United States v. Windsor

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Vote: 5 (Breyer, Ginsburg, Kagan, Kennedy, Sotomayor)
4 (Alito, Roberts, Scalia, Thomas)

Opinion of the Court: Kennedy
Dissenting Opinions: Alito, Roberts, Scalia

**Facts**

In 1996, as some states were beginning to consider same-sex marriage but before any state had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two key sections: Section 2, which was not challenged in this case, allows states to refuse to recognize same-sex marriages performed under the laws of other states. Section 3 is at issue here:

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.

§3 does not forbid states from enacting laws permitting same-sex marriages or providing them to their residents. But it does, for purposes of the more than 1,000 federal laws that address marital or spousal status, define marriage as a between a man and a woman.

The respondent in this case, Edith Windsor, met Thea Spyer in New York City in 1963 and they began a long-term relationship. Windsor and Spyer registered as domestic partners in 1993, when New York gave same-sex couples that right. In 2007, amid concerns about Spyer’s health, the couple wed in a lawful ceremony in Ontario, Canada, but they returned to their home in New York City. The State of New York deems their Ontario marriage to be a valid one.

When Spyer died in February 2009, she 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.” 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 brought suit in a federal district court, contending 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 that the Department of Justice would no longer defend the constitutionality of DOMA’s §3. According to the Attorney General, “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” But the president 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.” According to the Attorney General, the rationale for the dual approach (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 president’s decision not to defend the constitutionality of §3, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend §3’s constitutionality.[[1]](http://college.cqpress.com/sites/clca/cases/usvwindsor/tabid/5432/mid/6349/dnnprintmode/true/Default.aspx?SkinSrc=%5bG%5dSkins%2f_default%2fNo+Skin&ContainerSrc=%5bG%5dContainers%2f_default%2fNo+Container" \l "fn1) The district court denied BLAG’s motion to enter the suit on the ground that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. [Note: The Supreme Court eventually accepted the standing of BLAG to defend the constitutionality of DOMA, even though the President and the Department of Justice no longer sought to defend DOMA. This aspect of the majority and dissenting opinions has been edited out in the excerpt below.]

On the merits of Windsor’s case, the district court held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the U.S. 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. But the United States continued to enforce §3 of DOMA, meaning that Windsor had not received her refund at the time the U.S. Supreme Court decided to hear the case.

**JUSTICE KENNEDY delivered the opinion of the Court.**

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. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

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. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.

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 . . . 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. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland* (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Though [this and other] 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* (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.”

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” . . .

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 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. Federal courts will not hear divorce and custody cases even if they arise in diversity because of “the virtually exclusive primacy . . . of the States in the regulation of domestic relations.” . . .

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. . . . What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect . . . .

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* (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. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

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. 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. In determining whether a law is motived by an improper animus or purpose, “ ‘[d]iscriminations of an unusual character’ ” especially require careful consideration 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 Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. 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 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. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. 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,* 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 . . . .

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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 Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

**CHIEF JUSTICE ROBERTS, dissenting.**

[W]hile 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. It states that “[t]his opinion and its holding are confined to those lawful marriages,”—referring to same-sex marriages that a State has already recognized as a result of the local “community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.” Justice Scalia believes this is a “ ‘bald, unreasoned disclaime[r].’ ” 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.

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

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

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For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

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. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? 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 . . .

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. That is the issue that divided the parties and the court below . . . 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. Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation’s history and tradition,” a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of “ ‘ordered liberty.’ ”

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.

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas* (2003) (Scalia, J., dissenting). I will not swell the U.S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even 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 . . .

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with malice—with the “purpose” “to disparage and to injure” same-sex couples. It says that the motivation for DOMA was to “demean,” to “impose inequality,” to “impose . . . a stigma,” to deny people “equal dignity, to brand gay people as “unworthy,” and to “humiliat[e]” their children.

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution. . . .

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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. 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.” 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 . . .

In the majority’s telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one’s political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today’s Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. 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.

**JUSTICE ALITO, with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.**

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court’s holding that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” suggests that substantive due process may partially underlie the Court’s decision today. But it is well established that any “substantive” component to the Due Process Clause protects only “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ as well as “ ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’ ”

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that §3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of “heightened” scrutiny, and that §3 cannot survive such scrutiny. They further maintain that the governmental interests that §3 purports to serve are not sufficiently important and that it has not been adequately shown that §3 serves those interests very well. The Court’s holding, too, seems to rest on “the equal protection guarantee of the Fourteenth Amendment—although the Court is careful not to adopt most of Windsor’s and the United States’ argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.

Underlying our equal protection jurisprudence is the central notion that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ ” *Reed v. Reed* (1971). The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that “fair and substantial relation to the object of the legislation.” . . .

In asking the Court to determine that §3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. . . .

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down §3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that §3 encroaches upon the States’ sovereign prerogative to define marriage.

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today’s opinion of the Court will soon be scattered to the wind.

In any event, §3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that §3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by —3, Congress has the power to define the category of persons to whom those laws apply.

[[1](http://college.cqpress.com/sites/clca/cases/usvwindsor/tabid/5432/mid/6349/dnnprintmode/true/Default.aspx?SkinSrc=%5bG%5dSkins%2f_default%2fNo+Skin&ContainerSrc=%5bG%5dContainers%2f_default%2fNo+Container" \l "fr1)] BLAG is composed of the Speaker of the House, the majority and minority leaders, and the majority and minority whips. It has the authority to ask the House Office of General Counsel to participate in litigation or file amici curiae briefs on the House’s behalf.