

The Supreme Court in *United States v. Windsor*: Why the “Death” of Fungible Federalism After a Century of Convenience?

by
Dana E. Prescott*

*When the collective action of the states created the federal government several centuries ago, most of the Founders recognized the inherent tensions between federal hegemony and state sovereignty. Often identified by the term “federalism,” the power to decide its’ contours and dimensions was soon the exclusive purview of the Supreme Court under the guise of judicial review. Until the Supreme Court’s decision in *United States v. Windsor*, striking down §3 of the Defense of Marriage Act [DOMA] as a deprivation of “equal liberty,” federalism traditionally left to the sovereignty of the states the realm of marriage and divorce. For family law practitioners, state court judges, and civil rights’ advocates, the Court’s refusal to apply century old precedents to DOMA suggests that *Windsor* actually reveals the Court’s preference for a fungible federalism limited to economic or property interests. This article argues that by refusing to extend federalism to personal liberties, the Court dilutes or negates the sovereignty of the states to experiment with social welfare policies by conjuring weak concepts of equality and liberty that lack constitutional text or structure.*

I. Introduction

In this issue of the Journal, scholars address various aspects of multiculturalism and its influence upon family law practitioners. When this issue was originally contemplated, same-sex marriage was in the throes of litigation and public referendums and

* Dana E. Prescott, Esq., MSW is a member of Prescott, Jamieson, Nelson, & Murphy LLC., Saco, Maine. While he is a member of the Journal Board, the opinions contained in this article are his own and do not reflect the views of the Board or the AAML. He may be reached at danap@maine.rr.com.

legislative activities were at various stages of the democratic process. Throughout the United States and much of Europe, government officials, policy makers, and the public debated, often in graphic and intemperate language, the rights of adoption, marriage, divorce, child custody, guardianship, and estate planning by members of the gay and lesbian communities. As a national organization of stature, the American Academy of Matrimonial Lawyers has a special responsibility to encourage civil debate which encourages the development of social welfare policies, legislative enactments, and judicial decision making that respects the diversity and complexity of modern family systems.

As these developments began to churn through the branches of government and the legal scholarship in the 1990s, lawyers were wistfully kvetching over the “federalization of family law” in the United States (and I am one of those).¹ Along with the confluence of these constitutional and legislative developments at the turn of the twenty-first century, the “internationalization” or “globalization” of family law morphed along with technological revolution, private enterprise without borders, and more complex forms of immigration.² The duty to sensitively adjudicate the multicultural interests of individuals and family systems across a mishmash of intra- and inter-national borders, social norms, political structures, and interpretations of what is even the “rule of law,” continues to generate rather challenging ethical and legal conundrums for lawyers and court systems. The point is that our profession is only beginning to adapt and adjust evi-

¹ See Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIM. LAW. 173, 189 (1999) (“Finally, despite the preclusion in the VAWA from using the Act in the family law context, the [United States Supreme] Court stated that to allow Congress to regulate commerce in the way envisioned by the enactment of the VAWA is to open the door to Congressional regulation of other areas traditionally reserved for the states, including marriage, divorce and child-rearing.”); Laura P. Morgan, *The Federalization of Child Support: A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law”*, 16 J. AM. ACAD. MATRIM. LAW. 195, 195 (1999) (“‘Family law’ has long been singled out by the United States Supreme Court as the one area, more than any other, into which the federal government may not intrude, either by legislation, regulation, or assertion of federal jurisdiction.”).

² For a current discussion of these developments, see ANN LAQUER ESTIN, *INTERNATIONAL FAMILY LAW DESK BOOK* (2012).

dence-informed policies to a world which is rapidly shape-shifting without a homogenous reference point for courts or culture.

The relevance of these introductory paragraphs to family law may be found in three decisions by the U.S. Supreme Court on June 25 and 26, 2013.³ Each was a five to four vote containing an amalgamation of concurring and dissenting opinions. Each involved democratically enacted laws generated in response to American policy and practice toward a vulnerable discrete minority.⁴ Two of those decisions, *Adoptive Couple v. Baby Girl*,⁵ involving the statutory interpretation of the Indian Child Welfare Act of 1978, and *Hollingsworth v. Perry*,⁶ which concerned the

³ The consistency of the opinions of each Justice and the various forms of logic and law will have to await the voices of scholars. The breakdown of votes is found in the footnotes below.

⁴ The history and consequences of the Supreme Court's intemperate and provocative language in the arena of race and slavery is well-known. What is much less-discussed is the Court's language concerning groups like the Mormons and Jehovah Witnesses, as well as Japanese Americans during World War II, Native Hawaiians, Puerto Ricans, or Native Americans. See JILL NORNGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* xvi (2006) ("The interaction of several factors may help explain the different results for these different groups in their use of the law. One important factor is the distance of the cultural activity the group seeks to protect from Judeo-Christian tradition, individualism, republicanism, and capitalism, all of which form the core values of the dominant culture.").

⁵ ___ U.S. ___ 133, S. Ct. 2552 (2013). From the opinion abstract "ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and BREYER, JJ., joined. THOMAS, J., and BREYER, J., filed concurring opinions. SCALIA, J., filed a dissenting opinion. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, and in which SCALIA, J., joined in part." The majority reasoned, as follows: "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result." *Id.* at 2556-57.

⁶ 133 U.S. 2652 (2013). From the opinion abstract: "ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, GINSBURG, BREYER, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS, ALITO, and SOTOMAYOR, JJ., joined." The fact that the discussion required incorporation of language and comments from the Restate-

Article III standing of private parties to obtain a “ticket to the federal courthouse” to challenge a referendum to ban same-sex marriage under the California Constitution.⁷ These two decisions will receive relatively little discussion after this introduction because the intersection of their logic and scholarship are beyond the scope of this paper. This choice, however, should not diminish the importance of understanding the influence of personal preferences and beliefs of members of the Court and its selective avoidance of federalism.⁸

In *United States v. Windsor*,⁹ the Court (after meandering through Article III as well) struck down section 3 of the Defense of Marriage Act [DOMA]¹⁰ as a deprivation of “equal liberty.”¹¹

ment (Third) of Agency (2005) is rather peculiar given constitutional precedents but the majority, as umpire, ruled that “States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.” *Id.* at 2658.

⁷ See John G. Roberts, Jr. *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1993) (“If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional.”). As now Chief Justice Roberts points out in his law review article, case and controversy and standing are intertwined with Article III and the authority of Congress as a constitutional function of separation of powers.

⁸ See *Adoptive Couple v. Baby Girl*, __ U.S. at __ (Thomas, J., concurring) (slip op. at 1) (“Adoption proceedings are adjudicated in state family courts across the country every day, and “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). Indeed, “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” *In re Burrus*, 136 U. S. 586, 593, 594 (1890); *Hollingsworth v. Perry*, 133 S. Ct. 2675 (Kennedy, J., dissenting) (“The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government.”).

⁹ __ U.S. __, 133 S. Ct. 2675 (2013). From the opinion abstract: “KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to Part I. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts II and III.”

¹⁰ DOMA, 1 U.S.C. § 7 (1996), was the planned consequence of President Clinton’s realpolitik before his re-election campaign in 1996. Among the shortest federal statutes ever enacted with an influence on so many people, Section 3 defined marriage for purposes of more than 1000 federal laws, as follows: “In determining the meaning of any Act of Congress, or of any ruling, regulation,

Justice Scalia's dissent in *Windsor* properly noted the majority's reliance upon a curious combination of substantive due process, federalism, and equal protection.¹² As I will discuss below, much like the unhealthy and weak roots of the Court's creation of a liberty or freedom of contract¹³ a century ago, the Court could have simply applied federalism to strike down DOMA and protect state experimentation with state social welfare policies like marriage and divorce. But the majority of the Court did not and the dissents, properly wondered, why not?¹⁴

It is rather obvious from *Windsor* that both the majority and dissents were quite conscious of federalism as a means to that

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."

¹¹ *Windsor*, 133 S. Ct. at 2680.

¹² *Id.* at 2707 (Scalia, J. dissenting) ("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.") (citation omitted).

¹³ The phrases "liberty of contract" and "freedom of contract" are often used by scholars interchangeably. Professor Mayer suggests that the term liberty has "particular reference to the constitutional concept." David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 218 n.5 (2009). For an early discussion of the novel doctrine of "liberty of contract," see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1909) ("Suffice it to say here that the doctrine of liberty of contract is bound up in the decisions of our courts with a narrow view of what constitutes special or class legislation that greatly limits effective law-making."). This distinction, however, poses a dilemma because marriage is, to many, more than "a mere contract." John Witte Jr., *More Than a Mere Contract: Marriage as Contract and Covenant in Law and Theology*, 5 ST. THOMAS L. REV. 595, 599 (2008) ("In the American common law tradition, marriage has long been regarded as a natural if not spiritual estate, a useful if not essential association, a pillar if not the foundation of civil society.") (footnote omitted).

¹⁴ See *Windsor*, 133 S.Ct. at 2709 (Scalia, J. dissenting) ("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."); *id.* at 2720 (Alito, J., dissenting) ("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").

56 *Journal of the American Academy of Matrimonial Lawyers*

same end and, as explored below, had read the scholarly decision by the First Circuit Court of Appeals in *U.S. Department of Health & Human Services v. Commonwealth* (hereinafter *USDHHS*).¹⁵ Why the majority preferred the “death of federalism”¹⁶ for personal liberties as determined by the states, when the Court had the opportunity to rectify its non-textual canon of economic-only-federalism by eliding a non-fungible jurisprudence, is curious.¹⁷ Or as a well-traveled adventurer said about an equally unreal world of events: “Curiouser and curiouser!”¹⁸

¹⁵ 682 F.3d 1 (1st Cir. 2012). See *Windsor*, 133 S. Ct. at 2688 (“For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased.”).

¹⁶ In 1974, Professor Grant Gilmore published his brief tract entitled. See GRANT GILMORE, *THE DEATH OF CONTRACT* 3 (1974) (“We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore.”). What Gilmore ultimately meant by “death” was that classical contract theory, as developed by Oliver Wendell Holmes and others scholars and lawyers of that era, never actually lived so its death was a fiction. One reason was that judges, living with the need to reconcile the human capacity for chaos in motion, kept avoiding the formal and the external consequences of *laissez faire* in favor of more practical judgments. Of no small measure, Holmes, a man of his times and era, recognized the right of persons or the state to engage in “justifiable self-preference” or, more explicitly, “[i]f a man is on a plank in the deep sea which will only float one, and a stranger lay hold of it, he can thrust him off if he can. When the state finds itself in a similar position, it does the same thing.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 44 (1881) (Sheldon M. Novick, ed., 1991).

¹⁷ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1425 (1987) (“Victims of government-sponsored lawlessness have come to dread the word ‘federalism.’”); see also JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 383 (1981) (“These blacks and women and poor could hardly have been more different from one another. They could barely communicate with one another or even recognize each other, much less sympathize with one another. Some would hate one another. Yet the three groups had some things in common—they were in many ways impotent, economically, socially, politically, legally. They all were living in a great republic that preached and practiced its own peculiar form of majority rule.”).

¹⁸ LEWIS CARROLL, *ALICE IN WONDERLAND* 6 (1942) (“‘Curiouser and curiouser!’ cried Alice (she was so much surprised that for the moment she quite forgot how to speak good English). ‘Now I’m opening out like the largest telescope that ever was! Good-by, feet! Oh, my poor little feet, I wonder who will put on your shoes and stockings for you now, dears? I shall be a great deal too far off to trouble myself about you.’”).

II. The Fungible Liturgy of Federalism

Although these opinions concerning DOMA do reveal the personal philosophies of the Justices (though nothing really surprising), there is no jurisprudential theory from the Supreme Court which connects the Constitution to “cognate equality”¹⁹ between the citizens of the states and the federal government.²⁰ As Justice Brandeis famously noted in a dissent which bridges the fractious social welfare debates of the past and present:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²¹

From these roots or rootlessness, the liturgy of federalism is vast, seemingly inconsistent, and riven with controversy.²² Neverthe-

¹⁹ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 81-82 (1921) (“The same fluid and dynamic conception which underlies the modern notion of liberty, as secured to the individual by the constitutional immunity, must also include the cognate notion of equality.”). Care must be exercised here because “rights language” entails negative and positive aspects. See JAMES Q. WILSON, *THE MORAL SENSE* 245 (1993) (“‘rights talk’-the widespread tendency to define the relation of the self to others and to society as a whole in terms of rights and to judge whether one has been treated properly by whether one has had one’s rights fairly defended.”).

²⁰ See WALTER F. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* 13 (1964) (“A political system which combines separation of powers and federalism needs an umpire if it is to function.”).

²¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 315 (1932) (Brandeis, J. dissenting).

²² See CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND THE NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT* 19 (2012) (“The old, new, and progressive trends of federalism register the significance of the judicial role, which remains at the base of comprehending the merits of political arguments and policy outcomes that comprise the American federalism heritage.”); MITCHELL S.G. KLEIN, *LAW, COURTS, AND POLICY* 7 (1984) (“The Framers invented the notion of federalism, where authority over people is exercised simultaneously by both the national government and state governments.”); *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER (1913-1938)* 23 (Archibald MacLeish & E. F. Prichard, Jr. eds., 1962) (“That the Supreme Court should have been given all the powers it has is of course not a matter of natural law. But if any federalism is to endure, it must provide for some checkrein on the constituent units, and

less, it is reasonable to suggest that federalism, as a function of constitutional architecture, is the dominance of the national sovereign in opposition to the authority of states to contravene that dominance. Of course, the Supreme Court's imputation of judicial review as constitutional text in 1803 could not have foreshadowed the Court's inability, as revealed in the various opinions interpreting the same case law in *Hollingsworth* and *Windsor*, to agree upon a coherent jurisprudential theory of Article III for purposes of federalism. After several centuries of impressive scholarship and precedent, the plain lesson is that the personal predilections of the Justices concerning the social policy before the Court define the architecture of Article III. As such, the contours of federalism *are* "the history of judicial review."²³ And the history of judicial review is the treaded path of litigation frequently revealed and unraveled over years of trials and appeals between interest groups seeking to litigate the difference between what *is* (for them) and what *ought to be* (for others).²⁴ As

the history of the American colonies and states it that that checkrein should be a court and not Congress."); William Eskridge & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 *VAND. L. REV.* 1355, 1355-65 (1994) ("Federalism is sometimes said to be an unstable halfway house between unified national government and an alliance among separate sovereign states.").

²³ LEONARD W. LEVY, INTRODUCTION, IN *AMERICAN CONSTITUTIONAL LAW AND HISTORICAL ESSAYS* 3 (Leonard W. Levy ed. 1966); see U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). As one author noted, Chief Justice Marshall "asserted the authority of the Supreme Court to interpret the Constitution. Today that authority is taken for granted, but it was not universally recognized in 1801. Constitutions are political documents. They define the way a nation is governed. The central issue of whether they were justiciable in courts of law was problematic." JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 2 (1996); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE. L.J.* 75, 80 (2001) ("Although most constitutional law aficionados would agree that there is a double standard in the post-1937 case law, that consensus might evaporate when one asks the next logical question: a double standard between what and what? . . . To chart this divide is, in essence, to identify which aspects of the Constitution are currently in exile and which aspects are not.").

²⁴ See Misty L. Wall, *A Model for Policy Analysis Applied to the Goodridge Case*, 19 *J. GAY & LESBIAN SOC. SERV.: ISSUES IN PRAC., POL'Y, & RES.* 49, 60 (2007) ("The judicial system has become a fundamental agent in the

an evolutionary function of this Supreme Court doctrine and the grafting of text, three categories of federalism took root amid these political and social preferences. First, state government is constitutionally ceded privileged space into which the federal government may not intrude.²⁵ Second, the national government cannot intrude upon state prerogatives because constitutional authority to act forcibly is silent.²⁶ Third, a state has authority, irrespective of any subsequent attempt at federal dominance, because the national government long ago relinquished that authority.²⁷ Each of these categories generates tensions between federal supremacy and the penumbra of sovereignty under which a state is presumed to have policy freedom.²⁸

struggle to secure equal civil rights for gay men, lesbian women, and their families.”). In many respects, this is the most basic test of social contract theory. See IAN SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* 3 (2003) (“For social contract theorists, the state’s legitimacy is rooted in the idea of agreement.”).

²⁵ See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 837 (1976) (applying the Tenth Amendment to prevent Congress from extending federal wage laws to state and local employees).

²⁶ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 U.S. 2566, 2608(2012) (“As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding.”).

²⁷ See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”). The third category derives from the ancient maxim expressed by children seeking fairness in play: “no do-overs.”

²⁸ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1430 (1987) (“The conventional British position understood ‘sovereignty’ as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself voluntarily chose to observe. To try to divide or limit sovereignty in any way was to create the ‘political monster’ or ‘hydra of *imperium in imperio*’—‘the greatest of all political solecisms.’”) (footnotes omitted).

60 *Journal of the American Academy of Matrimonial Lawyers*

None of the categories described above are immune from the tendency of interests groups to unleash their preference for a version of federalism in the guise of nationalistic will. In times of political crisis, war-mongering, or social and cultural angst, the constitutional discussion is too often dominated by hyperbole or intimidation.²⁹ Nor is the U.S. Supreme Court immune from competition in their marketplace (chambers) for an agreed-upon ideology as a form of law-giving. (How many five to four or plurality opinions are there each year?) Indeed, the metaphor of a judge as umpire³⁰ is not just silly but potentially damaging to the less-rational interest groups who view the world through a prism of single-issue obedience.³¹

²⁹ The Alien and Sedition Acts of 1798 and the Patient Protection and Affordable Health Care Act of 2010 share a common bond on this point between the birth of the Republic and this new century. For a cogent analysis of the relationship between positive and natural rights and the current expectations of the American citizenry toward delivery from the vicissitudes of life, see Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1643 (2012) (“This article argues that the intense opposition to the PPACA arises from the realization that the Act represents a genuine revolution in the way we think about American citizenship and the nature of our political community.”) (footnote omitted).

³⁰ The term is not new even if made popular by modern justices during confirmation hearings. Many lawyers and judges wince at the metaphor because it oversimplifies and diminishes the role of judges. The fact that it is politically effective does not mean it should be repeated as mantra. See Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1715 (2007) (“Viewing judges merely as objective umpires chills the very introspection required to achieve a more objective jurisprudence. Consequently, it becomes more difficult to achieve the kind of objectivity we should all want in our judges and our jurisprudence. This is true for several, fairly obvious, reasons.”); see also GILMORE, *supra* note 16, at 15 (“courts should operate as detached umpires or referees, doing no more than to see that the rules of the game were observed and refusing to intervene affirmatively to see that justice was done or anything of that sort was done.”).

³¹ The manner in which courts of federal or state jurisdiction exercise the authority to which groups will submit without violence is actually extraordinary to observe as a lawyer and citizen. See MURPHY, *supra* note 20, at 13 (“The ‘cult of the robe,’ the concept of the judge as a high priest of justice with special talents for elucidation of ‘the law,’ that sacred and mysterious text which is inscrutable even to the educated layman, forms a sort of institutional charisma which is bestowed on judges with their oath of office.”). This is not, however, an unlimited resource. Any institution of judges who confuse personal politics with

Whatever these facets may reveal in the kaleidoscope of litigation, the broad ambit of judicial review permits the Court to expound its personal values and morals towards *a* private group at *a* specific point in American history.³² When federalism is defined by a value-laden form of liberty³³ (or equality for that matter) the Supreme Court, through judicial review, acts as its own arbiter of its own version of majority will as collective national conscience.³⁴ Indeed, the practical pluralities in *Hollingsworth* and *Windsor* give credence to the notion that judicial review is a matter of convenience, not scholarship or a jurisprudential philosophy, when the “neglected states” act in the manner of “States

rational authority would be wise to respect history. See INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 49 (Deborah Lucas Schneider trans., 1991) (“The police on the one hand and scholars and administrators of the law on the other agreed that political matters should not come under review by the courts. In addition, the courts did what they could to extend the definition of ‘political’ until it applied to almost everything.”).

³² The difference between values and ethics may be described, as follows: “Whereas gentlemen, or honest men, necessarily agree as to things moral, they legitimately disagree in regard to such things as Gothic architecture, private property, monogamy, democracy, and so on.” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 43 (1953). As Justice Cardozo wrote “great ideals of liberty and equity are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.” CARDOZO, *supra* note 19, at 92-93.

³³ See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“The word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of the people and our law.”).

³⁴ See CHARLES P. CURTIS, *LIONS UNDER THE THRONE: A STUDY OF THE SUPREME COURT OF THE UNITED STATES ADDRESSED TO THOSE LAYMEN WHO KNOW MORE CONSTITUTIONAL LAW THAN THEY THINK THEY DO, AND TO THE LAWYERS WHO KNOW LESS* 284 (1947) (“The Court had become potentially our conscience, the spiritual guide and father confessor of all our governments, state as well as federal, a court of honor as well as a court of law, our wise old uncle, the Hays office, if you please, of political behavior, or if you prefer, our daimon of Socrates; mediator, in brief, between man as an individual and man in society.”). This is a book worth assigning in law school; if for no other reason than to remember when there was a depth and charm to legal writing about the law.

62 *Journal of the American Academy of Matrimonial Lawyers*

as States.”³⁵ In reality, litigation is a slow and risky means to achieve social change for there is no assurance the judiciary, in either its ephemeral or actual being, will prefer value judgments consistent with those of the proponent.

Regrettably, these tensions over two centuries generated implacable political divisions which still resonate today, surfacing recently in the same-sex marriage debate.³⁶ Indeed, marriage itself, for generations of lawyers and judges, was rhetorically characterized as a contract defined and sanctioned by state governments with all the attendant liberty to expound bigotry.³⁷ By the early twentieth century, a majority of the Supreme Court could and did impose personal values, buttressed by the social science and political beliefs of their times, to sustain social welfare policies which served the interests of political elite or the economic interests of the fittest.³⁸ Under the guise of a national-

³⁵ National League of Cities, 426 U.S. at 837.

³⁶ See *Windsor*, 133 S.Ct. at 2718-19 (Alito, J. dissenting) (“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.”).

³⁷ See *Maynard v. Hill*, 125 U.S. 190, 210 (1888) (“[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract.”); *Sheppey v. Stevens*, 177 F. 484, 489 (N.D.N.Y. 1910) (“If, then, public policy demands that men of full age and competent understanding shall have the utmost liberty of contracting (for lawful purposes, of course), how can it be consistent with a sound public policy that men may contract to prevent such persons, one or more, from making and performing a lawful contract to marry?”); *Brown v. Tuttle*, 13 A. 583, 584 (Me. 1888) (“The parties were living together in violation of the principles of morality and chastity, as well as of the positive law of the state,—a relation to which the court can lend no sanction.”); see also Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, STAN. J. C.R. & C. L. L. REV. 1, 7 (2005) (Freedom of contract suggests a “conception of liberty from state power. However, the legal system does not merely allow contracts to be made; it ordinarily enforces them to one degree or another.”).

³⁸ See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 201 (1955) (“The answer is that American society saw its own image in the tooth-and-claw version of natural selection. And its dominant groups were therefore able to dramatize this vision of competition as a thing good in

ized liberty of contract, the Court thereby created constitutional protections for private entities as a euphemism for the imposition of pseudo-scientific or social constructions which labeled socio-economic class, race, culture, and gender as deficits of genetics or sloth.³⁹

More to the point, the selective imbalance between the role of the states as “laboratories of ideas” or as a “crucial” check on the “tyranny of the national government”⁴⁰ is what makes social policy litigation about marriage (by both sides of the political alter) such an intriguing subject for study.⁴¹ In the debate over

itself. Ruthless business rivalry and unprincipled politics seemed to be justified by the survival philosophy.”). In *Buck v. Bell*, 274 U.S. 200 (1927), Justice Holmes rather starkly upheld that era’s eugenics laws: “It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Id.* at 207. A biographer noted that this decision pre-dated recognition of the constitutional right to privacy in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) which, after the events in Europe during World War II, struck down a sterilization law for felons on equal protection grounds but did not overrule *Buck*. See SHELDON. M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 352 n.65 (1989).

³⁹ See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872) (As a “married woman [the applicant for a law license] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client.”); see also GRANT GILMORE, *THE AGES OF AMERICAN LAW* 63 (1977) (“The legislatures, stirred by populist discontents, experimented with social legislation-regulating the hours and conditions of employment, restricting the exploitation of women and children, and so on. The courts routinely struck down these statutes on one or another ground-the most amusing ground having been the great principle of freedom of contract. That is to say, if a ten year old child wants to work twelve hours a day in a textile mill, by what warrant is the legislature to deprive the child’s parents of their right to enter into such a contract on his behalf?”); HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES (1492-PRESENT)* 260-261 (1999) (“A New York banker toasted the Supreme Court in 1895: ‘I give you gentlemen, the Supreme Court of the United States-guardian of the dollar, defender of private property, enemy of spoliation, sheet anchor of the Republic.’ Very soon after the Fourteenth Amendment became law, the Supreme Court began to demolish it as a protection for blacks, and to develop it as a protection for corporations.”).

⁴⁰ Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501 (1995).

⁴¹ One of the problems in the debate concerning marriage as a contract is the confusion created when various voices ignore historically accurate information or manufacture certain historical truths. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED*

64 *Journal of the American Academy of Matrimonial Lawyers*

DOMA, the evolution of a constitutional “tree of life,”⁴² as consistent with federalism, exposes the argument that regulating the right to marry *within a state* is really protection of a *national majority* with the *will* to impose a *national policy about personal liberties*. This argument challenges intellectual values as few social policy issues do.

Yet this argument does not resolve the conundrum of fungible federalism when the objective is national usurpation of state authority to define who may marry within the borders of each state. In the specific case of marriage contracts, the Supreme Court, even in *Windsor*, has made clear (over multiple pages) that the federal courts are not to go there.⁴³ But the rationale of the majority was not federalism but some blended version of equal protection based upon some amorphous finding of political malice and an unstated standard of review.⁴⁴ Indeed, if propo-

STATES AND WESTERN EUROPE 32 (1989) (“With Reformation and Enlightenment, the idea of marriage as a contract took a new turn. As we have seen, consent was the essence of marriage in ecclesiastical law. But thinkers as diverse as Martin Luther and John Locke began to emphasize the aspect of marriage as a civil contract.”).

⁴² The use of this metaphor is not unique to this paper but it does have value as a means to “root” the discussion in judicial and constitutional duty. See Vicki C. Jackson, *Constitutions as “Living Trees”?: Comparative Constitutional Law and Interpretive Metaphors*, 75 *FORDHAM L. REV.* 921, 926 (2006) (“In Canada, a widely used metaphor is of their constitution as a ‘living tree.’ The idea of a ‘living tree’ may better embrace multiple modalities—text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns—of contemporary constitutional interpretation.”). Professor Jackson was appointed to write an amicus brief in *Windsor* “to argue the position that the Court lacks jurisdiction to hear the dispute.” *Windsor*, 133 S. Ct. 2675, 2680 (2013).

⁴³ See *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) (“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.”).

⁴⁴ See *id.* at 2696-97 (Roberts, C.J., dissenting) (“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. . . . I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.”).

nents of a *national* policy of marriage mean what they say, these proponents should convince the Court to reinvigorate the doctrine of *Swift v. Tyson*⁴⁵ and extend federal law to a national common law of marriage, divorce, and child custody.⁴⁶

What is of contemporary interest is that in a free and competitive market, America's earliest political evolution selected the judiciary as the font of interpretation and justification for first defining and then securing majority-will.⁴⁷ The federal judiciary created and adapted judicial review to assure its authority to say what *is*, but, unlike classical contract theory, did not accord "prime legal value"⁴⁸ to formalism. Gilmore wisely noted that when "we think of our own or of any other legal system, the be-

⁴⁵ 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the Court held that in commercial cases involving diversity the courts were not bound by state law but by general principles of commercial jurisprudence. Although marriage and divorce are statutory rights, not those of the common law, creations of federal law are supreme if the jurisdiction of the courts is constitutionally grounded. *Swift* was subsequently overturned in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). As Justice Holmes wrote in dissent "I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.* [215 U.S. 349 (1910)], but I would not allow it to spread the assumed dominion into new fields." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting). *But see Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) ("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?").

⁴⁶ I am not endorsing this position, but drawing attention to the fact that some scholars have made such a pitch; though the constitutional footing is murky. *See* BANKS & BLAKEMAN, *supra* note 22, at 32 (noting that until it was overruled in 1938, *Swift* "eventually let federal judges craft centralizing rulings in a variety of private law realms, including wills, torts, contracts, and damages.").

⁴⁷ *See* *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal).").

⁴⁸ Carol Weisbrod, *Essay: On the Expressive Functions of Family Law*, 22 U. C. DAVIS L. REV. 991, 995 (1989).

gining of wisdom lies in the recognition that the body of law, at any time and place, is an unstable mass in precarious equilibrium.”⁴⁹ In the guise of federalism as a restraint on national dominance, the *judiciary might have maintained* this precarious equilibrium as a *functional* alternative but the Court has found it difficult, from era to era, to do so.

III. *Windsor* and *USDHHS* as a (Non) Couple?

With the exception of the Supreme Court’s meanderings in the pre-1937 era of economic substantive due process and the occasional resurrection of substantive due process in the context of privacy and relationships, as well as the equally strange path by which the Supreme Court selectively raises the Ninth, Tenth, and Eleventh Amendments as a convenient constitutional Lazarus, state sovereignty maintained some sphere of authority when it came to some “social readjustments.”⁵⁰ In this realm, freedom from national control has historically included a state’s freedom to define the marriage contract in the absence of a *specific* constitutional limitation, unless one revives a different shibboleth.⁵¹

⁴⁹ GILMORE, *supra* note 39, at 110.

⁵⁰ LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, *supra* note 22, at 79; *see id.* at 70 (“Mr. Justice Holmes never forgot that the activities of government are continual attempts by peaceful means to adjust these clashes of interest, and was equally mindful of the fact that the body to whom this task of adjustment is primarily delegated is the legislature.”). I addressed the evolution of state family law courts into social service agencies in Dana E Prescott, *Unified Family Courts and the Modern Judiciary as a “Street-Level Bureaucracy”: To What End for the “Mythical” Role of Judges in a Democracy*, 27 *Quinnipiac L. Rev.* 55, 55 (2007) (“Embedded in narrative myths concerning the creation and evolution of American democracy is the notion of a limited role for the federal and state judiciaries, as institutional organizations and bureaucracies, in the daily lives of American citizens.”). I had not, however, directly contemplated the more complex issues of federalism in that paper.

⁵¹ *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”). Thus, it is “settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.” *Id.*

For this generation, it is a state's authority, as an incubator of social justice, to define marriage that may expose the fungible death of federalism by the Supreme Court. What federalism could have avoided is what Justice Scalia properly laments: the need to "maintain the illusion of the Act's [DOMA] supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them."⁵²

On May 31, 2012, the First Circuit Court of Appeals, on appeal from the District Court for the District of Massachusetts, affirmed the holding that declared section 3 of DOMA unconstitutional as applied to lawful same-sex marriages in Massachusetts and enjoined federal officials from enforcing section 3. In *Commonwealth v. U.S. Department of Health & Human Services*⁵³ the court held section 3 of DOMA unconstitutional precisely because "Congress has never purported to lay down a general code defining marriage or purporting to bind the states to such a regime."⁵⁴ DOMA was one "of the shortest major enactments in recent history" and affected a thousand or more "generic cross-references to marriage in myriad federal laws."⁵⁵ In this consolidated appeal from the denial of benefits available to heterosexual married couples under federal law, the court summarized the issue, as follows: "Rather than challenging the right of states to define marriage as they see fit, the appellants contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom."⁵⁶

In its analysis, the court rejected the argument that some heightened level of scrutiny or the "old classifications" was re-

⁵² *Windsor*, 133 S. Ct. at 2707-08 (Scalia, J., dissenting). Unfortunately, Justice Scalia has used language in the past that has demeaned his colleagues and certain groups but, on this point of political discourse in modern America, he is sadly right. While an occasional "caustic barb" or witty metaphor has its place in the theatre of ideas, he should heed his own admonition as some of the public may read his language in the future and confuse his words with a right to action. See KEVIN A. RING, *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE IX* (2004). What matters here, however, is the author's conclusion: "In politically incorrect splendor, Scalia says he likes his Constitution 'dead'". *Id.* at 6.

⁵³ 682 F.3d 1 (1st Cir. 2012).

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 5.

68 *Journal of the American Academy of Matrimonial Lawyers*

quired as a “prescribed algorithm” for same-sex marriages.⁵⁷ Instead, equal protection and federalism, though often treated separately by Supreme Court precedent, required a “closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests regulating marriage.”⁵⁸ Without the need to invoke strict scrutiny, or any other legal construction not found in the Constitution’s text or structure, the Court of Appeals noted that Supreme Court precedent permitted “intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited permissible justification.”⁵⁹ From this precedent the court reasoned that “in areas where state regulation traditionally governed, the Court may require the federal government interest in intervention be shown with special clarity.”⁶⁰

Following a discussion of Supreme Court decisions involving food stamps, special permits for a group home, and status-based disqualification of a class of persons, Judge Boudin concluded that the court struck down as unconstitutional on equal protection grounds each classification because “the protesting group was historically disadvantaged or unpopular, and the statutory justification thin, unsupported or impermissible.”⁶¹ Thus, the loss imposed on same-sex couples by DOMA through tax penalties, loss of social security benefits, or medical care and other benefits if employed by the federal government, meant that the extreme deference accorded to ordinary economic cases would not be extended to DOMA for equal protection purposes.

The Court of Appeals rejected arguments premised upon the Spending Clause and the Tenth Amendment precisely because a federalism-based challenge diminishes, “somewhat,” the deference ordinarily accorded economic legislation.⁶² The court developed two rationales for its holding: (1) DOMA “intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation-domestic relations and the definition and incidents of lawful marriage-which is a leading in-

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ *Id.* at 10.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 11-12.

stance of the states' exercise of their broad police-power authority over morality and culture"⁶³, and (2) Congress has "never purported to lay down a general code defining marriage or purporting to bind the states to such a regime" as against "specific definitions applicable to specific laws like immigration."⁶⁴

What mattered was the fact that DOMA intruded into an area of traditional regulation so as to require closer examination of the justifications that would prevent DOMA from violating equal protection and thereby exceeding federal authority. After reviewing the four rationales offered, or implied, from scant legislative history, the court summarized a living federalism:

We conclude, without resort to suspect classifications or any impairment of *Baker*, that the rationales offered do not provide adequate support for section 3 of DOMA. Several of the reasons do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point. If we are right thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.⁶⁵

With extraordinary deftness, too rarely seen today in a cultural environment that rewards coarseness in the public square, Judge Boudin concluded that traditions might be honestly held without attributing hostility against a minority. Instead, the court concluded that "one virtue of federalism" is that "diversity of governance based on local choice" applies equally to marriage between a man and a woman or those states that chose to legalize same sex marriage.⁶⁶ With finesse worthy of Chief Justices John Marshall and John Roberts a couple centuries apart, the First Circuit Court of Appeals concluded that under "current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."⁶⁷

⁶³ *Id.* at 12.

⁶⁴ *Id.*

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 16.

⁶⁷ *Id.* Judge Boudin's political acumen is rather sharp: "Invalidating a federal statute is an unwelcome responsibility for federal judges; the elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect But a lower federal court such as ours must follow its best understanding of governing precedent, knowing that in large matters the Su-

The more precise question, as the First Circuit posits, is one of the relationships between the federal and state governments in the area of marriage and its dissolution. This is not a vertically reciprocal duty of comity; of polite respect for the prerogatives of a lesser governmental structure within the national constitutional framework. This outcome is a foundational imperative if federalism itself has any remaining life. Thus, the constitutional question intrinsic to DOMA is whether the *majority or minority of a state*, exercising the liberty to lobby or litigate within its constitutional framework, has the right to self-determination. The question then becomes whether there is a path for analyzing federalism beyond the selective preferences of a group of federal judges who prefer public accolades for engaging the plaque-awarding language of “equality” rather than inhabit the original text and constitutional form between a state as sovereign entity and federal hegemony. For those who believe that this decision is premised on cognate equality, beware. The Court may want to redefine equality for another preferred group on another day and within a different policy environment.⁶⁸

IV. Conclusion

Logical and constitutional consistency require recognition that even personal values must still respect core structural

preme Court will correct mis-readings (and even if it approves the result will formulate its own explanations.” *Id.* at 15-16 (citations omitted). Professor Grant Gilmore, nearly forty years ago, suggested that since the “Supreme Court will not, indeed cannot, reconsider many of its own arguably obsolete holdings, the time may have come for the inferior federal courts to experiment with the idea that, in case of need, they should not follow or consider themselves bound by obsolete Supreme Court holdings-which would be a much cleaner approach to the problem than refined and artificial distinctions which only lead to states of intolerable complexity.” GILMORE, *supra* note 39, at 98. He concluded that in “all probability, the worst fate that such innovative federal judges would have to fear would be reversal; it is unlikely that they would be impeached.” *Id.* (footnote omitted).

⁶⁸ GILMORE, *supra* note 39, at 93 (“The rebirth of judicial activism has gone hand in hand with a rebirth of the federalizing or nationalizing principle.”). Professor Gilmore was commenting on the Supreme Court’s decision in *Erie* in 1938 striking down the *Swift* doctrine: “control over the development of the substantive law was not going to be returned to the states at a time when the powers and presence of the federal government had reached a point unknown in our history.” *Id.*

precepts concerning federalism or members of the judiciary may find themselves “stranded on a sparsely populated ideological island.”⁶⁹ As suggested throughout this essay, respect for democratic structures requires some level of intellectual and political consistency to avoid the mere convenience of using federalism to reward one private group over another. Indeed, this “ghost of *Lochner*” finds opposition in the admonition of Justice Holmes that the “14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁷⁰

The U.S. Supreme Court may yet render federalism once again a means to a nationally dominant social end (*de-Lochnerize?*). Of course, it is not difficult to hear the gnashing of neural synapses among some scholars and judges over the notion that the text of the Constitution is less than the chastely predictive canon of all things that a free society may ever need or want (without confusing the differences). Even Justice Holmes, at his most pithy, recognized that federalism meant something else in the context of judicial oversight heard from the shadows of the judicial cave:

“Young man,” said Holmes to his sixty-one year old friend [Justice Stone], “about seventy-five years ago I learned that I was not God. And so, when the people of the various states want to do something I can’t find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, ‘Goddamit, let ‘em do it!’”⁷¹

As Alexis de Tocqueville wisely observed, however, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”⁷² The role of courts, when influencing American social welfare policy, is not without virulent debate. Despite being agents within a democratic government, federal and state judges are in many ways separated from the public by appointment, often for life, rather than being elected to serve a definite term length. For some, this fact alone establishes the courts as an undemocratic agent. Seventh Circuit Court of Appeals Judge Richard Posner, describes judges as “the

⁶⁹ MURPHY, *supra* note 20, at 20.

⁷⁰ *Id.* quoting *Lochner v. New York*, 198 U.S. at 75 (Holmes, J., dissenting).

⁷¹ CURTIS, *supra* note 34, at 281.

⁷² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. P. Mayer ed., 2001).

72 *Journal of the American Academy of Matrimonial Lawyers*

individuals who resolve disputes over the application of legal norms and who often in the course of doing so modify, refine, or elaborate those norms.”⁷³

If all disputes in court offered even the moderately predictable norms found in criminal, tort, and commercial contracts then there might be more hope for family law practice. The relationship between intimate humans and the needs of the state to have a sufficiently healthy body of citizens from generation-to-generation lacks any semblance of “norm” much less a national rule of thumb. This is not just the fault of the courts; though it is much easier to blame institutions for the consequences of personal choice than to accept individual responsibility. Indeed, legal norms in family law must contort, adapt, and reform to meet the ever-expanding needs of a modern *polis* quite vigilant about rights and entitlements but not so much about duty and responsibility. Yet state rights and responsibilities require a principled respect for the power of federalism to protect private groups within states against national control by a vocal purveyor of *a* national (social) truth.

This statement is not the labeling of principled disagreement as a form of bigotry for that is a puerile form of argument itself unworthy of democratic principles.⁷⁴ Members of the Supreme Court and advocates and opponents of same-sex marriage may, however, still find themselves fellow travel companions with conservatives and progressives if non-fungible federalism is ever revealed as something other than an ideological and value-laden moment. It is difficult to accept that the group preference to retain the accouterments of power over others, in the guise of labeling the others as feckless or inherently inferior, for example, would have changed through the ballot alone.⁷⁵ The ebb and flow

⁷³ RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 6 (1990); see also Robert Dahl, *The Supreme Court as a National Policy Maker*, 156 *EMORY L.J.* 50 (2001).

⁷⁴ See *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (“I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.”); Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 *WIS. J.L. & SOC’Y.* 145, 145 (2009) (“Such a facially discriminatory statute fails constitutional review, an example of majoritarian, discriminatory bias”).

⁷⁵ The books of the late military historian John Keegan provide an important context for understanding the nature and practices of groups toward other

(or death and re-birth) of federalism for two centuries reflects tensions between majority will (as construed by those with the power to construe others), social science mythology and bias, and the constitutional potency of judicial review.

Thus, the argument for judicial deference when protecting the status quo, according to which the courts are constrained to only making decisions in harmony with majoritarian values (even though often no attention is given to ascertain what those values *actually* are), has various logical and legal shortcomings. Whether people want to acknowledge it or not, there may still be vocal groups in some states that view *Loving* or *Brown* as wrongly decided. Indeed, a primary reason for judicial review is that the public is not bound to vote according to constitutional text. Although there is no reason a citizen could not look towards a constitution before marking a ballot, as long as a person meets the institutional requirements to register as a voter, a citizen is free to base his or her vote on any rationale.⁷⁶ There is, of course, still reason to be sensitive to the exercise of judicial power when imposing policy-changes based upon current conceptions of equality and not federalism. It is this troubling lack of a non-fungible federalism which renders equality a function of personal beliefs shifting with the era rather than constitutional doctrine.

The reality of democracy is that those who vote get what the majority of those voters voted for and those who do not vote get what the majority who voted voted for. Despite some wishful thinking, the Supreme Court is not a business court, but a consti-

groups. See JOHN KEEGAN, *A HISTORY OF WARFARE* 386 (1993) (“Neighborliness flourishes, we must recognize, inside firm bounds of restraint. The civilized societies in which we best like to live are governed by law, which means that they are policed, and policing is a form of coercion. In our acceptance of policing we silently concede man has a darker side to his nature which must be constrained by fear of superior force.”).

⁷⁶ See Elihu Root, *The Importance of an Independent Judiciary*, *THE INDEPENDENT* 72 (1912) (quoted in FRED CAHILL, *JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY* 14 (1952)) (“It is not the duty of our courts to be leaders in reform, or to espouse or to enforce economic social theories, or, except in very narrow limits to readjust our laws to new social conditions. The judge is always confined within the narrow limits of reasonable interpretation. It is not his duty to function or within his power to enlarge or improve the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy.”).

74 *Journal of the American Academy of Matrimonial Lawyers*

tutional one.⁷⁷ A reality of American history is that judges fix or interpret social policy on the most controversial issues. The only question is which rights and who benefits? The origin of this movement flows, inevitably, from Chief Justice Marshall's affirmation of judicial review of legislative and executive branch behaviors. The *vital* concept is that *federalism* means that *states* are the authoritative voice on marriage in the absence of specific constitutional prohibition and that the root of the problem is the centuries-old process of cherry-picking the fruit of federalism.

As Judge Boudin wisely wrote in *Commonwealth*, the application of federalism was a *constitutional* duty. Same-sex marriage is one of the most pressing and controversial policy issues, and social experiments, facing America today.⁷⁸ From Presidential election cycles to cable TV invective, the definition of marriage, the threatened demise of civilized society, the destruction of religious values, and American notions of fairness and entitlement all blend into a maelstrom of unpleasant discourse.⁷⁹ Of course,

⁷⁷ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 320-21 (1941) ("It is always the dynamic party of change which is frustrated by the court's attitude, for the conservative party, resting on the policy of letting well enough alone, presents for review little legislation that is untried or novel.").

⁷⁸ Sometimes you do not need a footnote to state the obvious. *But see* Windsor v. United States, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) ("As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy.").

⁷⁹ James Dobson epitomizes the ferocity of resistance to same-sex marriage but he is not alone in an apocalyptic paradigm: "This is the climactic moment in the battle to preserve the family and future generations hang in the balance. This apocalyptic and pessimistic view of the institution of the family and its future will sound alarmist to many, but I think it will prove accurate unless – unless – God's people awaken and begin an even greater vigil of prayer for our nation. That's why we are urgently seeking the Lord's favor and asking Him to hear the petitions of His people and heal our land." See Jack Harrison, *The Future of Same-Sex Marriage after Lawrence v. Texas and the Election of 2004*, 31 U. DAYTON L. REV. 313, 313 (2004-2005) (quoting JAMES DOBSON, *MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE* (2004)). For a different opinion in the context of teaching creationism in public schools, see Mc-

one person's radical judiciary concerning threats to personal privacy and freedom of contract, for example, are another person's non-radical judiciary when righteously enforcing child labor, miscegenation, or racial covenants that affect property rights or protect existing entitlements. Each end of the political spectrum finds solace or rage in freedom from government interference unless, of course, the judicial preference is deemed the "toleration of evil"⁸⁰ (as often abjectly categorized by the "losing" party).

Before DOMA stepped into the breach as a national majoritarian policy, family law experiments at the state level, such as no-fault divorce, were the prerogatives of each state's experimentation with social policy surrounding family dissolution and reformation. Same-sex marriage is but part of an adaptive political and legal continuum which includes adoption, divorce, alimony, grandparents' rights, de facto parenting, joint custody, or in vitro parental rights.⁸¹ What is unremarkable is that same-sex arguments are merely the latest version of civil or human rights that federal courts have had to resolve since the inception of judicial review. For purposes of such a comparison, you can reverse or substitute a different group into any of these questions: "Is being [gay or lesbian] really the same as being a racial or ethnic or religious minority? Are [gays and lesbians] seeking special rights rather than equal rights? Are 'they' seeking toleration or demanding governmental endorsement of a lifestyle?"⁸² Is sexual orientation a choice or a pre-determined biological im-

Lean v. Arkansas, 529 F. Supp. 1255, 1274 (1982) ("No group, no matter how large or small, may use the organ of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others.").

⁸⁰ See Murphy, *supra* note 20, at 195.

⁸¹ One of the mysteries of family law is why the United States Supreme Court granted certiorari in *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households.").

⁸² EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 3 (2004).

perative governed by nature or nurture?⁸³ The response to each of these questions will often conform to the pre-existing cultural beliefs of the proponent.⁸⁴

There is no dispute that by virtue of the Court's power to exercise judicial review for several centuries, nationalized doctrine over the regulation of family law was voluntarily ceded to the states generations ago.⁸⁵ Cherry-picking nationalistic policies dependent upon antipathy toward the latest private group target may seem a proper and righteous exercise of *force majeure*. Indeed, as Justice Holmes argued from his own experience in the Civil War, the ultimate source of power was the force that lay behind government and that the dominant force of the community determined the sanction of that force.⁸⁶ What is of particular importance, whether in contract or constitution, was that Holmes perceived that the law "reflected not the community at large, but the interests of a dominant class" such that the law was "both the

⁸³ See CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* 232 (1996) ("Generally conservatives arm themselves with biological arguments while liberals argue for the power of social forces and thus in favor of social programs."). For anyone wondering if this is just idle chatter, please review SB1172 from California which prohibits a mental health provider from engaging in sexual orientation change efforts and states, as matter of legislative finding, that being "lesbian, gay, or bisexual is not a disease, illness, deficiency, or shortcoming." The Court of Appeals for the Ninth Circuit issued an injunction against enforcement pending full review. See *Pickup v. Brown*, Case No. 12-17681, 2012 WL 6869637 (9th Cir. Dec. 21, 2012).

⁸⁴ See Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY* 157 (Douglas Laycock et al. eds., 2008) ("Second, this chapter seeks to demonstrate the ultimate unworkability of a radical separation of religion and law on the subject of marriage. As a matter of anthropology, the human personality seeks to mark social transitions such as marriage with ritual and solemnity. As a matter of jurisprudence, the law teaches values through behaviors it sanctions and those it prohibits."). I read the chapter. With all due respect, Professor Reid does not come close to proving his point.

⁸⁵ CURTIS, *supra* note 34, at 205 ("Nothing is said about federalism in the Constitution, nothing explicit."); see also *id.* at 331 ("The Constitution, unlike the Declaration of Independence, was not a proclamation and it was shrewdly silent on these things.").

⁸⁶ See Sheldon M. Novick, *Introduction to the Dover Edition*, in OLIVER WENDELL HOLMES, *THE COMMON LAW XII* (Dover Publ'ns 1991) (1881).

instrument and the result of natural selection.”⁸⁷ In the meantime, the death of federalism at the hands of the Supreme Court shares a common rabbit hole with the death of contract: “who knows what unlikely resurrection the Easter-tide may bring?”⁸⁸

⁸⁷ *Id.* at xiv.

⁸⁸ GILMORE, *supra* note 16, at 103.

