

Lesbian, Gay, Bisexual, and Transgender Issues in Philosophy



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APA NEWSLETTER ON

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WILLIAM S. WILKERSON, EDITOR

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FROM THE EDITOR

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The two recent Supreme Court decisions regarding same-sex marriage are the occasion of this collection of essays discussing the merits and problems of same-sex marriage, the status of queer families, and the legal ramifications.

The first two essays tackle the question from both more abstract and more concrete locations. John Corvino has kindly consented to reprint his careful analysis of one of the most common objections made to same-sex marriage. Conversely, Raja Halwani builds upon objections to same-sex marriage put forward by gays and lesbians, like Michael Warner and Claudia Card, to argue that gay marriage does not represent the best path forward for gays and lesbians, but that a more radical undermining of marriage is called for.

Next, two trans and queer activists present a moving account of how a queer family can form in the most unlikely of circumstances, take root, and transform everybody's lives in the process. The essay vividly poses questions about how we define our families, why we enter into relationships that we call families, and what makes us stay committed to family. It should be noted that, for reasons of safety and security of themselves and their children, both authors have chosen to remain anonymous and to alter names in their otherwise biographical account.

Finally, Richard Nunan has truly performed some heroic work trying to untangle the tortuous and really contradictory reasoning employed by the justices of the Supreme Court. His essay is the sequel to his previous essay that detailed the long road and the tremendous complications of getting these two cases to the Supreme Court. While the decisions can only be considered victories in the immediate for gays and lesbians who desire marriage, the legal arguments that led to these victories are a decidedly mixed bag in the long run, both for "liberals" and "conservatives" alike. Richard has done us a great service by providing this analysis; almost nothing with this level of detail can be found in any mainstream discussions of the decisions, and it underscores the many threads that together comprise the thinking of nine very intelligent but very human justices.

ARTICLES

Same-Sex Marriage and the Definitional Objection

John Corvino

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Excerpted and reprinted by permission from John Corvino and Maggie Gallagher, Debating Same-Sex Marriage (Oxford University Press, 2012).

According to the *Definitional Objection*, what we are denying to gays is not *marriage*, since marriage is by definition the union of a man and a woman. Sure, we could call a same-sex union a "marriage," but we ought to use scare-quotes when doing so, since a same-sex union can in fact no more qualify as marriage than a union between a man and a bicycle—that's just not what marriage *is*. Like Abraham Lincoln, who reportedly asked "How many legs would a dog have if we called its tail a leg?" and then insisted (correctly) that the answer is four, proponents of the Definitional Objection claim that calling same-sex unions "marriages" involves a conceptual error.¹ As Maggie Gallagher puts it, "Politicians can pass a bill saying a chicken is a duck and that doesn't make it true. Truth matters."²

In its barest form the Definitional Objection contends that same-sex marriage is simply impossible. As Alliance Defense Fund attorney Jeffery Ventrella puts it, "[T]o advocate same-sex 'marriage' is logically equivalent to seeking to draw a 'square circle': One may passionately and sincerely persist in pining about square circles, but the fact of the matter is, one will never be able to actually draw one."³ And again, "The public square has no room for square circles, because like the Tooth Fairy, they do not really exist."⁴

It is tempting to respond that we don't normally pass legislation or constitutional amendments banning impossible entities: why worry about something that not only doesn't exist, but can't possibly exist? Committed same-sex relationships certainly exist, and some jurisdictions grant them legal recognition under the name "marriage." So the debate seems to be less about whether something exists than about what to call these existing things.

By analogy, consider a modified version of Ventrella's "square circles" example. Surely there is no such thing as a square ball (or cubical ball, to use a more precise but clumsier term). Yet some tennis coaches have their players practice with

irregularly shaped rubber “balls,” whose bouncing behavior is erratic, in order to improve their reflexes. Suppose that some of these “balls” are cubical, and that coaches and players refer to them as “square balls.” Now it might be an interesting academic question whether these or any objects could possibly be square balls. But that question has little relevance to whether people should continue to call them “square balls,” and it certainly has no relevance to whether they should continue to practice with them. These objects exist (we are supposing), and “square balls” is a handy term for them. In a similar way, committed same-sex unions exist, and “marriage” is a handy term for them. What’s the problem?

Conservative writer Robert H. Knight has tried to explain the problem with an analogy:

When the meaning of a word becomes more inclusive, the exclusivity that it previously defined is lost. For instance, if the state of Hawaii decided to extend the famous—and exclusive—“Maui onion” appellation to all onions grown in Hawaii, the term “Maui onion” would lose its original meaning as a specific thing. Consumers would lack confidence in buying a bag of “Maui onions” if all onions could be labeled as such.⁵

In his public debates, Institute for American Values president David Blankenhorn makes a similar point using a different example, asking audiences to imagine what would happen if the word “ballet” were used to refer to all forms of dance.

Knight’s and Blankenhorn’s examples are revealing. Yes, it would be bad to use the term “Maui onion” for all onions or the term “ballet” for all forms of dance, but that’s because doing so would frustrate human aims. If you go to the theater expecting ballet but end up getting Riverdance, you may be disappointed. The same is true if you go to the grocer asking for Maui onions but getting plain white ones, or asking for a chicken but getting a duck. Indeed, Knight makes the frustration problem explicit: “Consumers would lack confidence in buying a bag of ‘Maui onions’ if all onions could be labeled as such.”

Would extending marriage to gays and lesbians frustrate human aims in a similar way? Not directly. No one worries that, if society extends marriage to same-sex couples, then grooms will meet brides at the altar, lift their veils, and exclaim in shock “Damn, you’re a dude!”

But perhaps the similarity is indirect. Same-sex-marriage opponents often contend that stretching “marriage” to include same-sex couples would have bad consequences, such as severing the institution from its child-centered functions. Notice, however, that this contention represents a rather different sort of argument: a consequentialist argument based on same-sex marriage’s alleged harms. (We will cover such arguments in subsequent sections.) Recall that the point of the Definitional Objection is not that treating same-sex unions as marriages would lead to bad consequences, but that doing so is *wrong in itself*, amounting to a kind of lie or confusion. It says that such marriages are not possible, which is different from saying that they’re not desirable.⁶

Knight’s “Maui onions” example is misleading precisely because it obscures this distinction. “Maui onion” is a label that vendors attach to a distinctive variety of onion grown on the island of Maui. Suppose that a genetically identical variety could be grown on the island of Kauai, and that the resulting onion was indistinguishable in taste, texture, shelf-life and so on. In that case, it would be not only possible, but perhaps even sensible, for vendors to apply the “Maui onion” label to the genetically identical onion. In a similar way, Americans often use the term “classical music” to refer to all traditional Western instrumental music, not just music created during the Classical Period (as distinct from the Baroque and Romantic periods). Words are symbols, and speakers may use them in whatever ways serve their communicative aims.

Knight would doubtless respond that the cases are disanalogous: whereas traditional Maui onions and the hypothetical Kauai-grown “Maui onions” are genetically identical, traditional (heterosexual) relationships and same-sex relationships lack an underlying structural similarity. Perhaps so. But it doesn’t follow that same-sex relationships are so different that they are ineligible for marriage. The problem with the Definitional Objection is that, instead of arguing for this conclusion, it simply asserts it. Eligibility for marriage is precisely what’s at issue here. The Definitional Objection says that same-sex couples cannot marry because same-sex marriage is impossible. That’s a circular argument if anything is.

Another problem with the Definitional Objection is that it confuses a conceptual issue with a moral one. To see why, consider what I call the Marriage/Schmarriage Maneuver. Imagine a marriage-equality advocate who, after hearing the Definitional Objection, responds:

You know what? You’re right! This thing we’re advocating isn’t marriage at all. It’s something else—let’s call it schmarriage. But schmarriage is better than marriage: it’s more inclusive, it helps gay people without harming straight people, etcetera. We’d all be better off if we replaced marriage with schmarriage. Now, it’s unlikely that the word “schmarriage” will catch on—and besides, it’s harder to say than “marriage.” So from now on, let’s have schmarriage—which includes both heterosexual and homosexual unions—but let’s just call it by the homonym “marriage,” as people currently do in Massachusetts, Canada, South Africa and elsewhere. Okay?

Marriage traditionalists will surely respond “Not okay”—but why? The answer is that they reject the idea that the more inclusive institution—schmarriage—is better than marriage. Without some further argument for why it’s morally important to maintain an exclusively heterosexual notion of marriage, the Definitional Objection looks like a mere academic quibble, akin to the “square balls” issue discussed above.

...

Notwithstanding the foregoing argument, Maggie Gallagher continues to insist that “the first reason” and “the deepest reason” to oppose treating same-sex unions as marriages is

“because it is not true.”⁷ That is, she continues to endorse the Definitional Objection, and she claims repeatedly that it is not a circular argument.

Suppose you were to ask me “Why should I accept your view of marriage?” and I were to respond, “Because it’s true.” You would justifiably be unsatisfied. Indeed, you would probably be annoyed. “Okay, John,” you might reply, “but that doesn’t really answer my question: why should I accept your view of marriage as true?” In other words, *accepting* my view of marriage—which includes same-sex couples—means accepting it as true, as correct, as better than the alternatives. That’s what *accepting it* means. Yet Gallagher treats “because it’s true” as an independent, non-circular argument—indeed, as the most important argument she offers.

Gallagher attempts to clarify by comparing and contrasting the word *marriage* with the words *red*, *dog*, *mother*, and *corporation*, and here the confusion simply escalates. She asks us to imagine a world in which the word “dog” means “either dog or cat,” but she doesn’t appreciate the force of her own example. She claims that in such a world, “those of us who know what a cat is or what a dog is would understand that something less true was being asserted.” Actually, no. Definitions only assert something true (or false) insofar as they attempt to capture established usage. But here Gallagher asks us to imagine abandoning established usage in favor of a different one: one where the string of letters D-O-G refers, not only to certain members of *Canis lupus*, but also to members of *Felis catus*. In that case, assuming that other definitions remain constant, the following statements would all be true:

Dogs are popular pets.
 Some *dogs* are Tabby.
 Not all *dogs* bark; some purr.
 The famous cartoon characters Felix and Garfield are *dogs*.
 and so on.

(I italicize *dogs* to underscore that the term is being used non-standardly here.)

Of course, there are many good reasons for distinguishing between dogs and cats, as we currently use those terms. But there are plenty of ways of indicating the distinction that differ from our own. For example, like Spanish speakers, we could use the terms *perros* and *gatos* instead of “dogs” and “cats.” In Gallagher’s hypothetical society, we could use the terms “canine dogs” and “feline dogs”—or as she suggests, “dogs that bark” and “dogs that meow”—without any loss in precision. These different ways of indicating the distinction might be more or less convenient, more or less euphonious, or more or less familiar, but they are not more or less *true*.

Perhaps Gallagher’s point is simply that *established usage* requires that the word “marriage” refer only to different-sex unions; this may explain why she spends considerable time reviewing marriage’s history. But Gallagher herself concedes that other societies have recognized same-sex unions as marriages. These marriages may not be common, and they may not be “gay marriages” as we understand them, but they show something important: we are not the first generation to recognize that “male-female” need not be

part of *the very definition of “marriage.”* Moreover, usage changes over time. So if Gallagher is making an empirical claim about English usage, it appears to be a losing one: many competent speakers today use the word “marriage” to include same-sex couples. Language is malleable, and so is marriage: as Gallagher admits, in an apparently unguarded moment, “Marriage is not static. It changes, adapts, and evolves” (107). Precisely!

What Gallagher really wants to say is this: *heterosexual unions are so important, and so different from same-sex unions, that we ought to reserve a privileged term and privileged status for them.* As she puts it, there is “a basic human reality, captured by this word, that deserves to be named as distinct and unique” (100). That is a meaningful, non-circular claim. But it’s not the Definitional Objection, at least not as Gallagher has articulated it. And whatever it is, it’s something that requires argument and evidence, not mere assertion.

Consider an analogy to another social practice: baseball. When the designated-hitter rule was introduced—allowing someone else to bat for the pitcher—some purists objected “That’s just not baseball!” Today, virtually all competent English speakers use the term “baseball” to refer to a game that includes the designated-hitter rule. We can still argue about whether that rule is a good idea, whether it should have been adopted in the first place, or whether it should be continued. But arguing that we cannot use the designated hitter rule “because it’s not true” would be silly.

Gallagher will surely object that marriage is not like baseball, and that my analogy proves that I’ve missed the point. Baseball is a conventional institution: it is created by humans for human purposes and can be changed to suit those purposes. In this respect it resembles Gallagher’s example of *corporation*, which she contrasts with *marriage*. As she writes, “If ‘marriage’ is a word like ‘corporation’ we are launched into a purely consequentialist argument, in which truth claims do not arise” (104). In that case, “marriage means whatever the individuals decide it means,” and ultimately, “the term ‘marriage’ has no outside referent” (100).

Gallagher’s confusion here is legion. First, there is her strange claim that “truth claims do not arise” in consequentialist arguments. (Consequentialist arguments, like all sincere arguments, aim to establish true conclusions.) Second, there’s the idea that a conventional institution can mean whatever the *individuals* decide it means. This is false. The pile of paper clips on my desk cannot constitute a corporation, even if I say so, and a game that two people play with a deck of cards can’t be baseball, although it may nevertheless be worth playing. The whole point of *conventional* institutions is that they depend on shared understanding across a community. Third, absolutely no one in this debate thinks that “the term ‘marriage’ has no outside referent,” as Gallagher bizarrely asserts. We simply disagree about what that referent can be.

Even worse for Gallagher is that her own preferred comparison—between the word “marriage” and the word “mother”—contradicts the very point she is aiming to make. She wants to argue that “marriage” refers to something whose boundaries exist independently of our legal and social customs—what philosophers might call a *natural kind*. The word “mother” is like that: its primary meaning is a biological

reality. As Gallagher puts it, “The mother is the person who bears the child with her body” (103).

Except, sometimes, she’s not. Two sentences later Gallagher rightly notes that we have expanded the use of term “mother” to include those who do not meet the biological or “natural” definition: “When the natural mother cannot or will not perform the maternal function for the child, we give a motherless child a mother through the legal process” (103). Precisely. The word “mother” refers to a certain biological relationship, but it can also refer to a certain *social role* that is often (but not always) performed by biological mothers.

Now, my own view—contra Gallagher and the new-natural-law theorists—is that it’s strange to treat marriage as essentially a biological reality. But the point is now unnecessary, because even if one insists that “marriage” refers primarily to a biological relationship, Gallagher’s “mother” example shows us how to expand the term’s use. By performing social roles that are associated with married couples—lifelong romantic partnering, mutual domestic care, and so on—a same-sex couple can marry, even if they don’t meet Gallagher’s biological criterion.

Let me illustrate by way of a personal example. My parents regularly refer to my partner, Mark, as their “son-in-law.” There is in fact no *law* acknowledging Mark as my spouse: both Michigan (where I live) and Texas (where my parents live) constitutionally prohibit same-sex marriage or similar unions. And we clearly don’t meet Gallagher’s biological requirement. Yet my parents recognize Mark as their son-in-law. Why?

Because Mark is the person who is committed to me for life, and vice-versa—that’s why. Because he’s the one I share my home and my bed with, for ten years and counting. Because he’s the one who cares for me when I’m sick, who comforts me when I’m grieving, who cheers me on at milestones, and who will bury me when I die (assuming I go first). Because he’s the one who pulls me aside to tell me that I’m acting like a jerk, or that it’s time to trim my nose hair, or that maybe I’ve had too much to drink. Because he’s the one my parents call when they’re concerned that I’m working too hard, or they’re trying to figure out what to give me for Christmas, or they want to surprise me with a visit. Because he’s the one who, on stressful days, brightens my mood with a simple text-message saying “I love you.” Because he is, as they say, “my better half.”

My parents, who have been happily married for over forty-four years, always wanted me to find such a person someday. When I was growing up, they did not imagine that this person would be a man. But he is, and he’s their son-in-law, and don’t try to tell them otherwise.

Indeed, here’s one place Gallagher and I agree. She writes that the word “marriage” refers “not primarily to the law, but to a phenomenon outside the law, that the law either recognizes or fails to recognize, supports or fails to support, with real-world consequences” (105). I wholeheartedly concur. As vital as it is, the legal reality is not the only important reality. Just ask my parents.

NOTES

1. According to one source, Lincoln actually made the comment about a calf. See *Reminiscences of Abraham Lincoln by Distinguished Men of His Time*, collected and edited by Allen Thorndike Rice (1853–1889) (New York: Harper & Brothers Publishers, 1909), 242. I found the source here: <http://timpanogos.wordpress.com/2007/05/23/lincoln-quote-sourced-calves-tail-not-dogs-tail/#more-636>.
2. Maggie Gallagher, “The Maine Vote for Marriage,” *Real Clear Politics*, http://www.realclearpolitics.com/articles/2009/11/05/the_maine_vote_for_marriage_99020.html.
3. Jeffery Ventrella, “Square Circles?!! Restoring Rationality to the Same-Sex ‘Marriage’ Debate,” *Hastings Constitutional Law Quarterly* 32, no. 2 (2004): 682.
4. *Ibid.*, 683.
5. Robert H. Knight, “How Domestic Partnerships and ‘Gay Marriage’ Threaten the Family,” in *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality*, ed. John Corvino (Lanham, MD: 1997), 297.
6. As Sherif Girgis, Robert P. George, and Ryan T. Anderson put it, “the current debate is precisely over whether it is *possible* for the kind of union that has marriage’s essential features to exist between two people of the same sex” (249, emphasis mine). They contrast their concern with “utility-based” reasons for restricting marriage to one man and one woman (275). See Sherif Girgis, Robert P. George, and Ryan T. Anderson, “What is Marriage?” *Harvard Journal of Law and Public Policy* 34 (2010): 245.
7. John Corvino and Maggie Gallagher, *Debating Same-Sex Marriage* (Oxford University Press, 2012). Hereafter cited parenthetically in the text.

Same-Sex Marriage

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On Wednesday, June 26, 2013, the United States Supreme Court announced its decisions regarding its March 2013 deliberations regarding to important cases bearing upon same-sex marriage. It struck down Proposition 8 on unconstitutional grounds and it voided one part of the Defense of Marriage Act, the part that did not extend the federal benefits and responsibilities that opposite-sex married couples have to same-sex married couples. This means that in those states in which same-sex marriage is legal, same-sex couples will have these benefits and responsibilities. The Supreme Court’s decisions will likely also have an effect on non-citizens married to citizens: the former will likely now have the right to permanent residency.

The court’s decisions said nothing about whether there is a federal, constitutional right to same-sex marriage, which means that many states can still, in principle at least, ban or prohibit same-sex marriages. Thus, the court’s decision is mixed: assuming that marriage is a good thing, it is a step forward; but only a step, as it is at best unclear what is going to happen in states that do not allow same-sex marriage (including what will happen to the rights of same-sex couples married in another state who move there).

Such a decision is nonetheless a landmark legal and moral victory for gay and lesbian rights. It is one step closer to full same-sex marriage rights across the union; it will help boost gay people’s and same-sex couples’ social and political status; same-sex couples would no longer have to rely on complicated and often unreliable legal documents that

grant access to each other in certain cases (such as medical emergencies); and their relationships will attain equality with those of heterosexual people and opposite-sex couples.

However, the moral victory would be tainted. This is for two (non-exhaustive) general reasons: first, the rights of other sexual minorities would still be left unaddressed, and, second, the most powerful argument against same-sex marriage remains also unaddressed. What follows would still apply if, or rather when, same-sex couples have a federal, constitutional right to marriage. Let's begin with the first reason.

Extending same-sex marriage rights still leaves the rights of other sexual minorities unaddressed. I have in mind transgender and transsexual people, even bisexuals. Kayley Vernallis has interestingly argued recently that same-sex marriage would leave many bisexuals' rights unaddressed: Since bisexuals are attracted to members of both genders, then a bisexual married to a member of the same sex or of the opposite sex cannot express her sexuality unless she violates one or more of the ideals of marriage. For example, if Salma were married to Omar, she would not be able to act on her desires for women without either cheating on Omar or having an open relationship. Each option would violate one ideal of marriage, according to Vernallis. The first violates the ideal of sexual fidelity, the second the ideal of monogamy. If Salma were married to Leila, she would have to face the same options but now with a man. Vernallis concludes that only marriages involving four bisexual members, two of whom are men and two of whom are women, can satisfy the ideals of marriage and extend proper equality to bisexuals.

Vernallis's argument faces some serious objections. First, there is no agreed upon list of what the ideals of marriage are. Second, it is not clear that marriage is about sexual self-expression, as many would say that it has multiple purposes, including—prominently—love. But if love is a crucial purpose of marriage, and if it is usually exclusive to one person (the occasional polyamorous relationship notwithstanding), then bisexuals can marry the person they love, and so marriages of multiple members would not be necessary. Third, there are many logistical nightmares in such marriages; it is often hard enough for two spouses to plan their day, to deal with day-to-day issues and emotions that arise in a twosome marriage, so it is difficult to see how marriages of foursome would function.

But perhaps the most interesting issue the argument faces is the following: What happens when one member decides to exit the marriage? Would the whole thing then fall apart? Would the three who are left over be required to find a replacement? How? This issue contains three inter-related ones: (1) the (non-legal) logistics of exiting such a marriage; (2) the conceptual issue of whether the marriage remains a marriage when one person decides to exit it; and (3) the legal issue of divorce. Claudia Card has forcibly argued in her essay "Gay Divorce" that the nightmare of divorce should make anyone pause before he or she decides to marry. One main reason for her claim is not simply that divorce procedures are emotionally and financially draining, not to mention time-consuming, but also that in cases of abuse, a spouse might be trapped in the marriage until the divorce is finalized. Card's argument highlights the role of the state in our private lives.

By granting rights of access of one spouse to the other and of (unintentionally) abetting abuse by preventing abused partners from exiting a marriage pending divorce, the role of the state makes marriage a highly problematic (indeed, to Card, evil) institution. Moreover, my interpretation of Card's argument is that it is not an empirical one; it is not about the number of abused spouses in marriages. It is about the principle of it all: Why should the state be involved in our intimate lives when this can have pretty bad consequences?

There is one premise in her argument that Card should have emphasized more and that her philosophical opponents continue to under-appreciate: even if the laws of marriage were changed (if, e.g., divorce becomes unilateral), there would remain the issue of whether what we then have on our hands is still marriage. That is, should one make the obvious retort that the laws of marriage can be fixed, one might argue on Card's behalf that this is easier said than done: Why would marriage be marriage if it can be dissolved easily or at will (unilateral divorce)? Or if the state's role were reduced merely to rubber-stamping whatever individual agreements the two partners agree on, in what way would it be marriage? Indeed, part of Cheshire Calhoun's case in the defense of same-sex marriage is that it should not be reduced to individual agreements between the couples, that it should remain the state-backed and enforced institution that it is, as this is a principal way that gay people can attain proper visibility.

There is another point in support of Card's argument that needs to be made explicit, which is that even if the laws of marriage were fixed and what remains is recognizably marriage, there remains the issue of *why*: Why have marriage at all—as opposed to weddings, ceremonies, celebrations of love, intimate relationships, etc.? Obviously, one answer is that marriage has many benefits, both social and legal, given its current standing in society. But this answer is good only conditionally: only given the existing structure and meaning of marriage today, will getting married confer its social and legal benefits. But the answer does not address the issue in itself, so to speak: Why should we have marriage at all? It seems that marriage as a legal institution serves no necessary function that cannot be attained in ways other than by state control and intervention.

In my 2010 book, I defended and built on Card's argument by borrowing from Michael Warner's book *The Trouble with Normal*. Here is what I wrote: "in the end, the elevation of marriage to the status it currently occupies seems to be entirely arbitrary, the product of a long historical process that has no proper moral justification."¹ The idea behind these words combined Card's argument with the point that marriage is ultimately unnecessary. It seemed to me then, and it seems to me today, that no one has addressed this argument properly. The best people have done is to basically claim that it might be sound, but that we have a reality with which we need to contend, and it is with this reality that their arguments are dealing. In other words, people continue to make the conditional response I stated above.

Indeed, I think some have short-changed Card's argument (and, as a consequence, arguments built on it). Consider, for example, my friend John Corvino's treatment of it in his wonderful book (co-authored with Maggie Gallagher)

Debating Same-Sex Marriage. Addressing Card and Warner's arguments, he gives the analogy with higher education. He claims that the institution of higher education has many defects (indeed, the same ones that marriage is claimed to have) but that if gay people were excluded from it, we would not argue that we should dismantle the institutions of higher education, but we would argue instead that we should reform it.² Corvino then explains Card's analogy with slavery. Card's point is that just because a (mythical) society deprives women from the right to own slaves it does not follow that women should demand this right. Corvino then asks us to choose between the two analogies: Which is more apt, the slavery one or the higher education one? He states, "So my disagreement with Card and Warner boils down to whether marriage is more like college—a flawed but basically good thing—or more like slavery, which is irredeemably morally flawed. To me it seems patently obvious that marriage is more like college."³

I have never understood Card's point about slavery to be an analogy, though many people (including my students) read it that way. Why? Because it would be a bad analogy, thereby making Card's argument weak. And it would be a bad analogy because the institutions of slavery and of marriage have many more differences between them than they have similarities (I think!). Instead, I have understood Card's discussion of slavery to be an illustration of the logical point that if an institution is irredeemably bad, we ought not to clamor to partake in it. So when Corvino asks us to choose between the two analogies he is, to my mind, being unfair to Card's argument. Of course I would choose higher education, and I would do so because marriage is closer to it than to the institution of slavery. However, the issue was never to compare marriage to slavery, but to highlight the point that we should not pursue rights that are rights to partake in an evil institution or practice. (I should note here that even if Card intended her point about slavery to be an analogy, I would take leave of her intentions and construe her point differently and, to my mind, more convincingly.)

But Corvino's point is still powerful. Although I have serious reservations about the way he lumps together their arguments, we can still ask Card and Warner: Would your reasoning apply also to institutions such as higher education? And why wouldn't it? After all, and if Corvino is correct, higher education suffers from defects similar to those that Warner and Card claim marriage suffers from: "it privileges some life choices over others; it grants status; it unlocks a variety of economic and social benefits."⁴ It is here that I think that Corvino is most uncharitable to Card's and Warner's arguments, because the answer to higher education is obvious: we can fix the problems with higher education without necessarily ceasing to recognize it as higher education, whereas this is not obvious with marriage. For example, even if we live in a society where people who decide to not attend college are not looked at as inferior, we would still have higher education and recognizably so. And institutions of higher education are necessary; it is almost impossible to imagine a social configuration without some form of higher education or other, whereas with marriage this is not so obvious: change the laws with which Card raises issues and it is debatable whether we have marriage on our hands or some other animal entirely.

Unless these two points are addressed, arguments defending same-sex marriage succeed only in a limited way: they succeed in showing that given our social configuration, we need the benefits and the status of marriage to treat gay people and same-sex couples equally.

Perhaps this is sufficient for most proponents of same-sex marriage. Indeed, they might even argue that given the political climate it is dangerous to speak of getting rid of marriage. Here, however, I would like to mention two things. First, our options are not limited to agitating for marriage rights for same-sex couples and to agitating for abolishing marriage for everyone. There is a third option, which is to take marriage off our political agenda altogether (this is the option that Card supports in "Gay Divorce"). So gay people will still have the option of whether to pursue it or to take it off the agenda and pursue other, more worthwhile causes.

But I want to say something also in defense of the idea of abolishing marriage. I am reminded of people who argue against the one-state solution for the Israeli-Palestinian issue on the ground that the political climate is not ready for such a move. My response to this has always been something of mild bafflement: political climates are not set in stone; they are not scripts to which we must adhere or rules by which we must abide. Political climates change all the time, and the factors that make them change are many and diverse, but one factor is political agitation for a particular outcome. My point about the one-state solution has always been that if it is the just solution to the Israeli-Palestinian conflict, then we must fight for it. And part of what it would mean to fight for it is to change the political climate. We cannot simply state, "Sure. The one-state solution is the right solution but, shucks, we need to set it aside because the political climate is not quite ripe." Instead, we work to make the climate different: we write about it, we make films about it, we demonstrate for it, we lobby our representatives about it, and we do what is necessary to make it happen.

I want to say something similar about marriage. Quoting myself again (I seem to enjoy doing this):

Given the dubious role of the state in marriage, given that marriage discriminates against non-married people by giving the first, but not the second, a package of benefits, and given that there is absolutely no good reason why marriage should have the glorified status in society that it has, its current social, institutional existence is utterly unjustified. Neither the state nor society has any good reasons to treat marriage in a special way. We are better off leaving it up to individuals to form their own commitments and relationships, and to celebrate them in the way they see fit.⁵

If getting rid of marriage is the right thing to do, then by all means we should work to attain this goal. Of course, before we do so we need to make sure that the above arguments against marriage are sound, that there are no defeasible conditions to make us retain marriage even if the arguments are sound, and that the political costs in agitating against marriage are not so high as to make the fight not worth it (all these conditions are satisfied when it comes to the one-state solution; I am not sure about marriage).

The Supreme Court's recent decision brings same-sex marriage one step closer to reality. And if it should finally become reality, we need, after celebrating, to develop a new political and philosophical agenda, one that aims to fix the injustices of marriage, and one that aims to address other sexual minorities, including bisexuals. We need to answer the question that Vernallis raises: Would opposite-sex and same-sex marriages be sufficient to satisfy the rights and aspirations of bisexuals and other sexual minorities?

NOTES

1. Halwani, *Philosophy of Love, Sex, and Marriage*, 308.
2. Corvino and Gallagher, *Debating Same-Sex Marriage*, 81.
3. Ibid.
4. Ibid.
5. Halwani, *Philosophy of Love, Sex, and Marriage*, 310.

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On Family and Family (*The Ascension of Saint Connie*)

Two Anonymous Authors

Connie hadn't had a lucid thought in days. The day we moved her from hospital to hospice she didn't say anything at all. "Do you know where you are?" No response. "You're in hospice at Van Ness House." No response. "Do you know why you're here?" No response. "You're here because you're dying. Did you know that?" It fell to Susan to tell Connie the truth.

"I do now," Connie had replied simply, as if somebody had finally revealed a secret truth to her rather than an obvious fact. And she said it with her old, strong, sardonic Connie voice. That may have been one of the last moments of lucidity that she ever had—as we began that regimen of morphine, methadone, and ativan that would help her slip away from us. The dementia was progressing as she was brought into the hospital for a final time. For the most part she had been delusional long before she had ever made it to what would be her hospice. And her denial about her HIV-status, a delusion in its own right, had long flourished ever since she had first learned about it years ago. Indeed, it

was perhaps that very denial and her fear of death that had ultimately led to this moment.

Connie was a passionate community activist, a 34-year-old trans woman committed to trans justice and to educating trans youth to protect themselves and their partners from HIV, even as she lay dying, the result of her erratic dosing, which led to multi-drug-resistant HIV. By shouldering the mantle of being a "leader" and an "icon," an "educator" and "activist" in a community obsessed with leadership, she became even more afraid of talking seriously about living with HIV and perhaps even afraid of showing any vulnerability at all. In the hospital, days before she moved to hospice, wasting away and covered with sweat because the air conditioning went out on the floor—with every bone in her frail body exposed—one of "her youth" commented on how great and thin she looked . . . how she'd be happy to have HIV to get a body like that.

This was home-hospice. But since Connie had essentially lost her home to her parasitic family, and somehow managed to lose her Medi-Cal while she was in the hospital, we had to scramble to find a space for her. Kathy Watt opened up the Van Ness Recovery House for us—a kind of "home-coming" for Connie who had actually begun her gender transition while "recovering" (quite briefly, it turned out) from her love-affair with drugs at this "last-stop" community treatment facility. Ironic, then, that this was her final home as we filled her up with morphine—finally free to give her all of the pain-killers in the world that she could ever want. "Nurse, can I have my pain meds?" we used to mordantly joke, imitating her sole refrain that had played on a loop during her frequent stays in the hospital. But Kathy, more than anyone, was able to function as an interlocutor between us and Connie's mother, who she knew from Connie's teenage years. The Van Ness staff and residents were so loving, supportive, and helpful as Connie and her entire world smashed into the House like a barren asteroid. Even now when we think about these extraordinary people who rose like giants during that time, we feel overwhelmed, speechless.

Family.

Perhaps there is a thin sense in which we like to call an activist community family. We are struggling together, after all, and sometimes we are friends. But there is surely another sense in which we call those real friends family. For we have developed intimacy bonds forged in the fire of lives shot through with the effects of oppression and the efforts to resist. Susan, with her long history in activism, including ACT UP and Queer Nation during "the plague" years, had always been a firm believer in community as family; real relationships, real friendships, deepened by breaking bread, sharing laughter and tears. Together we had often opened up our home for people to come to socialize and to be—particularly during holidays when "real family" turn their backs on many of us, leaving us out in the cold.

Here, certainly, in this moment of dying, family was formed, extended, deepened. For a time, the "inner circle" became a true formulation of family—me, Susan, Sabel, Diviana, Isabella, Christina, and Jake, as we facilitated Connie's departure from earth. At the time, in the heat of the moment, it indeed felt like this little, insular family would last for eternity. It held

together for only some time, however, after Connie died, in a year that was perforated with the departure of friends. It turns out this was a “death family.” When people stopped dying so much (or, rather, so fast), parts of the family tree dried up and died with nothing left to sustain them. But it was still special. It was magically fleeting like those “special moments” of intimacy that cast community comrades in new lights—Kara reading from beautiful Buddhist writings about letting go—visibly giving Connie some peace, while some of us huddled in Connie’s tiny room in the wee hours, brief days before she died.

And some things did last longer.

Sabel and I became sisters. While I had known her as one of Connie’s best friends for quite some time in trans activist contexts, we were never more than mildly friendly. But on the first night of Connie’s stay in hospice, when, as a consequence of some horrible oversight, we had not yet received the morphine, Sabel and I each took one of Connie’s hands, trying to ease her through the excruciating pain while Jake went out searching for something to numb her. For long hours of agony, through the medium of Connie, Sabel and I were transformed in horror and in love. And they did not know that a few months later they would be transformed yet again—become family in an entirely different sense of the word.

There’s this other sense of family that entails actual domestic arrangements and long-term care. And in that sense Connie actually became a kind of daughter-sister to us after her return from San Francisco five years earlier. When she returned, she was a wreck—emaciated from the effects of meningitis. She strove to pull together her life. But by the final two years, she had started to get really sick again. We brought her to the hospital, took care of her while she was in the hospital. And when she was out (a week here, a day there, punctuating ever-longer stays in hospital), she spent a lot of the time staying with us. She had always been family, but now she became *family*. Where was community then? Well, partly, she shut everybody else out. But partly, “community” couldn’t deal with it. As much as she didn’t want the community—especially the young people—to see her struggle, the community didn’t want to see tarnish on the local hero.

There’s family, and then there’s *family*.

Connie had always played an important role in our lives. In the early 2000s, after having met doing HIV work, she was the person who had ushered Susan into the L.A. trans community, while she was in the process of developing her politic around trans issues. And I had worked with her on trans issues since the late nineties when I was early in my transition. While I was in grad school, I worked part-time with an HIV-prevention program, where Connie worked as well. She had been there when I had been assaulted on Santa Monica Boulevard—one of the friends who tried to bring comfort to me afterwards. But many years later, she also liked to remind me of the trans women who worked the Boulevard and were harassed by the gangs. They used water guns to shoot urine and bleach at them. Connie wanted to remind me that as a class-privileged white girl, I still had gotten off easy.

Connie was instrumental in bringing us together. She “advised” Susan as she courted me; after she worked out a way for us to meet, she listened to Susan go on and on about “love at first sight.” When we finally got together we crossed the boundaries dividing the lesbian world and the MTF world, dragging friends and family with us in our wake. Some of Susan’s friends were perplexed: If she was dating a trans woman, didn’t that make her bi? Some of my friends were also perplexed: So was Susan really FTM? Some even started referring to her as “he” and “papi.” And then, of course, there was the concerned “trans sister” who decided to share information with Susan about my “operative status”—just in case she didn’t know. *That* was awkward.

Our relationship was, from the very outset, forged in queer and trans politics. We met at Charles Drew University doing trans activist work. Five years later, we were one of those 1,800 same-sex couples allowed to marry in California before Prop 8 passed. It was a marriage just as much about politics as it was love and commitment. Hard to separate such things, it seems. Very much in the same way that Connie came into our care.

But, then, of course, there’s *family* family. And when Connie’s mother showed up at hospice, it was something else. She had been absent for most of Connie’s decline. Connie refused to talk to her because of the consistently unloving, narcissistic reactions she received from her. It got to be so painful that she just shut her out altogether. It wasn’t until Connie had spent the better part of a year in the hospital before her mother even knew that she was seriously ill. They talked frequently, but Connie never let on. Part of the problem was denial. She had been there for her own brother, who had died of AIDS years ago. And she couldn’t bear to go through it again. But here she was. And when she descended upon Van Ness House, there was some friction between her and our own little queer “death family.” Before her arrival, we had been taking care of everything. Now, it seems that she wanted to “take charge” (only she didn’t know what she was doing). Happily, it turned out she only wanted to pretend that she was doing everything—and once everybody realized that, things worked out just fine. After all, the nurses, physicians, and case managers (who knew us from ten months of daily hospital visits), and even the hospice staff, wanted to work with us. None of them recognized this absent parent.

The remarkable intermingling of Connie’s community family and her family of origin commenced fully when they were informed that death was imminent. *Everyone* showed up. Even Connie’s brother had come with girlfriend and his two young daughters, Allie, age four, and Connie, age six (named after his sister). Susan knew the girls having spent some time playing with them in the hospital lobby as their father visited his sister (and provided her with illegal drugs, and stole her cell phone as she nodded off—all the worse because people from all over the country were trying to reach her to arrange visits, or just to hear her voice). But this was the first time I met the girls—as they scurried and played in the Van Ness lobby, only dimly aware of what was happening. They invited me to play, but I could not. Children seemed alien to me, then. And I was heavy with death. Riku and Susan spent long hours playing with the kids in the lobby, as confused residents of the recovery house watched everything through the lens of early sobriety.

The energy was high, intense. But death sometimes takes a long time, it turns out. Connie did not go quietly into the night. She wasn't ready. And then, suddenly, most of her biological family was gone as fast as they had come. She was still here. And who was remembering to administer the morphine, anyway?

Over and over, all night long. In the next room over, we could hear the murmurs from mother to child to "Let go. Let it happen," against Connie's pained moans. As Sabel lay in a bed vacated by one of the residents (all of whom had moved out of the sleeping quarters), so sick she couldn't stand from a new clinical trial regimen she was on, we all hovered around the door. Was it comfort or torture Connie was experiencing? Her mother had told her to leave before, after all. When she was kicked out at fourteen. By now her terror was undeniable. Her eyes said it all. As much as we tried to dull the fear and the pain they stayed wide and terrified. When even her mother left, I held her hand through that last night, lying in an adjacent cot. Tried to soothe her. Death moan and terror-filled eyes no amount of anything could calm. It was horrifying, heartbreaking, and relentless. And so it came as a perverse relief when Connie died that morning.

Farina said that she was still hanging on because there were family issues she needed to resolve. She said it was a "cultural thing." She made all of the arrangements to have Connie hear from her estranged father on the phone (he couldn't make it into the country from Mexico due to border complications). He had been long gone, and his relationship with Connie had been harsh and unaccepting. The phone pressed against Connie's ear, the man wept, begged for forgiveness from her. Somehow he reached her, punched a hole through the dementia, the medications, and the fear. Connie let go short minutes later. She was dead.

The little queer death family made all of the arrangements. Our extended queer and trans family raised a lot of money for the funeral service and burial. And it was a long week of events, as if the world could not let go of Connie, although she had finally let go of it. First the huge community memorial service (spiced up with typical community drama, but still moving and appropriate) and a second memorial to follow, a week later, in San Francisco. The viewing of the body, despite the fact that Connie had wanted to be cremated. Finally, the funeral itself. Connie was buried next to her uncle who died of HIV. As of this writing a year and a half later, her name has not been added to the headstone. It was here that wave two of the familial blending occurred. It was a Catholic burial, despite the fact that Connie had expressed an affinity for Eastern religions. She wanted to be cremated. When the Catholic priest spoke, he spoke of Connie as "he," "brother," and "son." He had never met Connie. Her grandparents arranged the whole service. What he knew about Connie, he heard from them. Diviana, Christina, Jake, Riku, Sabel, Kimberly, and us—we were stunned, immobilized. Some of us couldn't move, some drifted away in horror. None of us were capable of speaking. Was this how the family wanted to say goodbye? His profane words seemed relentless.

And then tia Gabby, Connie's aunt from San Francisco, who had always been there for Connie, spoke out clearly: "She's not a son, Father; she's a daughter." Her voice resonated,

momentarily stopped time. Somebody from the family of origin had truly joined trans family, crossed another boundary between worlds. The priest stumbled, tried to correct himself momentarily, although his misgendering continued. But tia Gabby had spoken. And that seemed enough: a new blending of family and family. Creating a moment with the promise of a new kind of family.

The aftermath of Connie's death involved emptying her section-8 apartment of everything that her brother hadn't already stolen and sold. Connie wanted everything to go to her daughter, but her brother and his girlfriend and the girls had been squatting in Connie's apartment for months. Connie's daughter was afraid that she wouldn't get anything, but we all agreed that Sabel and the rest of us would be there to ensure that she got to go through everything and take whatever she wanted.

We, with Jake and Sabel, were invited to dinner at Connie's apartment. This time Jake and I played with Connie and Allie. The girls were wild, feral then. And apparently desperate for family. They had been removed from their biological mother long ago. Apparently they had been left with their mother's mother, until something tragic happened and the social workers were unable to locate either parent for weeks, and they were placed into the system, only to be returned to their father. But he was often incarcerated, so the girls had been moved to California to stay for a few months with their great-grandparents. But they couldn't stay any place long—once he was paroled, his violence and dysfunction threatened all familial relationships and undermined the willingness of family to get involved with the girls. It was a package deal—you get the girls, you get him. Big Connie had been so worried about the girls. Often homeless, foodless, and in need. And she had deeper, unarticulated, worries, too. She had spoken several times about us adopting the girls. We had dismissed those ideas without much thought, however, unaware that we had been dismissing what was, in fact, to come.

Three months later, we had just returned to the United States from Canada after I underwent major surgery. All hell broke loose. The girls' father and his girlfriend had been staying with her sister, who had filed reports with Child Protective Services (CPS) and had the girls brought to Connie's daughter's home, where she, as a nineteen-year-old single mother, was attempting to care for a newborn. She couldn't keep the girls. So their father wrote a note on a scrap of paper, "to whom it may concern," signing over "all legal guardianship rights" to Sabel. With his mother by his side they all went to a notary public. And Sabel. She had become close enough to Connie's mother that the family trusted her. And there she was, a single trans woman, living on disability, with a small apartment, stepping up to shoulder a burden she could not possibly bear alone—a burden she did not want to bear at all. It was a strange time, those three weeks, nobody willing make the call to CPS. There was so much pressure from Big Connie's mother (here forward "the grandmother") not to report the girls' whereabouts. There was anger, confusion, and questions about what the girls' caregivers may have done. After all, the first thing that the grandmother said to all of us was, "Don't believe a word those girls say about anything. They lie about everything." Ever protective of her son, she did not want any official agencies contacted. But

their world caved in when their father insisted on showing up for Allie's fifth birthday. Sabel realized that she *had to* call CPS. So the day after Allie turned five, CPS showed up to remove the girls. They wouldn't let Sabel ride with them, and she had no car to follow them to the hospital—or the police station—or wherever the girls were taken, without anything, even a goodbye. The last thing Sabel said to them was "I will see you soon."

Our queer death family—what was left of it, anyway—went to children's court to support the girls. None of the girls' family of origin showed up, except for their father. When we crowded into the girls' attorney's office afterwards, she looked at us uncomprehendingly. A flannel-wearing dyke, two very tall trans women, and a (really) young-looking trans man. We must have seemed quite the crew—you don't see too many folks like us at family court. The lawyer, who, judging from her rainbow socks, was gay, gleamed understanding when we finally explained that we had helped tia Connie die of AIDS. *Ah*, she seemed to think. *Queer family*. We were allowed a half hour of unsupervised visitation with the girls. Their father wasn't.

The social workers tried to enlist us into parenthood immediately—we were given the designation of "non-relative extended family member" (defined as "any adult caregiver that has an established familial or mentoring relationship with a child. This prior relationship shall be verified by interviews with the parent and child or with one or more third parties" [AB1695]). The fact that the girls had recently spent the night at our house once actually, sadly, did give us more of a relationship to the girls than any other non-relative aside from Sabel herself. And that seemed to matter to a system that valued family of origin and family reunification. We all dutifully got Livescanned, tried to blow off the discomfort with giving our fingerprints to the FBI, and promised to the girls, to each-other, and to the lawyers and social workers that we would be "a part of the girls' lives."

But our eventual decision to foster-parent the girls was not something that was made easily or quickly. We had never planned on having children, had tacitly decided to not have children. But we also knew that we were the most financially and relationally stable of pretty much anybody in our worlds. And we did have things we could offer—a love of education, an ethical compass, a passion for justice, and a diverse and wildly creative social world.

Susan was certain about what we had to do: if we were the best opportunity for the girls, then it was our responsibility to take them under our care. She engages the world primarily as an activist, and who she is at bottom, the foundation of her feminist ethical framework and political activism—herself as a sentient human being—seemed to demand that we rise to this situation. I was not so certain. I not only engage the world as an activist, but also reflect on it as a philosopher. And I felt the necessity of second-thoughts and doubts. Torn, I worried whether we were up for the task. We had gone through multiple painful deaths, one right after the other. I was confronting the unwanted, daunting prospect of the next three years as department head, while my dreams of birthing my book to completion anytime soon had consequently slipped away. I had just undergone major surgery, needed time and private space to recover, needed to care for my

own body. And our own relationship had been seriously buffeted through this difficult year. While we were both cognizant of how much responsibility being a good parent was, how much it would demand of us, I wasn't clear that we were up for the radical life-transformation, particularly after all that had transpired. Indeed, I was worried that I simply wasn't capable of being a mother at all—a *good* one, at any rate. Susan worried, by contrast, that if we *didn't* do this it would take an even worse toll on our relationship than if we did. She was scared that if we decided against parenthood, the mirror would crack and she would disappear altogether and that she wouldn't be able to lock eyes with me again because we wouldn't even be ourselves anymore.

When DCFS contacted us to say that they found "the perfect home for the girls" we were both relieved and let-down. This new placement, we were told, was with a woman "interested in permanence." She was getting a Ph.D. in child psychology. She ran a daycare center in her home, so she had support staff. Like a used-car salesman, the social worker told us that we had to "make a decision right now" whether to take the girls or let them get placed. We said we'd opt for visitation privileges, since the situation seemed so good. Like much of what happened in the kids' lives, however, none of it panned out.

This woman was not getting a Ph.D., though she admitted to "taking an online class." The "childcare facility" was a foster-kid mill, with her nieces babysitting enough foster kids to cover the rent. The first time we visited, we could sense trouble. It was 110 degrees, but the kids were not offered food or water the entire four or five hours we were there. The second time we went to visit, she told us that she planned to adopt the girls. But they followed us to our car as we prepared to leave and begged us to take them. A lot of red flags went up during the three weeks they were in that placement.

So we had to make a decision. Susan being already decided, it was up to me. The red flags, the revelations about their placement, and the recognition that jumping from foster home to foster home was the likely fate of the girls upped the ethical demands considerably. It became clear to me then that we really were their best chance. And it was Cameron who helped me see that a good mother was something that I could indeed possibly be. He was neither friend nor family to us or Connie, though he was community. His mother died from HIV. He spent soothing time with Connie in hospice, and talked to us about his life as a foster kid. He told us about a foster mother who used to read to him, and how that was his most intense, binding memory of "family"—transient as it was. It spoke to me at the very core of my being. I knew that who I was at bottom had its roots in my early love of books, instilled through my parents' tender reading to me at bedtime. *That* was something that I knew I could do. No matter what.

We decided to take them and called the social worker to determine the next steps. Almost simultaneously, this woman put in her seven-day notice on the girls. They were kicked out. Connie had active ringworm and Allie had burn marks from an iron on her forearm. We'd made the right decision. And then the world turned inside out.

Everyone told us that “it takes a village.” Community. Leadership. Honoring Connie’s memory. Active feminism. Friendship. Family. Or, less poignant words. “I’ll call you soon . . .” “Can we get together?” “Do you need anything?” It didn’t take us very long to realize that the extended family we had built around us, nurtured, and developed over a decade together—and even longer than that, disappeared almost immediately. But nothing prepared us for the realization that we (with Sabel and Roberta, who has adult children of her own) were going to be completely alone in this. Friends, who promised to be there, weren’t. Others remained friends to us individually, but could not be there for us as a family. Most just disappeared altogether. We even had a friend accuse us of succumbing to the “lesbian baby-boom,” as though we sought out a child to bring our little family into the fold of happy white-bread Americana. No longer radicals, now we were succumbing to a “heteronormativity.” No longer “in your face” queers, we were now contributing to the gentrification of “the Movement.” Nothing could have been further from the truth. Meanwhile, we were forced to open our home and our lives to the scrutiny of the state. Our home was inspected. Our backgrounds looked into. Social workers, judges, lawyers, more social workers paraded through our house and lives. No one could have prepared us for the respect we received from the state. The only comment we ever heard about our “lifestyle” was when one of the social workers told the girls that “you are so lucky to have two mommies who love you now!” No transphobia. No lesbiphobia. None.

And over this past indescribable year, we have witnessed our initial sense of duty transformed into a fierce parental love for these extraordinary girls who have endured so much harm and loss and who yet continue to fight on, continue to *try*. Beautiful, beautifully different, but wounded. It required a literal and sometimes painful transformation of self to become a parent—and as Roberta likes to remind us, we “jumped into the deep end.” We were definitely in unchartered waters. But we have witnessed the blossoming of something entirely new—a family of four.

Our family.

We journeyed to San Francisco one year after Connie’s death. There, we met up with tia Gabby and the girls’ cousins in an alley where a mural had been painted commemorating three activist trans women who had died—one of them was Connie. There she was, painted with a veritable halo, like some Catholic saint. Deified in a city that had decided to claim her for its own. It reminded me of Connie’s Catholic funeral. Under that painted glow mingled our family of four, tia Gabby and her children, the community activists who came, remembering dead Connie fondly. The blurring and blending of the many different senses of “family” as we shared transient connection with each other. What is it *about* family? But the girls couldn’t take the pressure. It was too much for them. Connie, in particular, came unhinged at this memorial site.

She cries often about her dead tia Connie. If only she had taken her medicine, she weeps. If only she had taken it, she would be *here, now*. To love her. In a way, big Connie has become a place-holder for little Connie and all that bereaves

her. In a way, she struggles under the burden of that name and legacy. And, in a way, she must know that it is through her Connie’s death that our own little family came to be.

U.S. v. Windsor and Hollingsworth v. Perry Decisions: Supreme Court Conservatives at the Deep End of the Pool

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The *Windsor* and *Hollingsworth* decisions handed down by the U.S. Supreme Court this past June,¹ the first effectively allowing same-sex couples to begin marrying once again in California, the second guaranteeing at least some legally married same-sex couples access to federal marriage benefits, are at best mixed blessings. They do advance the cause of marriage equality incrementally, and *Windsor* also reaffirms the constitutional principle of equal protection under the law. But as judicial precedents, both cases are abstruse messes, most especially, and most oddly, from the point of view of judicial conservatives—and not primarily because of their outcomes with respect to same-sex marriage.

I’m referring here to the issue of judicial standing to litigate, which loomed so large in both cases. When I wrote for the newsletter last winter,² laying out the issues before the court in these two cases, and offering my opinion of the probable outcome in *U.S. v. Windsor*—predicting the court’s behavior in *Hollingsworth v. Perry* was anybody’s guess—the one issue I did not discuss for either case was standing of various parties to litigate. I offered to write a few additional comments on that topic when I sent my submission in to Bill Wilkerson, our editor. But as I explained to Bill in making the offer, I thought there was little point in doing so, because I felt confident that using the standing issue to punt on either of these cases was worse poison for the conservatives to swallow than a couple of partial, or even wholesale, losses on the same-sex marriage question. So Bill agreed I might as well leave that issue on the table. How wrong I was!

So apart from explaining the broader legal significance of the decisions with respect to marriage equality, I want to take this opportunity to explain the nature of the judicially administered poison most of the court’s conservatives have elected to swallow, in one case or the other, with respect to the standing issue.

1. WINDSOR: THE MERITS

Edith Windsor’s plea for equal treatment under the law went more or less according to expectations—at least my expectations—although Anthony Kennedy’s characteristically windy prose constituted a needlessly tortuous defense of the sound thesis that Section 3 of the Federal Defense of Marriage Act (DOMA), the part which withheld federal marriage benefits from same-sex couples regardless of their official marriage status in any state, violated the Fourteenth Amendment’s Equal Protection clause, as applied to federal law through the Fifth Amendment’s due process clause.

Windsor, a widow, was denied surviving spouse estate tax benefits, and billed over \$360,000 on the property she inherited when her partner Thea Spyer passed away in 2009. The two had lived together in New York City for forty years, eventually availing themselves of Canada's more inclusive marriage laws to wed in Toronto in 2007. That marriage came to be recognized by New York subsequent to a 2008 state court case requiring New York recognition of out-of-state same-sex marriage licenses. But as far as federal law was concerned, Windsor's state-recognized marriage license meant nothing. Her inheritance tax liability was one that no spouse in an opposite-sex marriage would ever have to pay.

Kennedy's majority opinion struck down the federal DOMA's Section 3 with respect to cases of same-sex couples possessing marriage licenses that are legally recognized in their domicile state. In an exercise of unusual judicial caution (for Kennedy), the majority opinion dodged the obvious issue of transportability: should a couple who married in Vermont (for example), subsequently moved to New York where their Vermont marriage continued to be recognized, and still later moved to South Carolina where it was no longer recognized, continue to enjoy federal (but not state) marriage benefits after taking up South Carolina residence? We don't know the answer to that yet, but such a case has already been filed here in South Carolina, and will presumably emerge soon in numerous other states prohibiting same-sex marriage.³

Several years ago, in a historical review of same-sex marriage litigation, legislation, and referenda that I wrote for the newsletter, and again in my follow-up last winter, I argued that there were only two significant questions to consider in cases like Windsor's (such cases have been brewing for a while): first, whether Congress would eliminate the federal DOMA's Section 3 before the Supreme Court did, in order to save itself the embarrassment of being found in obvious violation of the equal protection principle in its 1996 legislation; and second, whether John Roberts would go along with Anthony Kennedy in such an equal protection ruling.⁴ Kennedy's vote, I thought, was secure, in light of his earlier equal protection reversals of anti-gay rights laws in *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996). That has proven to be the case. Antonin Scalia, Clarence Thomas, and Samuel Alito I thought would be simply too hostile to gay rights—not to mention the concept of equal protection itself—to make that leap. That, too, has proven to be the case.

The answer to the first question was already apparent last winter: Congress has become so dysfunctional since 2009 that it now neither notices nor cares about the prospect of court-initiated public embarrassment with regard to its hostility to the doctrine of equal protection under the law. The issue was probably settled in March 2011, when Republican House Speaker John Boehner, together with his majority leader and majority whip, outvoted the Democratic minority leader and minority whip in their collective role as the five-member House Bipartisan Legal Advisory Group (BLAG), to authorize the House Office of General Council to defend DOMA in *Windsor* and similar cases, after the Obama Administration announced that it would no longer defend the constitutionality of Section 3. Having once decided to double down on the defense of DOMA, the republicans were unlikely to turn back when the Supreme Court granted certiorari in *Windsor* at the end of the following year.

On the less obvious issue of what Roberts would do, we now know the result: he opted to punt, siding with two of his more conservative colleagues on the issue of standing and its implications for the court's (lack of) authority to decide this case. (More on that later.) By doing this, he endeavored to duck the equal protection question entirely, although even he couldn't resist a brief effort to defend the motives of his republican (and some democratic) colleagues in the House and Senate who voted the federal DOMA into law in the first place:

That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the “principal purpose” [*Windsor* majority opinion, 22] of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. (Roberts *Windsor* dissent, 2)

In one sense this claim is indisputable. *Of course* there were reasons for this legislation other than the bare desire to harm. Legislative action can be tainted by constitutionally impermissible animus even in the absence of *any* desire to harm. There were undoubtedly members of Congress who viewed voting for DOMA as their religious duty, regardless of First Amendment strictures on such motives. They did not *desire* to harm: they still “loved the sinner,” but felt nonetheless obliged to “inconvenience” such sinners out of deference to their perceptions of the wishes of a higher authority. Others may have been political opportunists, pandering—George Wallace-like—to the bigotry of their constituents, and simply indifferent to the harm they were doing to the targeted population. Still others may have been conflicted about the harm they were doing, but acted to support DOMA out of a sense of political expediency, being fearful of the consequences in a tight reelection race. (President Clinton, I imagine, fell in this category.) There are all sorts of motives for legislative action, many of them not particularly laudable.

Despite his resolve to dismiss the case on the standing issue, Roberts's legal purpose in the passage above was to sketch an argument on the merits. He was arguing, in conjunction with his fellow dissent authors Scalia and Alito, that Congress *could* be taken to have legitimate reasons to meet an equal protection challenge if the standard of judicial review applied were “rational basis” rather than “strict scrutiny” (under which reasons for legislative restrictions on individual liberty have to be much more compelling). Roberts thus rejected the thesis that DOMA's passage “furthered no legitimate government interests” (Roberts *Windsor* dissent, 2), in this regard echoing (without expressly mentioning) Scalia's argument in *his* dissent: Congress had a legitimate interest in preserving uniformity of federal law across state lines by avoiding choice of law issues which would otherwise arise precisely because of the transportability issue. (See Scalia *Windsor* dissent II.B, 19-21. Roberts does not actually sign off on this portion of Scalia's dissent, however.)

The subtext of Roberts's remarks, once again not explicitly stated by him, is to suggest that Congress was concerned to sustain a perceived state right to maintain a particular State's

local moral culture against “foreign” incursions. As Alito put the point (in another dissent unsupported by Roberts), *Windsor* seeks:

to have the Court resolve a debate between two competing views of marriage . . . the “traditional” or “conjugal” view, [which] sees marriage as an intrinsically opposite-sex institution, . . . [and] 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. (Alito *Windsor* dissent, 13–14)

Because “the Constitution does not codify either of these views of marriage” (Alito, 14), Alito tells us that should have been the end of the matter as far as the court is concerned.

Roberts’s, Scalia’s, and Alito’s appeals for studied judicial neutrality on the issue of choosing between the “conjugal” and “consent-based” views are of course the purest of legal sophistries. Setting aside Alito’s gratuitously insulting choice of labels (same-sex intimacies can’t be “conjugal”⁵), the *Windsor* dissenters are willfully ignoring the fact that Congress’s decision to institute DOMA codified a zero-sum game on the issue of marriage benefits, where there might have been none, when the individual states began legalizing same-sex marriages. But once DOMA was enacted, whatever the court did, or “refrained” from doing subsequently, would be one side’s gain at the other side’s expense.

If the court were to act as the *Windsor* dissenters proposed, and leave §3 of the federal DOMA intact in the name of respecting the local autonomy of distinctive moral cultures among the several states, the real economic and social harms created by §3 for same-sex couples living in states where their relationships were recognized as legitimate would continue unabated. On the other side of the equation, if the court were to limit §3’s applicability—also in the name of respecting the local autonomy of distinctive moral cultures among the several states (different states this time), or simply because of §3’s adverse equal protection implications—the moral sensibilities of some social conservatives might be offended by the prospect of migrating same-sex couples enjoying federal marriage benefits while residing in the home territory of such conservatives (any of the “traditional marriage” states).

When put that way, the opposition sounds like mean-spirited officiousness. Why should social conservatives care about same-sex couples enjoying non-publicly observable federal benefits sanctioned by legal actions undertaken elsewhere, just because some of those couples now have the temerity to move to a state like South Carolina? But even if we grant that point, it would be naïve to suggest that our culture is indifferent to the presence of mere moral offense in the absence of clearly articulated ground for that offense. Our culture does still, sometimes, continue to regard that as sufficient harm, although such harm is typically accompanied by ill-conceived “back-up arguments” about the potential for further, more substantive, harms. Other marginally more sympathetic versions of this story can also be told. So there is a socially recognized cost on this side, too.

What is hypocritical, and also illogical, about the rhetoric of the *Windsor* dissenters, is the pretense that, in the legal environment created by the federal DOMA, the court would be doing no harm to the one side by taking no action on §3, in service of the moral environment interests of the other side. *Contra* Alito, the court *is* choosing sides: both in terms of the social costs, and between the judicially desirable goals of being respectful of the constitutional principle of equal protection on the one hand, and the prudential principle that unelected judges should, where possible, be deferential to democratically elected legislative bodies. But in direct conflicts between constitutional constraints and statutory initiatives, we know how the resolution is *supposed* to go. It did go the right way in *Windsor*, although Kennedy’s path to that conclusion was pretty confused. (See Section 3 below.)

2. HOLLINGSWORTH: THE MERITS

Hollingsworth was a victory for marriage equality by default. The original case, *Perry v. Schwarzenegger*, which changed into *Perry v. Brown* when Jerry Brown replaced Arnold Schwarzenegger as governor of California, was brought by a pair of resident California lesbian and gay couples denied California marriage licenses subsequent to the passage of Proposition 8. They sued the state on federal and state due process and equal protection grounds. (Kristin Perry was the first-named plaintiff.) Arnold Schwarzenegger and Jerry Brown both refused to defend Proposition 8 on behalf of the state of California, on the grounds that its passage violated both the state and federal constitutions’ equal protection provisions—i.e., Schwarzenegger and Brown were in agreement with *Perry et al.*, notwithstanding the California Supreme Court’s 2009 ruling in *Strauss v. Horton* (see discussion in note 18 below). In the absence of state authorities to defend Prop 8, Vaughn Walker, the California federal district judge handling the case, permitted the leaders of ProtectMarriage.com, the anti-gay marriage group that organized the Proposition 8 initiative for the 2008 general election, to act as intervener-defendants (with Dennis Hollingsworth as the first-named intervener-defendant).

This was a routine step under Rule 24 of the Federal Rules of Civil Procedure, crafted to ensure that a challenged law would be ensured an adequate defense in the judicial process. Matters became more complicated once Walker ruled in favor of the plaintiffs and struck down Proposition 8 as a violation of the Fourteenth Amendment’s equal protection clause because it constrained their fundamental right to marry without meeting even a rational basis test for such a constraint on individual liberty.⁶ At that point the ProtectMarriage organizers petitioned the Ninth Circuit to allow them to appeal the lower court decision. This was somewhat awkward because they were private parties, and thus some might argue that they were not directly harmed by the district court’s adverse decision. Unlike *Perry v. Brown*, an appeal would involve ProtectMarriage as the *initiators* of further litigation. Could they legitimately transition from their role as court-appointed intervener-defendants to plaintiff initiators of further action, when Rule 24 was designed to allow such intrusions only in litigation activated by another party?

The Ninth Circuit opted to resolve this question by posing it to the California Supreme Court and deferring to their authority: Could the official proponents of a successful California

ballot initiative be authorized to assert the state's interest in defending the initiative's constitutionality, when public officials refused to do so? The California Supreme Court affirmed that they could, in light of which the Ninth Circuit granted ProtectMarriage official status to defend Proposition 8 on behalf of the California voters who supported it. In effect, the Ninth Circuit was treating ProtectMarriage as a judicially appointed government, on the authority of the California Supreme Court. The response was certainly novel, but also quite reasonable under the circumstances, as I will explain in Section 4 below.

Ruling then on the merits of the appeal in *Hollingsworth v. Perry*,⁷ the Ninth Circuit opted *not* to follow Vaughn Walker's lead in applying the rational basis test to proscriptions against same-sex marriage. For if the Ninth Circuit did that, Walker's reasoning would no longer be limited to the state of California. Continued reliance on the rational basis test would have brought anti-gay marriage laws under question throughout the Ninth Circuit's jurisdictional reach (all states west of Colorado, Utah, and New Mexico, plus Alaska and Hawaii). So the Ninth Circuit confined itself instead to the California question by focusing on the fact that Proposition 8 was *withdrawing* a right to marry previously enjoyed by same-sex California couples in the wake of the California Supreme Court's original 2008 pro-same-sex marriage ruling.⁸ This is a very odd conclusion: Can same-sex marriage rights be upheld against hostile legislation or popular referenda *only* when they have been *revoked*, but not in a jurisdiction where they were never enjoyed in the first place?

The Ninth Circuit appears to have been applying Anthony Kennedy's reasoning in *Romer v. Evans*, which struck down Colorado voters' 1992 passage of Amendment 2, a "no special rights for gays" state constitutional provision that not only revoked existing state and local laws prohibiting sexual orientation discrimination, but even prohibited all future democratic initiatives to enact such legislation.⁹ The core of Kennedy's argument in that case turned on the inference that, because such a measure could be read as retaliation against gay-friendly measures adopted in various Colorado jurisdictions previously, it was motivated by constitutionally impermissible animus against a disfavored group.

Many commentators speculated that the Ninth Circuit was deliberately courting Kennedy's vote in the Supreme Court appeal that they assumed would be forthcoming. Moreover, the Ninth Circuit was assumed to entertain the hope that such a ruling might be more palatable to the Supreme Court generally, because its scope was narrowly drawn to apply only to the circumstances in California, and any other states that might now or at some future date be construed as having first permitted and then revoked gay marriage.

Perhaps, in considering the subsequent appeal, the Supreme Court found reliance on the *Romer* precedent too problematic. Doubtless, too, many of the justices found the alternative of wholesale dismissal of democratically initiated anti-gay marriage statutes and constitutional amendments even more unpalatable. (The multi-decade reaction against the broad sweep of *Roe v. Wade* has not gone unnoticed, even in the insulated chambers of the Supreme Court.) Roberts, writing for the five-vote majority, contended instead that the Ninth Circuit never had the authority to hear *Hollingsworth's*

appeal of the original case; ProtectMarriage had no standing to bring the appeal to the Ninth Circuit, let alone the Supreme Court. This meant the Supreme Court could simply vacate the Ninth Circuit ruling, which left Vaughn Walker's original decision as the default ruling, because the standing issue did not apply when ProtectMarriage acted only as an intervener-defendant. That reasoning served to confine the ruling to California, the maximum reach of Walker's ruling for the Northern District of California.¹⁰

In short, rather than enshrining Kennedy's odd *Romer* precedent or, alternately, disputing the judgment of democratic majorities in over thirty states (through legislative initiatives and constitutional referenda), the Supreme Court opted for deferred maintenance in *Hollingsworth*. But that decision has its own debilitating features. In fact, from the perspective of the court's judicial conservatives, it was, in my view, a truly astonishing move.

3. THE WINDSOR DISSENTS ON THE MERITS

It should be noted first that the voting alignments themselves were passing strange: two of the court's conservatives (Roberts and Scalia) joined with three of their more liberal brethren (Ginsburg, Breyer, and Kagan) to vacate the Ninth Circuit's ruling in favor of marriage equality in *Hollingsworth*, leaving the original federal district court ruling as the default resolution. Kennedy, another conservative, although fairly reliably moderate on gay rights issues, wrote a dissent on behalf of the remaining four justices (three conservatives—himself, Thomas, and Alito, and one liberal—Sotomayor).

In *Windsor* the division was more predictable on the surface, with Kennedy aligning with the four "liberals" to write the majority opinion, while three of his four more conservative colleagues wrote dissents.¹¹ But there was considerable disunity among the dissenters, with Roberts signing off only on Part I of Scalia's dissent, in which Scalia attacks the majority's argument concerning the court's authority to deliberate on this case (the standing question—sort of; see Section 4 below). Roberts declines to join Scalia's response on the merits, explicitly rejecting Scalia's contention that the majority opinion on the merits has broad negative implications for the status of same-sex unions in states that adhere to traditional heteronormative definitions of marriage. In fact, Roberts troubled to write his brief dissent chiefly for the purpose of denying Scalia's inference.

Kennedy did give Scalia plenty of ammunition in his rambling discourse on the merits of *Windsor's* complaint. After suggesting first that there is a violation of the principle of federalism in this case, because Congress has intruded on the long recognized authority of the individual states to establish their own internally uniform rules on the rights and obligations of marriage, and on marital eligibility (absent violations of the U.S. Constitution, such as southern and border state anti-miscegenation laws, struck down in *Loving v. Virginia*¹²), Kennedy then says the court need not address the federalism issue after all (*Windsor* majority opinion, Part III, 14–18). He then proceeds to address it yet again:

the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. . . . DOMA, because of its reach and extent, departs from this history and

tradition of reliance on state law to define marriage.
(18–19)

Kennedy switches gears at this point and begins discussing “whether the resulting injury and indignity” inflicted by DOMA’s Section 3 “is a deprivation of an essential part of the liberty protected by the Fifth Amendment” (19). In response to *that* question he cites the precedent of his previous majority opinion in *Lawrence v. Texas*, striking down sodomy laws as unconstitutional violations of (substantive) due process because there was no rational basis for such impositions on individual liberty, and asks if §3 is a statute cut from the same cloth.

In Section IV Kennedy begins to answer in the affirmative before switching gears yet again and suggesting that DOMA’s Section 3 is actually a violation of the Fourteenth Amendment’s equal protection clause because “[t]he 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” (20). (This was the ill-phrased line which earned Roberts’s somewhat disingenuous ire.) For the remainder of his opinion Kennedy goes back and forth between substantive due process and equal protection arguments, never addressing the issue of the appropriate level of judicial assessment of the worthiness of the social justification of the challenged law (the rational basis standard? strict scrutiny? “intermediate tier” scrutiny?), which would have been appropriate if *Windsor* is to be read as an equal protection case. Instead, settling on neither substantive due process nor equal protection, Kennedy appears, loosely and informally, to embrace the thesis that both principles were violated.

Scalia, in Section II of his dissent (15–26), proceeds to make much sport of the imprecision of Kennedy’s language, and tries to hang the entire enterprise on the theory that Kennedy really meant to apply the substantive due process standard, but could not, because Congress *had* a legitimate reason for acting with respect to Section 3: to maintain the uniform application of federal laws (19–20).¹³

Scalia fails to take note of the fact that choice-of-law questions pitting the marriage regulations of current domicile state against those of a couple’s previous domicile state *can* be resolved, quite uniformly, in much less draconian ways.

Part of what is going on in the merits component Scalia’s dissent, and of Alito’s, is a desire to cabin the reach of equal protection law as much as possible because, at bottom, both of them, and Thomas, and perhaps Roberts, regard its application against the federal government through the due process clause of the Fifth Amendment as a purely judicial invention, designed to expand the authority of the federal courts beyond the warrant of the actual texts of the Fifth and Fourteenth amendments. The Fifth Amendment addresses *some* threats to individual liberties that might be wrought by the federal government, and the Fourteenth Amendment addresses some additional ones against the states. Equal protection appears in the latter, but not the former.

Yes, it’s awkward to think that federal legislators and executive branch administrators can, formally at least, if not always politically, ignore equal protection considerations

when state and local law makers cannot. And yes, it would be awkward to jettison two-third’s of a century’s worth of federal equal protection precedents at this stage.¹⁴ But such matters cut no ice with principled fellows like Scalia, Thomas, and Alito.

Indeed, they share much the same view about the concept of substantive due process generally—Kennedy’s third argument (apart from the issues of possible violations of federalism or of equal protection). Substantive due process is the doctrine that whenever the government constrains individual liberty, the alleged reasons for its actions may be subject to judicial review under the relatively weak “rational basis test.” And when government action implicates rights that are “fundamental,” it has to have a sufficiently “compelling” reason to do so (the strict scrutiny standard). “Fundamental” rights are generally taken to include those expressly stated in the first eight amendments and the Fourteenth Amendment to the Constitution (“enumerated” rights). But they are also taken to extend beyond such strict textual grounding to include additional rights “implicit in the concept of ordered liberty” or “deeply rooted in this nation’s history and tradition.”¹⁵

Apart from the enumerated rights component, Scalia, Thomas, and Alito regard this entire doctrine as another piece of twentieth-century judicial invention designed to expand the powers of the courts. But they will engage their colleagues in the discourse, when the “fundamental rights” rhetoric strikes them as implausible, as it does in this case. Is the right to marry “fundamental” in the relevant sense? Well, not if the marriage is between a same-sex couple, if the standard is that it must be “deeply rooted in this nation’s history.” Or so Scalia and Alito argue in their dissents. Of course, in doing so, they conveniently overlook the tradition of applying the rational basis standard in cases where not-so-fundamental rights are implicated, as Kennedy did in *Lawrence v. Texas*. In Alito’s words:

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.’” (7)

Setting aside the rhetorical stunt of constraining the doctrine of substantive due process in a way that the court has not hitherto constrained it (since threats to liberty interests have also been regarded by the court as triggering substantive due process claims under the rational basis test), and the fact that there is a serious question here about whether the right to marry *is* fundamental, regardless of the gender of the partners, Alito’s (and Scalia’s) posturing on this particular issue reflects a deeper commitment that they have to the idea that *all* substantive due process reasoning that goes beyond alleged violations of textually grounded constitutional rights is just overreaching judicial fancy that the court would be better off discarding, regardless of its past practices and precedents.

Clarence Thomas, as is his wont, did not speak. He simply signed off on the dissent of his more loquacious philosophical fellow traveler (Scalia), and on parts II and III of Samuel Alito's dissent, which also disputed (in somewhat more temperate language than Scalia's) the merits of the majority's decision.

There's really nothing new in Scalia's dissent on the merits. Alito's dissent on the merits, focusing more heavily on the value of allowing moral disputes to play themselves out in the rough and tumble of legislative and electoral political processes, is reminiscent of Scalia's dissents in *Lawrence v. Texas*, *Romer v. Evans*, and various abortion cases. In that regard, both justices, together with Thomas, are advocates of the view that constitutional protections of individual rights should be applied very cautiously, and narrowly, by the courts whenever they conflict with the outcomes of democratically established initiatives—except, of course, when it is their oxen which are being gored.¹⁶

4. THE QUESTION OF STANDING IN WINDSOR AND HOLLINGSWORTH

The first part of Alito's dissent, on the standing/justiciability question, is far more interesting, because it is a novel plea for philosophical sanity from a conservative judicial perspective.

Alito contended that standing should have been granted to the gay marriage opponents in *both* cases: to the ProtectMarriage officials in *Hollingsworth* (where it was denied) as well as to BLAG in *Windsor* (where it was granted). Although Alito personally would then reject the arguments of the same-sex marriage advocates in each case, there is much to be said in favor of his views on the preliminary question of standing.

There is first of all the issue of apparent inconsistency: the challenge of trying to explain how the majority party of a single arm of the legislative branch of government may be granted standing to file an appeal on a same-sex marriage question—BLAG's role in *Windsor*—while representatives of an electoral majority of citizens may not be granted standing to do the same (in *Hollingsworth*)—especially after the supreme arbiter of California law, the California Supreme Court, concludes that such representatives are well-suited to that role, absent government-sponsored defense of the expressed will of the people.

Although Part I of Alito's dissent was signed by none of the other *Windsor* dissenters, Alito is not quite a lone voice on this point. In his *Hollingsworth* dissent, Kennedy shares Alito's view on the standing issue.¹⁷ Indeed, when compared to his majority opinion in *Windsor*, Kennedy's *Hollingsworth* dissent is striking in its eloquence:

The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement "the theory that all power of government ultimately resides in the people." (6)

In short, somebody needs to defend the will of the people in judicial disputes when their own government refuses to do so. The most natural voices for that purpose might

reasonably be taken to be the campaign architects of the expression of that will.¹⁸

Underlying the charge of inconsistency of the joint treatment of the standing issue in *Windsor* and *Hollingsworth*, the core argument for Alito and Kennedy relies on our understanding of the *purpose* of the doctrine of judicial standing, both generally and in the present context. Standing to litigate is based on a particular interpretation of the meaning of some jurisdictional language in Article III of the U.S. Constitution: "The judicial power shall extend to all Cases [satisfying specified requirements] . . . [and] Controversies [satisfying other specified requirements]." This has been understood, since early on in the history of the federal courts, to mean *only* cases and controversies, and that in turn has been taken to mean only disputes sufficiently focused and live to admit of possible resolution by the courts (the justiciability requirement), brought to the courts by parties subject to some kind of actual harm or imminent threat of harm (the standing issue).

It is worth noting first of all that this entire interpretive structure concerning the meaning of the "cases and controversies" language, and the restriction to *only* such disputes, is a judicial invention. (Logically speaking, "all" does not mean "only.") But that is only to say that the actual language of Section III addresses none of these details. It is not to say that they need not be addressed, nor to say that the appellate judiciary is somehow an inappropriate authority to address these details. In fact, it's clear that federal court dockets need to be manageable and efficient uses of scarce intellectual resources (the judges and their clerks). It is also reasonable to conclude that the jurists themselves are best equipped to hammer out those policies. That is, in any event, the system we now have in place.

Thus, for example, Alito is quite right to insist that, in terms of existing standing doctrine, the United States (as represented by the executive branch) had no authority to carry the *Windsor* litigation forward from the district court in the appeal process because it had agreed with the outcome at the district level, and with the plaintiff. Since the executive branch did not regard the nation as damaged by the outcome in the lower court, and since the harm to Edith Windsor had been repaired, neither party had a reason to advance the case, except to secure an affirmation of broader jurisdiction in the U.S. Supreme Court. Alito argues that: "We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates."¹⁹

More accurately, advisory opinions violate the court's own *interpretation* of the meaning of the vague language of Article III. But that interpretation does carry significant weight, since it dates back to 1793. Although judges of the high courts in a number of countries do sometimes advise their nation's executive or legislative branch on policy questions—at the initiative of the requesting branch—even though no live case is before the court, the U.S. Supreme Court has (almost) never allowed itself to get embroiled in national politics in this particular way. In other words, regardless of the meaning of the "cases and controversies" constitutional text here, there is also a significant separation of powers issue in play.

Strictly speaking, the interdiction on advisory opinions is a justiciability issue rather than a standing issue, but the two are closely intertwined. Using the language of standing with respect to continuing executive branch involvement in *Windsor* is therefore not inapposite.

BLAG's status, as Alito points out, is another matter. Congressional will—its decision on the federal DOMA back in 1996—arguably suffers harm in the district and circuit court rulings. So therefore does the putative will of the American people, as expressed through the voices of their representatives on Capitol Hill (at least the will of a majority of the people as it was back in 1996; to judge by current polling, that may no longer be the case).

The problem here is that the situation before the court in *Windsor*, and also in *Hollingsworth*, was almost entirely novel. It is very rare for an executive branch of government—the federal one in *Windsor*, and the state of California in *Hollingsworth*—to so completely throw in the towel on the constitutionality of an issue under litigation. In the case of *Windsor*, Alito cites the precedent of *INS v. Chadha*, concerning federal immigration law provision 244(c)(2) (see note 19 above), a case in which Congress was permitted to issue *amicus* briefs on behalf of its own legislative interests, because—as Alito points out—its legislative authority to issue a single chamber veto of executive branch action (a House veto of an attorney general/INS decision) was threatened by the prospect that the Ninth Circuit might rule in *Chadha* that such action violated separation of powers doctrine (as indeed it did rule). That finding arguably constituted a direct harm to the legislative reach of Congress, and therefore *amicus* briefs from the House and Senate to the Supreme Court were in order. Similarly, Alito observes, the Second Circuit impaired Congress's legislative power in *Windsor* "by striking down an Act of Congress" (Alito *Windsor* dissent, 4).

One difficulty with the *Chadha* parallel (other than the one which should have troubled Alito, discussed in note 19 above), is that in that ruling, Congressional involvement was only in the form of *amicus* briefs, invited by the Ninth Circuit. The executive branch, in the form of the INS, actually made the formal appeal of the Ninth Circuit decision (which favored the original petitioning immigrant, Jagdish Chadha, and was also the INS's preferred outcome). In *Windsor*, BLAG submitted its own appeal petition to the Second Circuit and the Supreme Court, with no formal invitation to serve as an *amicus* instead the executive branch's appeal, on the other hand, was expressly nominal on its own behalf—an invitation to Congress to proceed, in fact. Having already got what it sought at the district level, the Obama administration's only serious motivation for an appeal was its honorable conviction that Congress ought to have the opportunity to make its appellate case. Without the administration's complicity in the appeals process, Congress might not otherwise be permitted to move *Windsor* forward, because of the Article III technicalities discussed in this section.

From an Obama administration perspective, an advisory appeal (which, technically speaking, is what *Windsor* was for the executive branch), made to an ideologically divided Supreme Court, was risky. The prudent course would have been to allow similar cases to percolate through district

courts in other jurisdictions, until it became apparent to the Supreme Court just where collective constitutional judicial sentiment lay with respect to DOMA §3—a strategy that would also allow time for the emergent public shift in sentiment favoring marriage equality to solidify, making it easier for the Supreme Court to rule favorably on that issue a few years down the road. But that reasoning suggests that *only* BLAG's interests motivated the appeal.

Kennedy argued that the executive branch's loss of *Windsor*'s inheritance tax revenues constituted an unresolved injury that justified the executive branch staying in the game. But that's not very persuasive when the litigating party does not regard itself as injured! The relevance of the *Chadha* precedent is thus further attenuated. At least in that case the INS and the executive branch regarded an advisory opinion as desirable. What Article III means when *only* a third party wishes to prosecute the case further is not the issue in *Chadha*, and is certainly not clearly resolved in *Windsor*, where Kennedy pretends that *both* the executive branch and Congress have interests in a further ruling.²⁰

Another, perhaps even more compelling problem—for the other *Windsor* court dissenters, although not for Alito—turns on the fact that part of the Supreme Court's decision to review *Chadha* on the merits was its *rejection* of an *amicus* argument from Congress that the appeal no longer represented a genuine case or controversy, since both *Chadha* and the INS got what they wanted in the Ninth Circuit ruling. The Supreme Court reasoned that there was still a genuine case or controversy before it, precisely because the other side of the issue was being ably defended in the other *amicus* brief arguments that the Ninth Circuit had invited from the House and Senate! In fact the Supreme Court went further, asserting that:

Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of § 244(c)(2). The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress. We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. (*Chadha* majority, 940)

Is it really true that the Supreme Court has "long held" to a policy that Congress is the proper party to defend the validity of a statute when the executive branch refuses to do so? The proposition is historically dubious, in part because in the past, in cases like *Chadha*, the executive branch has at least appealed threatened statutes, even when it found their content problematic with respect to social policy or the Constitution. The same appears to be largely true of state governments (although canvassing such precedents is a task well beyond the scope of this article). *Windsor*, and probably *Hollingsworth*, are novel in this regard, since in each case the relevant executive branch refused to defend the lawsuit in which it was named as defendant. But the salient point is that, whatever we are to make of judicial history behind this claim, the Supreme Court did embrace the principle in

Chadha. What Scalia advocates in his *Windsor* dissent is a direct repudiation of this precedent.

Hollingsworth presents a similar problem for Roberts and those who signed off on his majority opinion (including Scalia; Thomas, oddly, signed with Kennedy on the standing issue in this one, although not in *Windsor*). Recall that Roberts's core argument was that:

petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. . . .

Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'"²¹

The problem here is that Roberts's decision to interpret the precedents he cites in this analysis as applying to the *Hollingsworth* petition was an entirely gratuitous reading. He was under no compulsion to read those precedents so uncharitably.

Precisely when does a grievance become sufficiently "generalized" or "indirect" to lose standing eligibility? In what sense are the ProtectMarriage organizers *merely* "concerned bystanders"? They have, arguably, invested a great deal of their personal time and energy in the outcome of Proposition 8, at least as much as the Congressional majority that voted for DOMA, to whom the court granted standing in *Windsor*, thereby putting the *Hollingsworth* ruling on standing squarely in conflict with *Windsor* on standing. Even though the two decisions were crafted by distinctly different majorities, the contradiction is no less striking, when produced by decisions handed down on the same day. Looking back to *Chadha*, the Supreme Court ruled there, too, that the presence of Congressional briefs was legitimate, and constituted sufficient cause to keep the case live, and justify ruling on the merits. Again here, the investment of the Congressional majority in its ruling against *Chadha* surely did not surpass the Prop 8 organizers' investment.

Furthermore, given the ruling of the California Supreme Court as to the legitimacy of substituting ProtectMarriage as litigator in place of an abdicating state government, most especially when the issue at hand involves the result of a popular referendum mechanism expressly designed to circumvent an unresponsive state government through democratic action, the ProtectMarriage organizers have an *institutional* interest in the outcome of the federal litigation. In this respect, Prop 8 organizers have as much institutional investment as Congress did, according to the Supreme Court, in both *Windsor* and *Chadha*. On both dimensions, personal injury and institutional investment, *Chadha* is precisely the wrong precedent for Roberts to be enlisting in his cause in either case. And so he doesn't. Scalia attempts to use it, wrongly, in *Windsor*.

In *Hollingsworth*, Roberts relies instead on a 1987 case, *Karcher v. May*.²² In that case Alan Karcher and Carmen Orechio, the leaders of the lower and upper houses of the New Jersey state legislature, were permitted to represent the interests of the legislative body in a federal district court case in which the New Jersey attorney general refused to defend the constitutionality of the school prayer law at issue. Subsequent to the district and appeals court rulings against the New Jersey General Assembly and Senate, Karcher and Orechio attempted to appeal the decision to the U.S. Supreme Court. But they had meanwhile lost their offices as Assembly and Senate leaders, and their successors declined to appeal. Consequently, the U.S. Supreme Court denied their standing to appeal because they could no longer act in their official capacity as representatives of the New Jersey legislature's position.

The *Karcher* court reasoned that the former plaintiffs were now acting essentially as private citizens, and therefore no longer eligible to represent the state legislature. The Prop 8 organizers, on Roberts's account (*Hollingsworth* majority, 12), were, once they were acting as plaintiffs rather than intervener defenders, no different from Karcher and Orechio at the time of their final appeal, and could thus equally be dismissed for lack of standing.

Roberts's reading of the *Karcher* precedent's relevance on this score is obtuse.²³ As Anthony Kennedy pointed out in his dissent, a plausible distinction may be drawn between the circumstances of the Prop 8 organizers and those of Karcher and Orechio. "[In *Hollingsworth*], by contrast, proponents' authority under California law is not contingent on officeholder status, so their standing is unaffected by the fact that they 'hold no office' in California's Government" (*Kennedy Hollingsworth* dissent, 9). And as Kennedy quite rightly points out earlier in his dissent:

The Court concludes that proponents lack sufficient ties to the state government. It notes that they "are not elected," "answer to no one," and lack "a fiduciary obligation" to the State. But what the Court deems deficiencies in the proponents' connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system. (*Kennedy Hollingsworth* dissent, 6)

In other words, there are good reasons for thinking of the Prop 8 organizers not merely as interested citizens, but as serving the advocacy function that the government would normally serve with respect to contested statutes.

Yet another self-inflicted wound to the court's integrity is connected with Roberts's reading of *Karcher*. In appealing to the precedential authority of that case in *Hollingsworth*, Roberts is simultaneously undermining his argument that Congress lacks standing to mount an appeal in *Windsor*. As Roberts acknowledges: "Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing" (*Hollingsworth* majority, 12). The implication for *Windsor*, of course, is that it is legitimate to grant the duly appointed representatives of a legislative body standing to prosecute a case, even to the point of filing an appeal,

when the relevant executive branch declines its customary advocacy role.

Apart from the irrelevant distinction of being federal players rather than state players, what is the difference between the BLAG majority and Karcher and Orechio, while the latter pair were still acting in their official capacity in the Third Circuit Court of Appeals? The only one that I can discern is the fact that, formally at least, Congress had only an *amicus* role in *Karcher*, with the executive branch undertaking the role of entering the appeal petition, while in *Windsor* the executive branch invited BLAG to be the lead partner in actually prosecuting the appeal, with the executive branch acting only in order to circumvent potential Article III difficulties which might otherwise prevent Congressional republicans from pursuing the case.

This risky strategy was of course not entirely selfless behavior on the Obama administration's part. Politically, it was in their interest not to be perceived as using Article III technicalities to "advance their gay agenda." But practically speaking, the *amicus*/appellant distinction between the two cases truly is a "mere legal formality"—provided we remain mindful of the judicial function of the standing and justiciability policies. If Karcher and Orechio still had standing during the initial appeal to file their *amicus* briefs, but really to prosecute the case—a point which the *Karcher* Supreme Court openly acknowledged, and which Roberts inadvertently confirms in *Hollingsworth*, so should BLAG have standing to prosecute *Windsor*, both in the Ninth Circuit and in the Supreme Court (since BLAG's will, unlike that of the New Jersey legislature in *Karcher*, has not changed during the period between the Second Circuit and Supreme Court appeals in *Windsor*).

Oddly, this point gets no mention by any of the participants in the *Windsor* decision and dissents.

5. CONCLUSION: WHITHER HENCE?

It's hard to know just what sort of long-term implications *Windsor* and *Hollingsworth* may have. *Windsor* will doubtless breed more cases like *Bradacs v. Haley* (see note 3 above), challenging state DOMA laws and heteronormative state constitution marriage amendments as violating federal equal protection doctrine. In this respect, ducking the issue in *Hollingsworth* has simply postponed that day of reckoning when the Supreme Court will have to confront the general question about the (federal) constitutionality of *all* such state laws. How long it will be able to postpone that without looking chronically silly is hard to estimate.

Windsor will also breed cases focusing more specifically on the question of transportability of federal benefits from marriage equality states to DOMA states. That question, at least, would have been a relatively simple one for the court to address directly in *Windsor*. The only conceptually difficult issue is what to say about couples seeking to circumvent heteronormative marriage policies in their state of residence by traveling to marriage equality jurisdictions for "destination weddings," and then attempting to secure recognition of federal marriage benefits back at home (as Katherine Bradacs and Tracie Goodwin are effectively doing in their case against South Carolina). On this point the Supreme Court may seek to split the difference in the short run, permitting transportability only when a same-sex married couple moves

from a state where their marriage is recognized to one where it is not.

This solution will, of course, fairly quickly prove an unworkable distinction. If the first step of limited transportability is granted under the authority of *Windsor*, federal benefits will quickly become transportable in all fifty states for same-sex couples whose marriage licenses are recognized in one state. This result may be no more than five years away, perhaps considerably less. Once that happens, it would become easier for the court to rule on the equal protection question about the various state provisions prohibiting same-sex marriage. (This, of course, is another reason why the court's most conservative members protested so vigorously against the majority opinion in *Windsor*.)

But whether that task actually becomes any easier will depend on which of the confused proliferation of competing arguments in Kennedy's *Windsor* opinion the court ultimately endorses as "the" precedent. The equal protection argument, clearly the one that Kennedy endorsed as primary, is naturally applicable to resolve the transportability question, while the "violation of federalism" argument is not. Federalism, in its dimension of being a principle of deference to state autonomy, in fact provides a ready argument *against* transportability. And finally, the substantive due process argument in *Windsor* could be employed either for or against transportability, depending on who is wielding the knife.

Which of those three arguments will at least five members of the court manage to convince themselves, or try at least to tell the rest of us, is the precedent established in *Windsor*? I presume that it will be the equal protection argument, but the murky language of Kennedy's majority opinion in *Windsor* is certainly no guarantee of that.

The most remarkable element, however, in both *Windsor* and *Hollingsworth*, is the court's behavior on the standing question. Apart from the inconsistency inherent in the joint opinions on this issue, what is truly startling is the price the court's conservatives were willing to pay in their effort to restrict judicial ratification of same-sex marriage as constitutionally protected. In essence, they cared so much about protecting the right of democratic majorities to assert their will on "moral climate" questions that they were willing to restrict the ability of democratic majorities to assert their will against executive branch threats to override or ignore that will generally. For that is precisely what the ideologically mixed majority did with its ruling on the standing issue in *Hollingsworth*, and what three of four conservative justices would have done, had they gotten their way on the standing issue in *Windsor*. As Kennedy put the issue in rejecting the thesis that the court should have dismissed *Windsor* on standing grounds:

if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. . . . Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed

it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court. (*Windsor* majority, 12)

For judicial conservatives to advocate such a position is, as Antonin Scalia says about a very different topic, "jaw dropping" (*Windsor* dissent, 2). Moreover, to borrow another phrase Scalia is fond of using against some of his Supreme Court adversaries, for the federal high court to override a state high court, in the manner of the *Hollingsworth* majority, seems an unjustified "exercise of raw judicial power." The California Supreme Court finding that *Hollingsworth* and his Prop 8 colleagues were suitable litigants was an attempt to insure that the people's opinion, however misguided it may have been, had a voice in the judicial dispute over Prop 8's constitutionality. Roberts and Scalia would deny access to that voice, both in *Hollingsworth* and in *Windsor*. Yet it is Scalia himself, a self-proclaimed champion of democratically-initiated policy making over judge-made law, who advocates dismissal of both the California Court's legitimate authority to decide such a matter, and the *vox populi*, when he endorses Chief Justice Roberts's majority opinion in *Hollingsworth*. He does it again more explicitly when he writes his own comparable dissent in *Windsor*.

Insofar as Roberts and Scalia actually succeeded with their standing argument in *Hollingsworth*, where their argument secured a majority, the court has, for now, strengthened the hand of any sitting president to ignore popular sentiment expressed through the ballot box. This is why I said at the outset that, from a conservative judicial perspective, the cure that Roberts and Scalia advocate to curtail the spread of same-sex marriage by judicial means is worse poison than the prospect they seek to combat.

Relying on these two cases for prognostication about future Supreme Court behavior concerning the standing issue, however, is a snare for the unwary. For starters, *Windsor* suggests the opposite conclusion: in a battle between the executive branch and a Congressional majority in either house, standing will be granted to Congress, in the event that the relevant majority is willing to "take up arms" in the federal courts on behalf of its otherwise undefended position. Although the issue doesn't explicitly come up in either case, *Windsor* might reasonably be taken to imply that the Supreme Court would afford the same latitude to a protesting majority in either or both houses of a state legislature—if, for example, the content of Proposition 8 happened to have been enacted in a statute produced by the California legislature rather than through a state constitutional amendment produced by a popular referendum among California voters.

Apart from the countervailing precedent in *Windsor*, four of the Supreme Court justices (Thomas, Ginsburg, Breyer, and Kagan), didn't even rule consistently on the standing issue across the two cases. Thomas, for example, joins Roberts and Scalia in *Windsor*, but endorses Kennedy's more expansive view of standing in *Hollingsworth*. The other five don't agree among themselves how standing should properly be applied in the two cases.

With such a hodgepodge of views, *Windsor* and (especially) *Hollingsworth* are unlikely to provide "settled precedent" to resolve standing questions in the next case in which an executive branch refuses to do battle with a litigant because the executive finds the law in dispute to be odious. (And now that such executive branch behavior has been exercised so dramatically at both state and federal levels, there surely will be more such cases hereafter.)

What I suspect would happen in such cases—or at least what *should* happen, is that the *Hollingsworth* precedent on standing will simply be reversed. It may well be less attractive, even to its chief architects, Scalia and Roberts, when confronted with the merits of some other case. One might reasonably ask, in the context of the present cases, just how homophobic are Scalia and Roberts that they would saddle themselves with such an unattractive doctrine on precedent? Of course, those two may only be the most dramatic purveyors of strange views about standing in these cases, because they behaved so remarkably out of character with respect to their judicial philosophies. Some of the other justices on the *Windsor/Hollingsworth* court may also be embracing interpretations of standing driven at least in part by a preferred substantive outcome in each case. The one noteworthy exception, at least on the conservative side, was Samuel Alito. Although it's surely not something I would say every day, on the issue of standing before the court in these two cases, he got it right. He appears even to be prepared to stick to his position on standing regardless of the likely outcome of either case on the merits.

NOTES

1. 570 U.S. ___ (June 26, 2013), slip opinion pagination for each case in citations below. See, alternatively, *Hollingsworth v. Perry*, 133 S. Ct. 2652, and *U.S. v. Windsor*, 133 S. Ct. 2884.
2. "Same-Sex Marriage: Spring 2013 Update on The Story So Far," *APA Newsletter on Lesbian, Gay, Bisexual, and Transgender Issues* 12, no. 2 (Spring 2012): 19–22.
3. *Bradacs v. Haley*, Case #3:2013cv02351 (August 28, 2013). Katherine Bradacs and Tracie Goodwin are residents of South Carolina who traveled to Washington, D.C., to marry in April 2012. Their marriage is not recognized under South Carolina law. This case is a general complaint against South Carolina's DOMA statute and anti-same-sex marriage constitutional amendment, filed in the wake of *Windsor*, and alleging several violations of the U.S. Constitution on equal protection, due process, and full faith and credit clause grounds. But it does allude specifically to the loss of federal benefits, too (Paragraph 22).
4. "Constitutional Rights versus State Autonomy and Direct Democracy: The Story so far on Same-Sex Marriage," *APA Newsletter on Lesbian, Gay, Bisexual, and Transgender Issues* 09, no. 1 (Fall 2009): 1–14.
5. Well, not if Samuel Alito has anything to say about the matter. "Conjugal" has multiple connotations, the principal one being that it pertains to the marriage relationship. It is, of course, question-begging for Alito to apply the expression (so understood) exclusively to licensed heteronormative monogamous relationships. "Conjugal" also bears the connotation of erotic intimacy within a marital relationship (as in "conjugal bed," "conjugal bliss," and "conjugal duty"). In that sense, Alito's attempt to monopolize "conjugal" for heteronormative sexuality could be read as downright offensive. (In fairness to Alito, he may be sufficiently clueless about the varieties of human sexuality that he simply failed to recognize the implications of what he was saying.)
6. *Perry v. Brown*, 704 F. Supp.2d 921 (2010).
7. 667 F.3d 1052 (9th Circuit, Feb 7, 2012).
8. *In re Marriage Cases*, 43 Cal.4th 757 (2008).
9. 517 U.S. 620 (1996).

10. Even more strictly speaking, rulings issuing from the federal district court might apply only in the northern half of California. But when such rulings implicate statewide governmental action, their reach is broader.
11. "Liberal" is a relative term where the contemporary Supreme Court justices are concerned. It is perhaps hard to make any confident judgments about the court's newest appointees, Sotomayor and Kagan, but none of the current residents of the court bear much philosophical resemblance to William O. Douglas, William Brennan, or Thurgood Marshall, recent iconic liberals on the bench. Harry Blackmun might be a closer comparison for some of them.
12. 388 U.S. 1 (1967).
13. "There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are." (Scalia *Windsor* dissent II.A, 15)
14. The doctrine of applying equal protection to federal action via the due process clause of the Fifth Amendment dates back to *Bolling v. Sharpe*, 347 U.S. 497 (1954), the *Brown v. Board of Education* companion case addressing educational segregation in Washington, D.C., whose laws fell under Congressional jurisdiction, since the District was not a state.
15. *Palko v Connecticut* 302 U.S. 319 (1937), at 325. The language is used here to justify applying some of the enumerated rights expressed in Bill of Rights (specifically from the First and Sixth Amendments) against the states. Also *Moore v. City of East Cleveland* 431 U.S. 494 (1977), at 503, citing *Griswold v. Connecticut*, the 1965 contraception access case, as an earlier precedent for endorsement of this language for discerning when unenumerated fundamental rights may be implicated in a case.
16. On the first point, that judicial action in defense of individual rights should be exercised very cautious in the face of democratically established opposition, see, in addition to Scalia's *Lawrence* and *Romer* dissents, his dissent in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (defending democratically instituted restrictive anti-abortion legislation against a woman's right to privacy), and his majority opinion in *Employment Division v. Smith* 494 U.S. 872 (1990) (First Amendment's free exercise clause affords no protection against the democratically-initiated exercise of the national war on drugs). On the "gored oxen" point, see, e.g., Scalia's majority opinion in *District of Columbia v. Heller* 554 U.S. 570 (2008) (defending Second Amendment rights against gun control legislation), and his concurrence in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (a case reversing decades of precedent on control of corporate spending on political speech during election campaigns, on the strength of a robust, but unimaginative and unnuanced, interpretation of First Amendment free speech rights). On the issue of devising novel constitutional doctrine in order to avoid deferring to democratically enacted policy which the court's conservatives found odious, see the joint dissent in *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012) (the Supreme Court ruling on the constitutionality of "Obamacare"; note, however, that this is a federalism case rather than an individual rights case).
17. The same appears to be true of Sonia Sotomayor, to judge by her joint votes on *Windsor* and *Hollingsworth* (identical to Kennedy's).
18. Whether Proposition 8 was a legitimate way to modify California's Constitution in the first place, given the state's regulations governing referendum initiatives, is another question entirely. In *Strauss v. Horton*, 93 Cal.Rptr.3d 591 (2009), the California Supreme Court affirmed that it was—quite mistakenly, I argue, in "Same-Sex Marriage in California: Direct Democracy vs. Constitutional Integrity," *Society for Lesbian and Gay Philosophy Newsletter* (Fall 2010): 16–28. There I contend that, in order to preserve their own political hides (as elected judges), the *Strauss* majority destroyed the two-tiered distinction between a constitutional amendment and a constitutional revision that was intended to govern the exercise of California's popular referendum system.
19. Alito *Windsor* dissent, 2. Alito is right about the applicability in this case—as far as the government itself is concerned—of the Supreme Court's policy of refusing to provide advisory opinions. But he is wrong in his argument for a complete absence of precedent for the court accepting such petitions. *INS v. Chadha*, 462 U.S. 919 (1983), one of the precedents upon which Alito relies, involved an appeal in which the INS was siding with respondent Chadha, despite formally initiating the appeal. The Supreme Court nonetheless accepted the case for review, even though it was clear from the INS's appeal that the agency was seeking final judgment on the constitutionality question on which the Ninth Circuit had already ruled in favor of the position defended by both the INS and Chadha.
This action looks for all the world as if the executive branch sought and was granted an advisory opinion from the Supreme Court, much like Alito's complaint about the executive branch's role in *Windsor*. Alito should be arguing that the court's decision to grant the INS standing in *INS v. Chadha* was just bad law. If the Supreme Court refuses to call something a duck, should we say then that, for legal purposes, the duck in question was never a duck?
20. The portion of Kennedy's *Windsor* opinion devoted to the question of standing is even more tortured than his comments on the merits. Neither portion is likely to serve as useful precedent for future cases, because the arguments he offers are so convoluted.
21. Roberts *Hollingsworth* majority, 7; citing *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992), at 560, note 1, and 573-74; citing also *Arizonaans for Official English v. Arizona*, 520 U.S. 43 (1997), at 64.
22. 484 U.S. 72.
23. I presume deliberately so. Roberts is nobody's fool, and it would hardly be the first time that an appellate judge misread precedent in an attempt to steer courts in a novel direction.