Equality and Federalism in U.S.-American Civil Rights Law: A Review of Two Recent Supreme Court Cases on Same-sex Marriage and Voting Rights

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Abstract

This article reviews two recent United States Supreme Court decisions concerning civil rights: *Shelby County v. Holder*, and *United States v. Windsor*. In *Shelby County v. Holder*, the Court invalidated an important section of the Voting Rights Act, which designated certain jurisdictions as requiring "preclearance" for changes in their election laws. In *United States v. Windsor,* the Supreme Court found unconstitutional a provision of the Defense of Marriage Act which defined marriage as between a man and a woman for the purpose of federal law. This article identifies two points of commonality between these two decisions: an emphasis on federalism, and on a formal conception of equality. It concludes by suggesting that certain aspects of the decision in *United States v. Windsor* might point towards a more substantive conception of equality.

I. Introduction

The most recent term of the United States Supreme Court saw two decisions which crystallize two important precepts of contemporary U.S.-

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American constitutional doctrine: a *formal conception of equality*, emphasizing the non-discriminatory treatment of all individuals before the law; and the principle of *federalism*, which vests the States with sovereign prerogative to determine and delimit certain rights and duties.

The two decisions at issue – *United States v. Windsor*[1] and *Shelby County v. Holder*[2] – addressed different constitutional questions. *Shelby County* concerned the constitutionality of the Voting Rights Act (VRA), perhaps the most important piece of civil rights legislation in the history of the United States. In its decision, the Court severely limited the efficacy of that law, by holding that the trigger for one of its key enforcement mechanisms was unconstitutional. *Windsor* concerned the constitutionality of section 3 of the Defense of Marriage Act (DOMA), which defined marriage as between a man and a woman for the purposes of federal law. The Court held that this provision violated the constitutional principles of equal protection and due process of law by its disparate treatment of gay and lesbian couples whose marriages had been recognized in State law.

The most obvious point of convergence in these opinions was a concern to preserve the role of States to originate, define, and delimit legal entitlements. *Shelby County* relied upon a principle of the "equal sovereignty of the states" to find unconstitutional statutory provisions placing special burdens upon one group of States with regard to their voting laws. The decision in *Windsor*, similarly, relied upon the historical power of States to define marriage to put into question the constitutionality of a federal statute which discriminated between same-sex and opposite-sex marriages which had been recognized on equal terms by certain States. In both cases, the Court emphasized that the States have a primary role in defining the civil and political rights of their citizens – rights which the federal government can only impinge upon with sound justification. In each case, the Court struck down the law in question because they found the federal government's justification wanting.

The somewhat more subtle point of convergence was the solidification of a conception of legal equality as the formally equal, non-discriminatory treatment of all individuals. This approach to equality forbids intentional forms of discrimination between individuals based on their race, sex, or sexual orientation. Between the Civil Rights Revolution in the 1960s and the present this formal conception of equality has contended with another, more substantive conception. This latter, substantive conception emphasizes the need to avoid the subordination of certain social groups to others, rather

[1] *United States v. Windsor*, 133 S.Ct. 2675 (2013).
[2] *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

than to avoid discrimination against certain individuals through the use of racial and other classifications.[3] This approach forbids public laws and policies and private policies which produce a disparate impact, or unequal outcomes, upon various social groups. While this effects-based conception of equality could be found in the Supreme Court jurisprudence in the late 1960s and early 1970s,[4] and remains entrenched in certain provisions of statutory law,[5] the Supreme Court has increasingly moved away from it, and embraced the formal, anti-discrimination conception of equality. *Windsor* and *Shelby County* largely confirm this trend. *Windsor* highlights the ways in which the DOMA discriminated against homosexuals in state-recognized marriages. *Shelby County*, while not explicitly decided on questions of individual equality, is arguably motivated in part by an interest in uprooting statutory provisions which aim to address subordination of racial groups through the use of racial classifications.

This article will summarize and contextualize the rulings in *Windsor* and *Shelby County* with these two points of commonality – federalism and formal equality – as the connecting threads. I will conclude with a brief consideration of how the principle of dignity, which was central to the holding in *Windsor*, might provide a basis for a renewed concern for questions of social subordination in the hands of a future, more progressive Court.

II. *Shelby County v. Holder*: The "Demolition" of the Voting Rights Act

In *Shelby County*, the Court ruled that a key section of the VRA was unconstitutional. In doing so, the Court relied primarily on principles of federalism and the equality of the sovereign states. Underlying this explicit ba-

[3] Cf. *O. M. Fiss*, Groups and the Equal Protection Clause, Philosophy and Public Affairs 5 (1976), 107 (arguing for a distinction between reading of the Equal Protection Clause through an "anti-discrimination principle", as opposed to reading it through a "group-disadvantaging principle", the latter of which *Fiss* supports).

[4] See, e. g. *Griggs v. Duke Power*, 401 U.S. 424 (1971) (reading the Civil Rights Act to prohibit employment practices producing racially unequal results without justifiable "business necessity", even if such practices were not intentionally discriminatory), and *Hunter v. Erickson*, 393 U.S. 385 (1969) (rejecting the use of city referenda to review anti-discrimination ordinance, on the grounds that, despite such a practice having no facially discriminatory purpose, its "impact fell on the minority"), and *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (ruling that a state prohibition on interracial marriages was unconstitutional in part because it was "designed to maintain White Supremacy").

[5] See, e. g. Civil Rights Act of 1964, Pub. L. No.88-352, §§ 704-714, 78 Stat. 241, 258-265 (1964) (as amended) (current version at 42 U.S.C. §§ 2000e-2000-e17 (2012)).

sis of the decision, however, was a discomfort with the use of racial classifications to achieve adequate minority political representation.

The first VRA became law in 1965.[6] Congress enacted it pursuant to the 15th Amendment to the Constitution, ratified in 1870. The 15th Amendment reads, in relevant part:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".[7]

It gives Congress the power "to enforce this article by appropriate legislation".[8] The 15th Amendment was one of the so-called "Reconstruction Amendments", intended to provide for the civil and political rights of African Americans in the southern States in the wake of the Civil War.[9]

Between 1877, when the federal army ended its occupation of the South, and 1965, when the VRA was enacted, the 15th Amendment was for the most part not effectively enforced. Blacks were excluded from voting in the South through numerous laws, which used devices such as literacy tests as a basis to deny blacks the right to vote.[10] The Supreme Court invalidated certain discriminatory laws over this period, and there were several legislative efforts in the 50s and 60s to prevent racial discrimination in voting, but these were mostly ineffective. Lawsuits by individuals or by the federal government to contest discriminatory laws were too cumbersome and expensive to counter the policies of southern governments intent on excluding blacks from voting.

The VRA sought to finally give the 15th Amendment teeth. Section 2 of the Act creates a nationally applicable rule against racially discriminatory voting rules. Section 2 can be enforced through the usual mechanism of lawsuits in federal courts, initiated either by private individuals or the Department of Justice. Section 5, however, creates a novel "preclearance" procedure, under which certain jurisdictions must get permission from either the Department of Justice or the United States District Court for the District of Columbia, before it can change its election rules.

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6 Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

7 U.S. Const. amend. XV, § 1.

8 U.S. Const. amend. XV, § 2.

9 See *E. Foner*, Reconstruction: America's Unfinished Revolution: 1863-1877, 1988, 281 et seq.

10 Literacy tests, which were often quite onerous, fell unequally on blacks and whites, since black literacy was lower than white literacy, due to unequal and segregated education. Moreover, election officers typically used their discretion to allow white citizens to vote, irrespective of test results, while denying the same right to blacks. See *South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966).

The effect of section 5 was to shift the burden of proof to the local government seeking to change its election rules. Jurisdictions must prove to the court or to the agency that the proposed voting rules do not deny or abridge the right to vote. This makes it very difficult for jurisdictions to circumvent judgments which invalidate their discriminatory voting policies with new policies which achieve the same result as those which have been outlawed. Section 5 has produced a judicial and administrative process in which judges and agency officials consider, amongst other things, whether proposed changes cause retrogression in minority representation, or reduce their ability to elect candidates of their choice. As all parties to *Shelby County* acknowledged, this preclearance provision has proved an exceptionally powerful and effective tool in insuring minority voting rights in States which had historically failed to respect them.

Section 4 of the VRA determined which jurisdictions were covered by the preclearance provision in section 5. It was this section which was the subject of controversy in *Shelby County*. Section 4 stated that section 5 would apply to any jurisdiction which, in November 1964, used literacy, educational achievement, or moral character qualifications to disqualify potential voters, and in which less than 50 % of the voting population voted in the presidential election of 1964, or was registered to vote. This requirement captured the electoral jurisdictions in the southern States, as well as some other outliers. The enforcement regime under sections 4 and 5 of the VRA was set to expire in 5 years, but was renewed in 1970, 1975, 1982, and finally in 2006.

The last renewal was set to expire in 25 years, and included significant amendments, which strengthened the law by reversing Supreme Court interpretations of the statutory language.[11] In the last two congressional renewals, no changes were made to the coverage formula in section 4 used to determine the applicability of the preclearance procedure in section 5. The coverage formula was not altered in large part because of the difficulty of finding sufficient political support for an altered formula.[12] Instead, Con-

[11] The new law, 42 U.S.C. § 1973c (2000) (West), overturns the Court's ruling in *Reno v. Bossier Parish*, 528 U.S. 320 (2000), stating that a voting law with discriminatory purpose violates the Voting Rights Act, whether or not it diminishes minority voting from the status quo. It also overturns the Court's ruling in *Georgia v. Ashcroft*, 539 U.S. 956 (2003), by stating that jurisdictions must be denied preclearance if their voting laws diminish the ability of minority to "elect their preferred candidate of choice". Arguably, the decision of Congress to reject the Court's interpretation of the existing law with these Amendments provoked the constitutional confrontation in *Shelby County v. Holder* (note 2).

[12] As *Nathaniel Persily* has argued: "If Congress had added or subtracted jurisdictions based on some new criteria then the justification for those criteria would become the central political and constitutional question underlying the bill. ... Nothing akin to the neutral trig-

gress sought to create a massive body of evidence in the legislative record to show that the existing coverage formula, though aged, still captured those jurisdictions in which the most significant voting rights violations persisted. Despite Congress' failure to devise a new coverage formula based upon current voting practices, it bears emphasis that Congress has repeatedly, with increasing majorities, and as recently as 2006, confirmed the necessity of the VRA and its preclearance procedure to address the problem of discrimination in voting.

In *Shelby County*, the Court ruled (by a majority of 5 to 4) that this coverage formula, which determined which states require preclearance, was unconstitutional because it discriminated between States and did so based on an irrational and outdated set of criteria. Chief Justice *Roberts* described the preclearance regime of the VRA as a sort of state of exception, which had achieved great results, but could no longer be fully justified under present circumstances.[13] Thus, he began his opinion by saying that

> "The Voting Rights Act employed extraordinary measures to address an extraordinary problem."[14]

He stated that because the coverage formula had not been altered in the latest renewal, it did not reflect the contemporary record of voting rights in the several States. As a consequence, some States were treated differently from others on the basis of an arbitrary set of criteria with no demonstrated link to present circumstances.

This argument hinged upon the principle of the "equal sovereignty of the states" and upon the notion that election rules are normally left to the province of the states. The principle of equal sovereignty creates a strong presumption against targeting a specific group of states, as sections 4 and 5 of the VRA do. Congress must therefore justify such discrimination with sound justification.

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gers of past reauthorizations could have been found." *N. Persily*, The Promise and Pitfalls of the New Voting Rights Act, Yale L. J. 117 (2007), 174, 208.

[13] Indeed, no parties to *Shelby County* could dispute the success of the Voting Rights Act to date. As the attorneys for the plaintiffs put it in a law review article celebrating the verdict: "No one should doubt that preclearance helped transform the South from a bastion of voting discrimination into a place where racial equality is an institutional priority. At the same time, that undeniable success came at a high cost. Preclearance deviates from our constitutional order in fundamental ways. Under our system of government, states are sovereign in the field of state and local elections. Yet preclearance deprived them of the right to self-government." *W. S. Consovoy/T. R. McCarthy*, *Shelby County v. Holder:* Restoring the Constitutional Order, Cato Supreme Court Review (2012-2013), 31.

[14] *Shelby County v. Holder* (note 2), at 2618.

> "A statute's current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets. The coverage formula met that test in 1965, but no longer does so. Coverage today is based on decades-old data and eradicated practices."[15]

The Court relied heavily on the fact that black voting participation rates were now roughly equal to or higher in the southern States than in the rest of the country to show that the evil the VRA had originally targeted had been cured.

The principle of the "equal sovereignty of the states", as applied in this case, is of somewhat dubious constitutional pedigree. Eight members of the Court had previously agreed to Justice *Roberts*' statement, in the Court's opinion in another voting rights case in 2009, that

> "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets".[16]

The principle of equal sovereignty, however, appears nowhere in the text of the Constitution. Its origin is in rather obscure case law. The cases cited for the principle of equal sovereignty refer to the equal terms on which states are admitted to the Union as sovereign entities, and the unconstitutionality of the federal government placing special limitations upon one state for admission that do not apply to other states.[17] However, as the Court originally acknowledged in its embrace of the principle of equal sovereignty:

> "The doctrine of the equality of States ... does not bar ... remedies for *local* evils which have subsequently appeared."[18]

One might add, moreover, that the circumstances in which the 15th Amendment was ratified diminish the relevance of the principle of equal sovereignty in the particular context of voting rights. During Reconstruction, the States were not in a position of equal sovereignty, as southern States were occupied by the Union Army, which for a time protected Afri-

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15 *Shelby County v. Holder* (note 2), at 2627.

16 *Northwest Austin Mun. Utility Dist. NO. One v. Holder*, 557 U.S. 193, 202 (2009).

17 *Coyle v. Smith*, 221 U.S. 559 (1911) (holding that an act of Congress could not mandate the location of a State's capital as a condition of entry into the Union); *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845) (holding that states have equal rights to the land under navigable waters by virtue of their admission to the Union on terms of equal sovereignty) (cited in *United States v. Louisiana*, 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960)).

18 *Northwest Austin* (note 16) at 202 (quoting *South Carolina v. Katzenbach* (note 10), at 328 et seq.) (internal quotation marks omitted).

can American's civil and political rights in a hostile environment. To read the 15th Amendment, and the VRA, through the lens of a strong principle of equal sovereignty is arguably to distort the historical context and intent of the 15th Amendment, which was to strengthen federal power at the expense of recently rebellious Southern states, and in favour of the political equality of all Americans, regardless of race.

The Court in *Shelby County* nevertheless elevated the principle of equal sovereignty from the margins to the center of our constitutional discourse. The principle sounds in the language of "state's rights" and "state sovereignty" which have often been invoked as a "neutral" defense for regimes of racial subordination in the southern States. This is not to say that federalism itself is a suspect constitutional principle. The American constitutional order is founded upon a distribution of powers between the federal and state governments, which prevents an overweening national power, enables legal and political experimentation at the state level, and ensures that certain aspects of government remain close to the local concerns, values, and knowledge of citizens. However, in the context of racial civil rights, the appeal to federalism is closely aligned with a solicitude for, or at least a lack of concern about, State-level laws and practices which perpetuate discrimination against and subordination of minorities to the power of majorities. In this respect, the Court's full-throated defense of equal sovereignty to overrule the judgment of Congress in favour of continuing federal supervision of State election laws has peculiar meaning.

One way to think about the result in *Shelby County* is that the Court appears to weigh and ultimately prioritize one kind of constitutional concern – the principle that states retain some of their sovereignty – against another – the right to vote. The Court's inquiry into Congress' method for implementing the 15th Amendment is motivated by the prior conclusion that the equal sovereignty of the states is a sufficiently grave constitutional matter as to call into question congressional legislation implementing a constitutional amendment. It then finds that, despite the record Congress had assembled showing that the coverage formula continued to provide a good standard by which to select certain jurisdictions for preclearance, this evidence was insufficient to overcome the strong presumption in favour of equal state sovereignty. This conclusion arguably suggests that the Court has prioritized the federalist principle of state sovereignty against the right to vote. On this reading, the Court seeks to return to an antebellum understanding of constitutional liberty which is concerned not primarily with all individuals' ability to participate in their government, but rather in the several States' ability to retain autonomy from national control.

Though the contentious issue of individual equality does not appear directly in the Court's reasoning in *Shelby County*, it underlies the Court's willingness to question the judgment of Congress to re-enact and strengthen the VRA. As noted above, American law has struggled with two conceptions of equality, with the Supreme Court increasingly favouring formal equality over substantive equality. Formal equality focuses on the problem of discrimination, and renders illicit public or private actions motivated by bias or bigotry or explicit racial classifications. It addresses problems of disparate treatment. Substantive equality focuses on forms of subordination, and renders illicit public or private actions that create unequal outcomes between various social groups. It addresses problems of disparate impact. These two principles are often in tension. In the case of employment law, for example, the Civil Rights Act,[19] as amended, makes it illegal to intentionally discriminate on the basis of race, but also makes it illegal to use employment policies that have a racially disparate impact, if there is no business necessity for such policies. As a consequence, employers sometimes face the prospect that they will be sued for intentional discrimination if they adopt a policy which consciously attempts to create a racial balance.

This conflict between disparate treatment and disparate impact was most recently addressed by the Court in the 2009 case *Ricci v. DeStefano*,[20] in which the City of New Haven was sued by white fire fighters who had not been promoted, despite passing the relevant test, due to the city's effort to address the lack of minority success on that test. The Court ruled in favour of the white firefighters. It held that, to avoid liability for disparate treatment, employers using race-conscious policies must have a "strong basis in evidence" for believing that they will be subject to liability for unequal results absent such policies.[21] This holding throws the balance in favour of the principle of formal equality, or disparate treatment. Justice *Scalia*, in his concurrence in that case, went further and suggested that the disparate impact provision of the Civil Rights Act might violate the constitutional guarantee of equal protection of the laws.[22]

This same tension between formal and substantive equality, between disparate impact and disparate treatment, has also arisen in the context of voting rights law. The Court has previously ruled that redistricting plans in which race is the predominant motivating factor violate the constitutional

19 See note 5.
20 *Ricci v. DeStefano*, 557 U.S. 557 (2009).
21 *Ricci v. DeStefano* (note 20), at 558.
22 *Ricci v. DeStefano* (note 20), at 594 (Justice *Scalia* concurring).

principle of equal protection.[23] And yet, section 5 preclearance procedures often require jurisdictions to make race-conscious decisions in order to avoid retrogression in minority representation. Thus, the principle of formal equality, of avoiding racial classifications in government policies, conflicts with the need to use racial classifications in order to avoid policies which diminish the representational strength of minority communities. By making section 5 of the VRA inoperative, the Supreme Court has taken another step against the use of racial classifications for any purpose, even if it is to combat policies which might reduce the political rights of minority communities.

This concern about the pernicious effects of racial classification became evident during oral arguments in *Shelby County*, when Justice *Scalia* questioned why the VRA enjoyed such widespread support in Congress:

> "I don't think that's attributable to the fact that it's so much clearer that we need [the VRA] now. I think it's attributable ... to a phenomenon that is called the perpetuation of racial entitlement. ... Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political process."[24]

Justice *Scalia's* argument, on one level, was that the VRA, by creating many majority-minority districts, and a broader constituency for federal intervention to support minority voting rights, had made it unlikely Congress would ever discontinue the Act on its own, absent judicial intervention. On a deeper level, however, *Scalia* is concerned with laws and policies which create "racial entitlements", meaning specific legal protections for racial minorities. *Scalia* believes such entitlements contravene the basic constitutional framework of individual liberty and equal protection of the laws. As he stated in an earlier case, holding that minority preferences in government contracting violated the principle of equal protection:

> "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual and its rejection of dispositions based on race ... To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."[25]

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23 *Miller v. Johnson*, 515 U.S. 900 (1995).

24 Transcript of Oral Argument at 47, *Shelby County v. Holder* (note 2).

25 *Adarand v. Pena*, 515 U.S. 200, 239 (1995) (Justice *Scalia* concurring) (internal citations omitted).

Here, *Scalia* captured the distinction between a concern to avoid "unlawful racial discrimination", intentional disparate treatment, on the one hand, and a concern to avoid anti-subordination, or disparate impact, on the other. In his constitutional vision, the use of racial categories to make up for inequalities in employment, education, or political representation, merely perpetuates "the way of thinking that produced slavery". This concern with racial entitlements arguable lies under the surface of the Court's ruling in *Shelby County*, which deprives the government of a powerful mechanism by which to use race-conscious policies to pursue political equality.[26]

As Justice *Ginsberg* pointed out in her dissent, there was a counter-intuitive logic to the Court's ruling in this case:

> "In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy."[27]

Though the original devices used to discriminate against minority voters were gone, others had taken their place. *Ginsberg* argued that the Congressional record provided abundant evidence that racial discrimination was still a problem, and that Congress had chosen a reasonable means to address the problem. Given the gravity of the constitutional violation, *Ginsberg* argued, the Court should afford Congress greater discretion:

> "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."[28]

Ginsberg also challenged the Court's reading of the principal of the equal sovereignty of the states. The precedent the Court relied upon regarded the conditions of state's entry into the Union, not the rules that applied to them once they were within it. *Ginsberg* concluded with a jab at the conservative Justice's pretensions to judicial modesty:

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[26] Though Justice *Scalia* did not write the opinion in *Shelby County*, Chief Justice *Roberts*, who authored the opinion, has previous voiced a similar preference for formal equality, and scepticism of substantive equality. For example, in a 2007 ruling, holding that the use of racial classifications to assign students to schools violated the equal protection clause, Chief Justice *Roberts* concluded: "Before *Brown* (*v. Board of Education),* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again – even for very different reasons. ... The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

[27] *Shelby County v. Holder* (note 2), 2612, 2632 (Justice *Ginsberg* dissenting).

[28] *Shelby County v. Holder* (note 2), at 2636 (Justice *Ginsberg* dissenting).

"The Court's opinion can hardly be described as an exemplar of restrained and moderate decision-making. Quite the opposite. Hubris is a fit word for today's demolition of the VRA."[29]

III. *United States v. Windsor*: The Dignity of Marriage

In *Windsor*, we move from the political public sphere of voting to the private sphere of marriage. Despite this shift in focus, the issues of federalism and the definition of equality remain central. In *Windsor*, the Court held that section 3 of the Defense of Marriage Act (1996), which defined marriage as between a man and a woman for the purpose of federal law, was unconstitutional. The consequences of DOMA had been significant, concerning taxes, bankruptcy, social security benefits, and even military funeral arrangements. Since DOMA had been enacted, 12 States and the District of Columbia had adopted provisions for gay marriage or civil unions in their states. The Court held (by a majority of 5 to 4) that DOMA was unconstitutional. Though some scholars have argued that the result was determined more by political and social changes rather than by judicial doctrine,[30] the majority opinion in fact offers a sound legal argument hinging upon three interrelated grounds: (1) federalism, (2) the principle of equal protection, and (3) the principle of due process. The result is an opinion that understands some constitutional claims as arising from entitlements granted by the States, and which stresses a formal, non-discriminatory conception of equality.

Justice *Kennedy*, writing for the Court, stresses the fact that the States have traditionally had the exclusive right to define marriage.

"DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[31]

Despite the detail he employs to justify this claim, *Kennedy* denies that he is resting his argument on the principle of federalism, in the sense that the federal government may not legislate on matters reserved to the States.

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29 *Shelby County v. Holder* (note 2), at 2648 (Justice *Ginsberg* dissenting).

30 See, e. g *Michael J. Klarman*, Windsor and Brown: Marriage Equality and Racial Equality, Harv. L. Rev. 127 (2013).

31 *United States v. Windsor* (note 1), at 2681.

Rather, his argument is that DOMA, because of its reach and extent, departs from this history and tradition of reliance on State law to define marriage.

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[32]

Thus, the argument is that DOMA's departure from the tradition of State regulation of marriage is a sign that something is rotten in Denmark – that there was a discriminatory motive at play in Congress' legislation. Chief Justice *Roberts*, in his dissent, chooses nonetheless to emphasize the pure federalism rationale in the majority opinion. His purpose is to construe the decision so that it could not provide the basis for a more far-reaching decision that would require all States to grant marriage equality.

The Court holds that, because DOMA was enacted out of a "bare desire to harm" homosexual marriages, it violates the principle of equal protection of the laws.[33] This equal protection argument, however, remains intertwined with the federalism argument:

> "The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper."[34]

The equal protection analysis is thus triggered by the fact that a state had legalized same sex marriage. Once it had done so, it had conferred an equal dignity which may then be infringed upon by discriminatory federal laws. In absence of such a State conferral of dignity, the injury of unequal treatment would not occur. States recognizing same sex marriage had, in other words, created an entitlement to marriage which places same-sex and opposite-sex marriage on an equal footing. DOMA then impaired this equal recognition by giving federal benefits to heterosexual married couples and denying them to homosexual married couples. The Court then assesses whether Congress had any reasonable grounds for treating the class of homosexual marriages unequally, and finds none of the justifications sufficient.

While *Kennedy* in his majority opinion disclaims any direct reliance on federalism – in the sense of the federal government stepping beyond its enumerated powers to interfere with powers reserved to the States – the

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[32] *United States v. Windsor* (note 1), at 2692 (citing *Romer v. Evans*, 517 U.S. 620 (1996)) (internal quotation marks omitted).

[33] *United States v. Windsor* (note 1), at 2696.

[34] *United States v. Windsor* (note 1), at 2695.

opinion's emphasis on the States' authority to create a baseline of equality sounds in other, broader, federalism concerns. The Court recognizes the federal states not merely as sources of entitlements, but as democratic bodies which, through the conferral of rights, also confer dignity, status, and equality upon rights-bearers.[35] The Court, in other words, gives constitutional consideration to the federal principle that the states are a site for democratic experimentation and the broader moral progress of political society.[36] These sorts of federalism concerns run perhaps deeper than the issue of enumerated powers, and into the fabric of the American constitutional order. They touch on the constitutive role of political contestation and legislative action at the State level in articulating the public's spatially and temporally varying conceptions of equality.

DOMA's infringement upon the equality created by the States, the Court holds, violates not merely the principle of equal protection, but the principle of due process of the law. Here, *Kennedy* builds upon his previous jurisprudence in the area of gay rights, where the concept of "dignity" played a central and hitherto unprecedented constitutional role. In *Lawrence v. Texas*, the Supreme Court had held that a Texas law criminalizing sodomy was a deprivation of liberty without due process of law. In this opinion, also written by *Kennedy*, the Court emphasized that:

> "Adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[37]

In *Windsor*, *Kennedy* builds upon this rationale to argue that DOMA undermines the dignity of gay married couples by treating them as a sepa-

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35 As *Ernest A. Young* and *Erin C. Blondel* argue, "The Windsor majority ... focused on the fact that the great state of New York had already resolved – and as a matter for federalism, was *entitled* to resolve – [the question of the definition of marriage] through its own democratic processes. ... [T]he Court did not impose its own view of whether same-sex marriages should be recognized; it accepted New York's." *E. A. Young/E. C. Blondel*, Federalism, Liberty, and Equality in *United States v. Windsor*, Cato Supreme Court Review (2013-2014), 117, 135.

36 *Reva Siegel* thus describes the opinion as paying "tribute to federalism as a system of governance that enables living constitutionalism, in which community judgment about the meaning of unjust exclusion can evolve and citizens over time learn better to respect the equal dignity of same-sex marriages". *R. B. Siegel*, The Supreme Court 2012 Term – Forward: Equality Divided, Harv. L. Rev. 127 (2013), 1, 87.

37 *Lawrence v. Texas*, 539 U.S. 558, 605 (2003).

rate class. The federalism arguments intrude in *Windsor*, however, in a way they did not in *Lawrence*. The dignity of homosexuals, as married couples, is only made constitutionally relevant, in the latter case, by the fact that such dignity has been *conferred* by a State's recognition of same-sex marriage:

> "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify."[38]

There is thus an important difference to note in the use of the concept of dignity in *Lawrence* regarding the criminalization of sexual acts and the reasoning in *Windsor* regarding the unequal treatment of marriages. While moral (and consensual) sexual choices are generally constitutionally protected, irrespective of State law, because they are foundational sources of individual dignity, marriage is a socially (and federally) constituted dignity. It is a *conditional* source of dignity, whose constitutional significance stems not from the liberty-preserving function of moral and sexual choice alone, but rather from the *social recognition* accorded to such choices through State marriage law. In *Hegelian* terms (as yet) foreign to American constitutional discourse, one might describe the distinction as one between morality and ethical life (*Sittlichkeit*) as sources of freedom.[39] Whereas the criminalization of homosexual sex inhibits the moral liberty of the subjective conscience by preventing the exercise of personal choices, the disparate treatment of marriages already instituted in positive law inhibits freedom by demeaning a social institution through which individuals recognize one another as self-determining agents. Simply put: our sexual dignity derives from our status as rational, embodied beings; our marital dignity derives from our status as bearers of historically, socially, and legally recognized rights and duties.

Windsor thus shares with *Shelby County* a concern for the States as a foundation of constitutional liberty, as well as a reliance on a formal con-

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[38] *United States v. Windsor* (note 1), at 2694.

[39] See *G. W. F. Hegel*, Elements of the Philosophy of Right, 1821, §§ 105-181, (A. Wood (ed.), H. B. Nisbet (trans.), 1991). *Hegel's* account of the normative significance of marriage is especially relevant in this context: "The *ethical* aspect of marriage consists in the consciousness of this union as a substantial end, and hence in love, trust, and the sharing of the whole of individual existence (*Existenz)*. When this disposition and actuality are actually present, the natural drive is reduced to the modality of a moment of nature ..., while the spiritual bond asserts *its rights* as the substantial factor ..." *G. W. F. Hegel* (note 39), at § 163.

ception of equality. Just as the Court in *Shelby County* emphasized the equal sovereignty of the States as the ground for their prerogative to determine their own election laws, the Court in *Windsor* sought to respect the States as democratic sources of entitlements, dignities, and social status. To be sure, these invocations of federalism are not identical. *Shelby County* addressed the problem of the unequal treatment of states without good reason. *Windsor* addresses the problem of the unequal treatment of individuals who have been granted entitlements by States.

This difference, however, points us to the second point of commonality between the two. *Windsor*, like *Shelby County*, advances a conception of equality as non-discrimination. In *Kennedy's* words:

> "What the State of New York treats as alike, the federal law deems unlike by a law designed to injure the same class the State seeks to protect."[40]

Kennedy invokes both the foundational anti-discrimination principle of "treating likes alike", and the language of anti-classification to find section 3 of DOMA unconstitutional. Whereas States recognizing same-sex marriage had erased an existing classification barrier – between heterosexuals and homosexuals – DOMA codified a classification, giving legal support for the treatment of gay and lesbian individuals as an inferior group, rather than as individuals with formally equal rights.

The majority is largely concerned with a conventional equal protection analysis which attempts to sniff out invidious discriminations which treat individuals unequally without justification. *Kennedy* thus focuses on the fact that Congress *intended* to discriminate against individuals in same-sex marriages:

> "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[41]

Windsor thus relies in large part on a formal conception of equality forbidding intentional discrimination against individuals by virtue of their membership in a social group. As I will suggest in the conclusion, however, another perhaps more substantive conception of equality lingers in the opinion as well.

Chief Justice *Roberts* in his dissent argues that Congress' interests in "uniformity and stability" provide ample justification for DOMA's restriction of marriage to heterosexual couples for the purpose of federal

40 *United States v. Windsor* (note 1), at 2692.
41 *United States v. Windsor* (note 1), at 2693.

law.[42] *Scalia*, in his far more acerbic dissent, emphasizes several factors: that the Court shouldn't have taken the case because there wasn't really a controversy; that the Court is infringing upon a domain which is better left to the democratic branches of government; and that Congress had legitimate reasons for enacting DOMA which the Court ignores. In prose reminiscent of *Carl Schmitt*,[43] Justice *Scalia* concludes that:

> "It is one thing for a society to elect to change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race."[44]

For *Scalia*, democratic politics is and ought to be the agonistic realm of friends and enemies, with radically opposed parties seeking to win a majority for their preferred policies. But to deem the Congressional and public opponents of gay marriage irrational and bigoted, as he claims the Court does, is to place them outside the realm of civilized contestation, thus creating the potential for ever more virulent culture wars.

IV. Conclusion

Shelby County and *Windsor* are of a piece in their emphasis on the essential constitutional role of the States in setting the legal terms for social and political life, and in defending a formal conception of equality which forbids intentional discrimination against individuals on the basis of their membership in certain social groups. These are two of the central concerns of the Roberts Court. The Court seeks to turn away from a federal government with very broad powers to determine legal arrangements and impinge upon states' legislative prerogatives. For example, though the Court upheld the individual mandate of the Affordable Care Act,[45] it did so under Congress' power to tax, not under the Commerce Clause, which between the 1930s and the past two decades had been read as an almost unlimited source of

[42] *United States v. Windsor* (note 1), at 2969 et seq. (Justice *Roberts* dissenting).

[43] *C. Schmitt*, The Concept of the Political (George Schwab trans. 1996), 1929, 54 ("When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy.").

[44] *United States v. Windsor* (note 1), at 2709 (Justice *Scalia* dissenting).

[45] Pub. L. No. 111-148, §§ 2001-2955, 124 Stat. 119 (2010).

federal power.[46] The Court thus seeks to strengthen the federal aspect of the American constitutional regime, giving states greater leeway to define individual entitlements and to construct local communities in accordance with their own conception of the good life, while restricting the powers of the government to set legal norms nationally. At the same time, the Court continues to turn away from the substantive vision of equality which had been advanced in constitutional jurisprudence and legislation in the wake of the civil rights era. The Court remains hostile to the use of racial classifications to remedy social inequalities between majority and minority groups and address forms of subordination that originate from past injustices. Instead, the Court focuses upon uprooting all efforts to treat individuals differently based on their membership in different social groups. Discrimination against individuals is the primary evil, and any form of discrimination, even if it is undertaken to advance greater social equality, will not find a sympathetic ear in the Court under its current composition.

I would like to conclude, however, by suggesting that the dignity jurisprudence which Justice *Kennedy* elucidates in *Windsor* might provide some basis for a more expanded conception of equality, and yet one that is mindful of preserving the role of States as sources of entitlements and social status. As *Reva Siegel* has argued, the Majority's argument in *Windsor* acknowledges that law impinges upon "social meanings",[47] insofar as the Court indicts DOMA because it "tells ... couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition".[48] *Kennedy* also invokes the language of "anti-humiliation" recently deployed by *Bruce Ackerman* to capture the overarching spirit of the jurisprudence of the civil rights era, as it sought to address sources of racial humiliation in various spheres of social activity.[49] As *Kennedy* writes,

> "the law humiliates tens of thousands of children now being raised in same sex couples".[50]

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[46] *Nat. Fed. Indep. Bus. v. Sibelius*, 132 S.Ct. 2566 (2012). The Court also took a federalist line in invalidating that portion of the Act which empowered the Secretary of Health and Human Services to deprive States of their Medicaid payments if they did not accept a Medicaid expansion made possible by the Act. The Court found this provision to exceed Congress' power under the Spending Clause by using the prospect of funding deprivation to coerce states into accepting the Medicaid expansion.

[47] *R. B. Siegel* (note 36), at 90.

[48] *United States v. Windsor* (note 1), at 2694.

[49] *B. Ackerman*, We The People: The Civil Rights Revolution, 2014, 3.

[50] *United States v. Windsor* (note 1), at 2694.

He emphasizes that, through DOMA,

> "same-sex couples have their lives burdened, by reason of government decree, in visible and public ways."[51]

Thus, the opinion is shot through with a concern for the ways in which laws impinge upon the consciousness of individuals in ways that deprive them of their dignity as free and equal persons.

The Court in *Windsor* was not merely concerned about whether the law in question *intends* such harms, but whether it in fact *causes* them:

> "The principal purpose and the *necessary effect* of this law are to demean those persons who are in a lawful same-sex marriage."[52]

In this language, one might glean the basis for a return to a consideration, not merely of the intent of public and private action, but of the "necessary effect" of such actions to "demean", "humiliate" or "degrade" individuals.[53] Such regard for how the law is experienced by the individuals affected by it might imply a return to a consideration of the substantive, disparate impact of laws on the psyche of individuals.

This approach would emphasize law as a form of social recognition; as a means through which individuals' identities are constituted. Such a vocabulary could prove very useful in future efforts to articulate the harms visited upon individuals by such policies as solitary confinement in incarceration, aggressive policing tactics such as "stop and frisk,"[54] or requirements that individuals produce birth certificates in order to vote. Understanding the harms caused by such policies may often require a broader attention to rights recognized in States, which are violated either by other State laws, federal laws, or private practices. The language of dignity thus provides a way for rethinking the relationship between formal and substantive equality, and perhaps also the role of the federal States in constituting the ethical life of the United States.

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51 *United States v. Windsor* (note 1), at 2694.

52 *United States v. Windsor* (note 1), at 2695.

53 *United States v. Windsor* (note 1), at 2695 et seq.

54 "Stop and frisk" is a policing tactic used in New York City and elsewhere, in which police officers stop and search individuals based on mere suspicion rather than probable cause. The practice tends to have significantly racially-disparate results. Recently, in *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. 12.8.2013), a United States District Court ruled that New York's stop and frisk policy violated the Fourth Amendment's prohibition on unreasonable searches and seizures, and the Fourteenth Amendment's principle of equal protection. The Court relied on statistical evidence and analysis of department practices to hold that the policing practice was discriminatory.