in mothers and fathers jointly raising their biological children," an interest which "simply does not apply to same-sex couples." DOMA accomplishes this encouragement by limiting federal marriage rights to opposite-sex couples.

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The subject of domestic relations, including marriage, has been the province of the states. But DOMA does not change this, and does nothing to strip the status that states confer on couples they

marry. Instead, DOMA limits the *federal* benefits, rights, privileges, and responsibilities of marriage to a subset of those deemed married under state law.

That the federal government often defers to state determinations regarding marriage does not obligate it to do so. While a state may be perfectly disinterested in prying into the reasons a couple marries, the federal government remains deeply and properly concerned with the reason(s) why a couple weds.

For example, when people marry for immigration purposes, the federal government may validly deem the marriage "fraudulent," even though it remains valid under state law. Tellingly, Windsor does not argue that federal Immigration and Customs Enforcement interferes with traditional state functions when it leaves states free to recognize, for their own purposes, any marriage they like but refuses to grant legal residency to immigrants it believes married only to secure the benefits of marriage.

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Section 3 of DOMA was enacted as the debate regarding marriage equality was just beginning in the states. At that time, no state had actually permitted same-sex couples to marry. In the intervening years, six states and the District of Columbia have enacted statutes or issued court decisions that permit same-sex marriage. On the other hand, thirty states have amended their founding documents by constitutional amendment to prohibit same-sex marriage, and eleven more states have enacted statutes to the same effect. Given the evolving nature of this issue, Congress was entitled to maintain the status quo pending further developments. Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of this debate in each state, with the meanings of those terms under federal law changing with any change in a given state. As Windsor rightly notes, prior to DOMA, a state's authorization of same-sex marriage had numerous implications for federal laws to the extent those laws were construed to incorporate state-law definitions of marriage. In order to avoid federal implications of state-law developments in the area of marriage, Congress, by enacting DOMA, reasonably froze federal benefits policy as it existed in 1996 with respect to same-sex marriage.

The federal government can legitimately limit the national impact of state-level policy development. Doing so facilitates the ability of the states to serve as laboratories of policy development. As the Massachusetts Supreme Court stated when it held that the Massachusetts state constitution required allowing same-sex couples to marry, "[t]he genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that . . . each State is free to address difficult issues of individual liberty in . . . its own" manner.

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I conclude, therefore, that it was rational for Congress to prefer uniform substantive eligibility criteria for federal marital benefits for same-sex couples over "uniform" deference to varying state criteria. Such a goal may be an exception to Congress's general deference to the states in the area of marriage (even in the face of contentious state-level variation) but this in no way makes the legislative classification employed in pursuit of uniformity irrational in light of the tremendous deference we afford acts of Congress under rational basis review. When, as here, an issue involves policy choices, the Supreme Court has cautioned that "the appropriate forum for their resolution in a democracy is the legislature." DOMA rationally serves the legitimate government interest in maintaining the status quo of the definition of marriage pending evolution of the issue in the states.

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The Supreme Court has reserved heightened scrutiny for a small number of subject classifications—principally race, alienage, nationality, sex, and illegitimacy. Heightened scrutiny attaches in recognition that these traits have been used to impose, and are therefore closely associated with, social inequality. Therefore, government conduct that employs these classifications is suspect and must have more than a legitimate or merely permissible justification.

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Until the majority's opinion, DOMA had never been held by the Supreme Court or any Circuit Court to involve a suspect or quasi-suspect classification. Indeed, in light of the Supreme Court's reluctance to apply heightened scrutiny to new categories of discrimination, and in consideration of the fact that it declined to do so in *Romer v. Evans* (1996), eleven other circuits have also not taken this step. . .

. Significantly, numerous Circuit Courts of Appeals decisions declining to extend heightened scrutiny to sexual orientation discrimination post-date both *Romer v. Evans* and *Lawrence v. Texas*. . . .

Therefore, I would join these eleven circuits, driven not only by a reluctance to do that which the Supreme Court itself has not undertaken when given the chance, but also out of routine respect for extant precedent. Subjecting the federal definition of marriage to heightened scrutiny would defy or, at least, call into question the continued validity of *Baker,* which we are not empowered to do. *Baker* involved a law that prohibited same-sex marriage, and thus discriminated on the basis of sexual orientation. Holding that sexual orientation merits heightened scrutiny would be substantively inconsistent with *Baker* since (1) any legislative action faces a high likelihood of invalidation under heightened scrutiny, and (2) it would be curious to apply heightened scrutiny to a form of discrimination that does not raise a substantial federal question of constitutional law.

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Whether connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue is not for the courts to decide, but rather an issue for the American people and their elected representatives to settle through the democratic process. Courts should not intervene where there is a robust political debate because doing so poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate. Courts should not entertain claims like those advanced here, as we can intervene in this robust debate only to cut it short.