"DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples."—Justice KENNEDY

"[T]he majority says that the supporters of this Act acted with malice—with the "purpose" "to disparage and to injure" same-sex couples. . . . I am sure these accusations are quite untrue. To be sure . . . , the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements. . . ."—Justice SCALIA

United States v. Windsor

570 U.S. ___, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013)

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

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.*, Baehr v. Lewin (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.

Section 3 is at issue here. It . . . provides as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

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

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

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States

District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. [T]he Attorney General informed Congress that "the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.". . . .

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

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. . . .

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

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

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

[T]he Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, . . . the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " Zivotofsky v. Clinton (2012) (quoting Marbury v. Madison (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the

separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court. . . .

III

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

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749.

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. . . . This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See McCulloch v. Maryland (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

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

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal

regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.,* Loving v. Virginia (1967); but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa (1975).

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

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." Ohio ex rel. Popovici v. Agler (1930). Marriage laws vary in some respects from State to State. . . . But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. " '[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' " Romer v. Evans (1996) (quoting Louisville Gas & Elec. Co. v. Coleman (1928)).

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

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." Lawrence v. Texas (2003). . . . New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U. S. Const., Amdt. 5; Bolling v. Sharpe (1954). The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. Department of Agriculture v. Moreno (1973). In determining whether a law is motived by an improper animus or purpose, " '[d]iscriminations of an unusual character' " especially require careful consideration. *Supra* (quoting *Romer*). DOMA cannot survive under these principles. . . . DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . " The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

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

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. . . .

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

closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries. . . .

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. . . .

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. . . .

* * *

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

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

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

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

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

■ CHIEF JUSTICE **ROBERTS**, dissenting.

I agree with Justice Scalia that this Court lacks jurisdiction. . . . I also agree with Justice Scalia that Congress acted constitutionally in passing DOMA. Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.

The majority sees a more sinister motive, . . . a bare desire to harm. . . . At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it

furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

[T]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages" . . . that a State has already recognized. . . . Justice Scalia believes this is a " 'bald, unreasoned disclaime[r].' " In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. [I]t is undeniable that its judgment is based on federalism. . . .

It is not just this central feature of the majority's analysis that is unique to DOMA, but many considerations on the periphery as well. For example, the majority focuses on the legislative history and title of this particular Act; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. . . .

We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of Hollingsworth v. Perry (2013). I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve . . . a question that all agree, and the Court explicitly acknowledges, is not at issue.

■ JUSTICE **SCALIA**, with whom JUSTICE **THOMAS** joins, and with whom **THE CHIEF JUSTICE [ROBERTS]** joins as to Part I, dissenting.

This case is about . . . the power of our people to govern themselves, and the power of this Court to pronounce the law. . . . We have no power to decide this case [and] we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I . . .

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

[A] single sentence lays bare the majority's vision of our role. The Court says that we have the power to decide this case because if we did not, then our "primary role in determining the constitutionality of a law" . . . would "become only secondary to the President's." But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we "undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is."

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

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. . . .

[W]e are quite forbidden to say what the law is whenever (as today's opinion asserts) " 'an Act of Congress is alleged to conflict with the Constitution.' " We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power " 'to say what the law is,' " giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, *e.g.,* Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes . . . the parties before the court disagree not with regard to the facts of their case . . . but with regard to the applicable law—in which event . . . it becomes the " 'province and duty of the judicial department to say what the law is.' "

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-standing role *at all.* We perform that role incidentally . . . when that is necessary to resolve the dispute before us. Then, and only then, does it become " 'the province and duty of the judicial department to say what the law is.' " That is why, in 1793, we politely declined the Washington Administration's request to "say what the law is" on a particular treaty matter that was not the subject of a concrete legal controversy. 3 *Correspondence and Public Papers of John Jay* 486–489 (H. Johnston ed. 1893). And that is why, as our opinions have said, some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit. . . .

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive's determination of unconstitutionality would have escaped this Court's desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. . . .

II . . .

A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers,

I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." . . . What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

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

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below . . . In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. See United States v. Virginia (1996) (Scalia, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See Heller v. Doe (1993) (a classification " 'must be upheld . . . if there is any reason-ably conceivable state of facts' " that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution"; that it violates "basic due process" principles; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment." The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," Washington v. Glucksberg (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of " 'ordered liberty.' " *Id.* (quoting Palko v. Connecticut (1937)).

[T]he sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a " 'bare . . . desire to harm' " couples in same-sex marriages. It is this proposition with which I will therefore engage.

B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence* (Scalia, J., dissenting). . . . [T]he Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid . . . justifying rationales for this legislation. Their existence ought to be the end of this case. . . .

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." Bear in mind that the object of this condemnation is . . . our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority . . . makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

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

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

I am sure these accusations are quite untrue. To be sure . . . , the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements. . . . To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect 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.

* * *

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

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

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. [T]he real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by " 'bare . . . desire to harm' " couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place. [N]o one should be fooled; it is just a matter of listening and waiting for the other shoe.

[F]ew public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place for some . . . are offset by victories in other places for others. . . . Even in a *single State*, the question has come out differently on different occasions. . . .

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

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it. . . . But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.

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

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. [W]hat [respondent Edith Windsor] seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of DOMA. . . .

II

[T]he family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e.g.,* S. Girgis, R. Anderson, & R. George, *What is Marriage? Man and Woman: A Defense* 53–58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 *The Monist* 388, 398 (2008). Others think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e.g.,* A. Sullivan, *Virtually Normal: An Argument About Homosexuality* 202–203 (1996); J. Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

III

[Windsor and the United States] argue that § 3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of "heightened" scrutiny, and that § 3 cannot survive such scrutiny. . . . The Court's holding, too, seems to rest on "the equal protection guarantee of the Fourteenth Amendment"—although the Court is careful not to adopt most of Windsor's and the United States' argument.

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

In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States . . . ask us to rule that the presence of two members of

the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

[W]indsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, *e.g.*, Girgis, Anderson, & George, *What is Marriage? Man and Woman: A Defense*, at 23–28. . . .

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. . . . Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

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

Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, *e.g.,* Rust v. Sullivan (1991) ("[T]he government 'may make a value judgment favoring childbirth over abortion' "). Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. . . .

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

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. . . . Unless the Court is willing to allow this to occur, the whiffs of federalism in the today's opinion of the Court will soon be scattered to the wind.

In any event, § 3 of DOMA, in my view, does not encroach on the prerogatives of the States. . . . [I]t does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that § 3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used

marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by § 3, Congress has the power to define the category of persons to whom those laws apply. . . .

EDITORS' NOTES

(1) In *Windsor*, the United States had argued, and the lower court had held, that "heightened" scrutiny should apply to classifications on the basis of sexual orientation. (See also the Letter from Attorney General Holder to Congress on Litigation Involving the Defense of Marriage Act [reprinted above, p. **Error! Bookmark not defined.**].) The Supreme Court did not officially address or adopt this argument and holding. **Query:** Does its application of *Romer*-style "careful consideration"—or rational basis scrutiny with "bite"—nonetheless amount to "heightened" scrutiny? Does *Windsor* simply apply a *Romer*-style analysis—concerned to protect against "animus," a "bare desire to harm a politically unpopular group," and classifications that "demean" on the basis of sexual orientation—or does *Windsor* add anything new to *Romer*?

(2) Officially, the basis for the Court's holding that DOMA is unconstitutional is the Due Process Clause of the Fifth Amendment. Remember, the Equal Protection Clause of the Fourteenth Amendment applies only to the states, and the Court has held that the Due Process Clause of the Fifth Amendment "incorporates" an "equal protection component" that applies to the federal government. See Bolling v. Sharpe (1954; reprinted above, p. **Error! Bookmark not defined.**), where Chief Justice Warren wrote: "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." **Query:** Is the Court's holding under the Due Process Clause of the Fifth Amendment only (1) a holding that DOMA denies equal protection or also (2) a holding that DOMA denies liberty as a matter of substantive due process? Both Justices Scalia and Alito in dissent interpret Kennedy's opinion as making these two separate holdings, and they criticize his opinion for not clearly delineating these two holdings. Are their readings sound? Or are they failing to grasp that for Kennedy (as for Warren in *Bolling*), due process and equal protection overlap and are intertwined?

(3) **Query:** What role do principles of federalism play in Kennedy's opinion? Consider the following two scenarios. (A) What if, after 26 states recognized same-sex marriage, the federal government passed a "Marriage Equality Act" that provided that, for purposes of federal law, " 'marriage' is a union between two adults as spouses" without regard to the sex of the two spouses? Would Kennedy's opinion imply that such a law violated principles of federalism? (B) Does *Windsor* imply, notwithstanding Kennedy's stated concern for principles of federalism, that states' "mini-DOMAs" are unconstitutional for the same reasons that the federal DOMA is unconstitutional: that they reflect a "bare desire to harm a politically unpopular group" and "demean" and "humiliate" same-sex couples?

(4) **Query:** What are the implications, if any, of *Windsor* for the constitutionality of state laws that deny recognition to same-sex marriage? Kennedy's opinion officially does not address this question—stating in concluding that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." Is Scalia right to argue nevertheless that Kennedy's opinion clearly implies that such laws are unconstitutional for the same reasons that DOMA is unconstitutional? In Obergefell v. Hodges (2015; reprinted below, p. __), the Court in an opinion by Kennedy held that such laws denied the fundamental right of same-sex couples to marry.

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