

Sexual Orientation, Gender Identity, and the Constitution

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Chapter 2: Procedural Obstacles to Adjudication on the Merits

Insert the following on page 65, in place of *Perry v. Brown*:

Hollingsworth v. Perry 2013 WL 3196927 (2013)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

....

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.”

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California’s Governor, attorney general, and various other state and local officials responsible for enforcing California’s marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners—the official proponents of the initiative—to intervene to defend it. After a 12–day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and “directing the official defendants that all persons under their control or supervision” shall not enforce it.

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address “why this appeal should not be dismissed for lack of Article III standing.” After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court:

“Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.”

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative’s validity, the court concluded that “[i]n a postelection challenge to a voter-

approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, “has standing to defend the constitutionality of its [laws],” and States have the “prerogative, as independent sovereigns, to decide for themselves who may assert their interests.”

On the merits, the Ninth Circuit affirmed the District Court.... We granted certiorari to review that determination, and directed that the parties also brief and argue “Whether petitioners have standing under Article III, § 2, of the Constitution in this case.”

II

Article III of the Constitution confines the judicial power of federal courts to deciding actual “Cases” or “Controversies.” § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so....

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an “actual controversy” persist throughout all stages of litigation. That means that standing “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). We therefore must decide whether petitioners had standing to appeal the District Court’s order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain “official sanction” from the State, which was unavailable to them given the declaration in Proposition 8 that “marriage” in California is solely between a man and a woman.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a “personal and individual way.” *Defenders of Wildlife, supra*, at 560, n. 1. He must possess a “direct stake in the outcome” of the case. *Arizonans for Official English, supra*, at 64. Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a “generalized grievance,” no matter how sincere, is insufficient to confer standing. A litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Defenders of Wildlife, supra*, at 573–574.

Petitioners argue that the California Constitution and its election laws give them a “‘unique,’ ‘special,’ and ‘distinct’ role in the initiative process—one ‘involving both authority and responsibilities that differ from other supporters of the measure.’” True enough—but only when it comes to the process of enacting the law....

But once Proposition 8 was approved by the voters, the measure became “a duly enacted constitutional amendment or statute.” Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. They therefore have no “personal stake” in defending its enforcement that is distinguishable from the general interest of every citizen of California.

Article III standing “is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests.’” *Diamond*, 476 U.S., at 62. No matter how deeply committed petitioners may be to upholding Proposition 8 or how “zealous [their] advocacy,” that is not a “particularized” interest sufficient to create a case or controversy under Article III.

III

A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if *they* have no cognizable interest in appealing the District Court's judgment, the State of California does, and they may assert that interest on the State's behalf. It is, however, a “fundamental restriction on our authority” that “[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*, 499 U.S. 400, 410 (1991). There are “certain, limited exceptions” to that rule. But even when we have allowed litigants to assert the interests of others, the litigants themselves still “must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.” *Id.*, at 411....

B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are “authorized under California law to appear and assert the state's interest” in the validity of Proposition 8.... As petitioners put it, they “need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U.S. 72 (1987).”

In *Karcher*, we held that two New Jersey state legislators—Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio—could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. “Since the New Jersey Legislature had authority under state law to represent the State’s interests in both the District Court and the Court of Appeals,” we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature’s behalf.

Far from supporting petitioners’ standing, however, *Karcher* is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State has a cognizable interest “in the continued enforceability” of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State’s presiding legislative officers in *Karcher*.

What is significant about *Karcher* is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President, but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, “since they no longer hold those offices, they lack authority to pursue this appeal.”

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties....

C

Both petitioners and respondents seek support from dicta in *Arizonans for Official English v. Arizona*. The plaintiff in *Arizonans for Official English* filed a constitutional challenge to an Arizona ballot initiative declaring English “the official language of the State of Arizona.” After the District Court declared the initiative unconstitutional, Arizona’s Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative—the Arizonans for Official English Committee—sought to defend the measure in the Ninth Circuit. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the Committee was “qualified to defend [the initiative] on appeal,” and affirmed the District Court.

Before finding the case mooted by other events, this Court expressed “grave doubts” about the Ninth Circuit’s standing analysis.... We recognized that a legislator authorized by state law to represent the State’s interest may satisfy standing requirements, as in *Karcher*, but noted that the Arizona committee and its members were “not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”

Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act “as agents of the people’ of California.” But that Court never described petitioners as “agents of the people,” or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had “the authority to assert the State’s interest in the initiative’s validity.” All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This “does not mean that the proponents become de facto public officials”; the authority they enjoy is “simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state’s interest in the validity of the initiative measure.” That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—“formal” or otherwise.... [T]he most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. “An essential element of agency is the principal's right to control the agent’s actions.” 1 Restatement (Third) of Agency § 1.01, Comment *f* (2005) (hereinafter Restatement). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals—or elected at all. No provision provides for their removal....

“If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal.” 1 Restatement § 1.01, Comment *e*. But petitioners owe nothing of the sort to the people of California. Unlike California’s elected officials, they have taken no oath of office....

IV

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers.... States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

* * *

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

[The dissenting opinion of Justice Kennedy is omitted].

United States v. Windsor
2013 WL 3196928 (2013)

JUSTICE KENNEDY delivered the opinion of the Court.

....

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“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.”

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U.S.C. § 2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA's § 3.... The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised."

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA.... The District Court...grant[ed] intervention by BLAG as an interested party.

On the merits of the tax refund suit, the District Court ruled against the United States.... [T]he Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

In granting certiorari on the question of the constitutionality of § 3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case....

II

....

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution.... Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of § 3 of DOMA.

The decision of the Executive not to defend the constitutionality of § 3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the

Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court....

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is “a real and immediate economic injury,” indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling....

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a “real, earnest and vital controversy,” the Court faces a “friendly, non-adversary, proceeding ... [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’” *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.” *Warth*, 422 U.S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act....

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of § 3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies

the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations.... Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term "prudential" counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky v. Clinton*, 566 U.S. —, — (2012) (slip op., at 7) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by

BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits....

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

....

I

A

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete “Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

The answer lies at the heart of the jurisdictional portion of today’s opinion, where a single sentence lays bare the majority’s vision of our role. The Court says that we have the power to decide this case because if we did not, then our “primary role in determining the constitutionality of a law” (at least one that “has inflicted real injury on a plaintiff”) would “become only secondary to the President’s.” But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we “undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.”

That is jaw-dropping. It is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of “primary” power, and so created branches of government that would be “perfectly co-ordinate by the terms of their common commission,” none of which branches could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.” The Federalist, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect themselves. They did it to guard their right to self-rule against the black-robed supremacy that today’s majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of “greater intrinsic value” or “stamped with the authority of more enlightened patrons of liberty”

than a government of separate and coordinate powers. *Id.*, No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "an Act of Congress is alleged to conflict with the Constitution." We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "to say what the law is," giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not *only* with regard to the facts) but with regard to the applicable law—in which event (and *only* in which event) it becomes the "province and duty of the judicial department to say what the law is."

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become "the province and duty of the judicial department to say what the law is." That is why, in 1793, we politely declined the Washington Administration's request to "say what the law is" on a particular treaty matter that was not the subject of a concrete legal controversy.... Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.

That is completely absent here. Windsor's injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General's brief on the merits reads: "For the foregoing reasons, the judgment of the court of appeals *should be affirmed*." Brief for United States (merits) 54 (emphasis added). That will not cure the Government's injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it. What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States....

The majority's discussion of the requirements of Article III bears no resemblance to our

jurisprudence.... It...call[s] the requirement of adverseness a “prudential” aspect of standing. *Of standing*. That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world...and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint.... The question here is not whether, as the majority puts it, “the United States retains a stake sufficient to support Article III jurisdiction,” the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not....

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive’s determination of unconstitutionality would have escaped this Court’s desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance....

[The dissenting opinions of Chief Justice Roberts and Justice Alito are omitted.]

Insert the following on page 71, in place of note 2:

2. *Windsor* is similar to *Perry* in that the named defendants are “friendly” to them, and indeed the result of this friendliness is a positive outcome for the plaintiffs in both cases. Indeed, it is the friendliness of the defendants—referred to by Justice Scalia in his *Windsor* dissent as “Executive contrivance”—that results in a finding of no standing in *Perry* but standing in *Windsor*. Yet are these conclusions regarding standing consistent with the rationales for the standing doctrine? Consider, in this regard, Justice Kennedy’s dissent in *Perry*:

There is much irony in the Court’s approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case.

Hollingsworth v. Perry, 2013 WL 3196927, at *21 (2013) (Kennedy, J., dissenting). Yet is this statement consistent with Justice Kennedy's opinion finding standing in *Windsor*? Or does he have a convincing way of distinguishing the two cases?

Six of the nine Justices voted consistently across the two cases regarding standing, with Chief Justice Roberts and Justice Scalia finding standing in neither case and Justices Kennedy, Thomas, Alito, and Sotomayor finding standing in both cases. The remaining three—Justices Ginsburg, Breyer, and Kagan—found standing in *Windsor* but not in *Perry*. Can this latter group be accused of allowing their conclusions on standing to be shaded by their likely preferred outcomes in the cases, given that both outcomes were seen as wins for the pro-gay rights position and—at least as evidenced by the vote on the merits of the constitutional claims in *Windsor* (examined in Chapter 5)—these three Justices side with the pro-gay rights position on the merits?

Chapter 5: Due Process and Equal Protection in Tandem: Marriage, Parenting, and Public Employment

Insert the following on page 454, following note 4:

5. In *Hollingsworth v. Perry*, 2013 WL 3196927 (2013) the U.S. Supreme Court held that the Ninth Circuit lacked jurisdiction to hear the case and ordered it to dismiss the appeal. Accordingly, the opinion no longer has precedential value.

Insert the following on page 457, in place of *Commonwealth of Massachusetts v. United States Department of Health and Human Services*:

United States v. Windsor 2013 WL 3196928 (2013)

[At issue in this case is a challenge to the constitutionality of Section 3 of the Defense of Marriage Act. In an earlier section of the opinion, excerpted in Chapter 2, the Court found that both it and the Court of Appeals had jurisdiction to review the trial court's decision declaring Section 3 to be unconstitutional. In the excerpt that follows, the Court addresses the merits of the challenge.]

JUSTICE KENNEDY delivered the opinion of the Court.

....

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there....

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons....

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.... Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and

policies to pursue....

In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect....

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. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)....

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), for example, the Court held that, “[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,” under the Copyright Act “requires a reference to the law of the State which created those legal relationships” because “there is no federal law of domestic relations.” In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction....

Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential

authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment....

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond....

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–535 (1973). In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. *Supra*, at 19 (quoting *Romer, supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

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.... The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian)

morality.” The stated purpose of the law was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was “to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.” The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA’s operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.... By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound....

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and

parent, benefits that are an integral part of family security....

* * *

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages....

Chief Justice ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world....

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past.... At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority’s analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their “historic and essential authority to define the marital relation,” may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion.... In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. The dominant theme of the majority opinion is that the Federal Government’s intrusion into an area “central to state domestic relations law applicable to its residents and citizens” is sufficiently “unusual” to set off alarm bells. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA’s departure from the normal allocation of responsibility between State and Federal Governments.... But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor....

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case.... I write only to highlight the limits of the majority’s holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA’s constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

....

II

....

A

There are many remarkable things about the majority’s merits holding. The first is how rootless and shifting its justifications are. 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.... Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996)—*all* of which are equal-protection cases. And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence v. Texas*, 539 U.S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.... In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution"; that it violates "basic due process" principles; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment." The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean....

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "bare . . . desire to harm" couples in same-sex marriages. It is this proposition with which I will therefore engage.

B

....

[E]ven setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this

legislation. Their existence ought to be the end of this case....

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses—those being the only sort that were recognized in *any* State at the time of DOMA's passage. When it became clear that changes in state law might one day alter that balance, DOMA's definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence....

* * *

The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." I have heard such "bald, unreasoned disclaimer[s]" before. *Lawrence*, 539 U.S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*, at 578. Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects"—with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE'S view that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "bare ... desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion:

~~"DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities."

Or try this passage:

~~"[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*,...."

Or this—which does not even require alteration, except as to the invented number:

"And it humiliates ~~tens~~ *of thousands* of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there....

Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

[The dissenting opinion of Justice Alito is omitted.]