Why Justice Kennedy's Opinion in Windsor Short-Changed Same-Sex Couples

Adam Lamparello, Indiana Tech Law School
Essay

WHY JUSTICE KENNEDY’S OPINION IN WINDSOR SHORTECHANGED SAME-SEX COUPLES

ADAM LAMPARELLO
WHY JUSTICE KENNEDY’S OPINION IN WINDSOR SHORTCHANGED SAME-SEX COUPLES

ADAM LAMPARELLO

ABSTRACT

Supreme Court Justice Anthony Kennedy’s decision in United States v. Windsor—invalidating the Defense of Marriage Act—made the same mistake as his decision in Lawrence v. Texas: it relied upon abstract notions of ‘liberty’ rather than the text-based guarantee of equality. Same-sex couples deserve more. They are entitled to equal treatment under the United States Constitution. Bans on same-sex marriage cannot be supported by a rational state interest, and instead constitute impermissible discrimination under the Fourteenth Amendment’s Equal Protection Clause. By issuing a doctrinally muddled decision that included discussions of federalism, liberty, due process, and equal protection, Justice Kennedy missed an opportunity to root same-sex marriage more firmly in the Constitution’s text. That makes the future of same-sex marriage more, not less, uncertain.

I. INTRODUCTION

In United States v. Windsor, the Supreme Court invalidated section three of the Defense of Marriage Act (DOMA), which confined the federal definition of marriage to opposite-sex couples. Some scholars stated that the “Windsor Court issued a decisive victory” for gay rights, claiming that “Justice Kennedy’s opinion sends a message that same-sex couples . . . deserve inclusion” in traditional marriage. A closer look at Windsor, however, reveals that same-sex couples won—and lost. While Justice Kennedy’s opinion used sweeping rhetoric and blasted DOMA’s

---

1 Assistant Professor of Law, Indiana Tech Law School; New York University School of Law LL.M.; Ohio State University College of Law, J.D., with honors; University of Southern California, B.A., magna cum laude.

1 133 S. Ct. 2675 (2013).


3 Katie Eyer, Lower Court Popular Constitutionalism, 123 YALE L.J. ONLINE 197, 213 (2013); see also Erwin Chemerinsky, The Court Affects Each of Us: The Supreme Court Term in Review, 16 GREEN BAG 2D 361, 373 (2013) (“After Windsor’s conclusion that no legitimate government purpose is served by denying gays and lesbians the right to marry, it is difficult to see how the Court will uphold any law prohibiting same-sex marriage.”).

“interference with . . . equal dignity,” it amounted to little more than a nebulous discussion of liberty, sprinkled with a federalist glaze. Like Lawrence v. Texas, Justice Kennedy’s decision failed to properly recognize same-sex couples’ constitutional and text-based right to equality, which is rooted in the Fourteenth Amendment’s Equal Protection Clause. Windsor could—and should—have stated that there is no “rational basis” for same-sex marriage bans. They are motivated by “moral disapproval of homosexuality,” which is equivalent to unconstitutional animus. Windsor’s promising rhetoric, but lack of a corresponding constitutional right, means that it has “highly ambiguous doctrinal significance,” and offers “virtually no guidance on how its reasoning might be applied to future cases.”

At first glance, it may appear that Windsor established such a right, as Justice Kennedy’s opinion held that DOMA “impose[s] inequality” and therefore “violates basic due process and equal protection principles applicable to the Federal Government.” Nowhere in his opinion, however, did Justice Kennedy either apply the Court’s traditional equal protection jurisprudence, which consists of multi-tiered levels of scrutiny,

---

5 Windsor, 133 S. Ct. at 2693.
6 Id. at 2692–93.
9 See Emma Freeman, Giving Casey Its Bite Back: The Role of Rational Basis in Undue Burden Analysis, 48 Harv. C.R.-C.L. L. Rev. 279, 285 (2013) (discussing the highly deferential rational basis test, which requires “only a superficial nexus between the state’s regulatory means and ends”); see also FCC v. Beach Comm’n’s, Inc., 508 U.S. 307, 320 (1993) (“The assumptions underlying [a particular law] . . . may be erroneous, but the very fact that they are ‘arguable’ is sufficient . . . to ‘immuniz[e]’ the congressional choice from constitutional challenge” (fourth alteration in original) (quoting Vance v. Bradley, 440 U.S. 93, 112 (1979))).
10 Windsor, 133 S. Ct. at 2693 (quoting H.R. REP. No. 104-664, at 16 (1996)).
11 See Loving v. Virginia, 388 U.S. 1, 2 (1967) (invalidating a ban on interracial marriage).
12 Eyer, supra note 3, at 214.
13 133 S. Ct. at 2694.
14 Id. at 2693.
15 See Matthew D. Bunker et al., Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech, 16 COMM. L. & POL’Y 349, 356–57 (2011) (explaining that laws discriminating against suspect classes are subject to strict scrutiny, which requires a showing that they: (1) advance a compelling state interest; (2) are narrowly tailored to achieve the asserted objective; and (3) are the least restrictive means available to achieve the asserted objective); see also R. Randall Kelso, Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice, 4 U. Pa. J. Const. L. 225, 234 (2012) (discussing intermediate scrutiny which applies to gender-based discrimination, and requires that a law: “(1) advance important or substantial government interests; (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance those interests.”).
or confront the issue of whether homosexuals constitute a suspect class.\textsuperscript{16} As one commentator notes, “it is difficult to know whether [\textit{Windsor}] silently applied some level of scrutiny or whether it rejected the tiers-of-scrutiny framework entirely.”\textsuperscript{17} Instead, Justice Kennedy held that DOMA served “no legitimate purpose,”\textsuperscript{18} without clarifying whether he was applying the rational basis test,\textsuperscript{19} some form of heightened scrutiny, or a hybrid of the two.

Furthermore, in a manner eerily similar to \textit{Lawrence}, Justice Kennedy’s opinion in \textit{Windsor} focused more upon abstract notions of liberty, holding that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”\textsuperscript{20} In so holding, Kennedy stated that DOMA “demeans the couple, whose moral and sexual choices the Constitution protects,”\textsuperscript{21} and “imposes a disability”\textsuperscript{22} that is intended “to disparage and to injure”\textsuperscript{23} same-sex couples. Justice Kennedy’s powerful language, however, lacked a textual grounding in the Equal Protection Clause, and therefore did not give same-sex couples the \textit{constitutional} force of equality.

Moreover, to the extent that Justice Kennedy’s opinion focused on equality, it was intertwined with his broader discussion of liberty, making \textit{Windsor}’s constitutional import, at best, dubious. It is also unclear why Justice Kennedy based much of his opinion on the Fifth Amendment, rather than using the “substantive component”\textsuperscript{24} in the Fourteenth Amendment’s Due Process Clause. The \textit{Windsor} opinion’s muddled nature is evidenced by the following passage:

The \textit{liberty} protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the \textit{equal protection of the laws}. While the \textit{Fifth Amendment} itself withdraws from Government the power to

\begin{footnotes}
\item[16] See Marcy Strauss, \textit{Reevaluating Suspect Classifications}, 35 \textit{Seattle U. L. Rev.} 135, 146 (2011) (setting forth the following factors for deciding suspect-class status: “(1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek political redress (i.e., political powerlessness); (4) the immutability of the group’s defining trait; and (5) the relevancy of that trait.”). Currently, race, national origin, religion, and alienage are recognized suspect classes, while gender is considered a quasi-suspect class. \textit{Id.}
\item[18] \textit{Windsor}, 133 S. Ct. at 2696.
\item[19] \textit{Id.}; see also Strauss, \textit{ supra} note 16, at 146 (discussing the classes generally subject to the rational basis test).
\item[20] 133 S. Ct. at 2695.
\item[21] \textit{Id.} at 2694.
\item[22] \textit{Id.} at 2695–96.
\item[23] \textit{Id.} at 2696.
\end{footnotes}
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.\textsuperscript{25}

As the above quote reveals, Justice Kennedy “blurred doctrinal categories, intertwining liberty and equality arguments.”\textsuperscript{26} Therefore it cannot be said that Kennedy’s generalized discussion of equality, which did not apply an identifiable level of scrutiny or confront the suspect class issue, meant that DOMA’s unconstitutionality was predicated on an Equal Protection Clause violation. Such “stealth determinations”\textsuperscript{27} make it difficult to apply Windsor to future cases\textsuperscript{28} and fail to provide same-sex couples with the constitutional guarantee that is rooted in the Fourteenth Amendment’s substantive promise of equality.\textsuperscript{29}

II. THERE IS NO RATIONAL BASIS JUSTIFYING BANS ON SAME-SEX MARRIAGE

Windsor did not offer an identifiable, textual basis upon which to fashion a rights-based claim for same-sex marriage. All we know from Justice Kennedy’s opinion is that DOMA impermissibly discriminated against same-sex couples. Strangely, however, as a matter of constitutional law, we do not know why.

Justice Kennedy’s federalism discussion underscores this point.\textsuperscript{30} If, as Justice Kennedy claims, DOMA demeaned and degraded same-sex couples, then why did he highlight the “unquestioned authority of the states”\textsuperscript{31} to define the contours of marriage? Why, in the last sentence of his opinion, did Justice Kennedy limit Windsor to “lawful marriages”?\textsuperscript{32} Does this mean that Justice Kennedy would approve of state laws that allowed same-sex couples to form civil unions but banned same-sex marriage? Based on his reasoning in Lawrence and Windsor, the answer is certainly no.

Justice Kennedy cannot have it both ways. A law impermissibly discriminates or it does not. If it does, as is the case with same-sex

\textsuperscript{25} 133 S.Ct. at 2695 (emphases added) (citation omitted).
\textsuperscript{26} Berger, supra note 17, at 778.
\textsuperscript{27} Id. at 774.
\textsuperscript{28} See id. at 782 (recognizing that Lawrence’s failure to apply a tier of scrutiny makes it “extremely difficult to know how to apply Lawrence to future cases”).
\textsuperscript{29} See Neomi Rao, The Trouble With Dignity and Rights of Recognition, 99 VA. L. REV. ONLINE 29, 31 (2013) (discussing the “muddled nature” of the majority opinion); see also Planned Parenthood, 505 U.S. at 846 (enumerating the protections of the Fourteenth Amendment).
\textsuperscript{30} Windsor, 133 S. Ct. at 2689–90.
\textsuperscript{31} Id. at 2693.
\textsuperscript{32} Id. at 2696.
marriage bans, then deference to states’ rights is unnecessary.

Thus, by sprinkling federalism into *Windsor’s* reasoning, while also relying on amorphous notions of liberty to ostensibly foreshadow a future ruling requiring states to recognize same-sex marriage, Justice Kennedy’s opinion appears disingenuous. It also threatens to undermine the Court’s institutional legitimacy by giving the impression that *Windsor* was a political, rather than constitutional, decision. Ultimately, therefore, *Windsor* reached the right result but for all of the wrong reasons, and did a disservice to same-sex couples. As one scholar noted, while *Windsor* “invokes powerful language of liberty, equality, and dignity, it orders only a limited form of change.”33 Same-sex couples deserve more.

As stated above, and as Justice Scalia’s dissent in *Windsor* suggests, the majority is paving the groundwork for a broader ruling that invalidates state bans on same-sex marriage.34 Justice Kennedy’s opinion, however, raises more questions than answers, particularly because his opinion was intended to—but did not—provide clear constitutional guidance. After all, one need not look far to see why same-sex couples have the right to marriage. The Fourteenth Amendment’s Equal Protection Clause requires the state to set forth, at the very least, a rational basis for banning same-sex marriage. This, without a doubt, the state cannot do. Yet, aside from an ambiguous discussion of equality under both the Fifth and Fourteenth Amendments, Justice Kennedy failed, as he did in *Lawrence*, to apply the rational basis test or engage in a principled equal protection analysis. Considered a supporter of gay rights, it is troubling that Justice Kennedy would avoid the constitutional path to true marriage equality.

*Lawrence* helps to explain this apparent contradiction. There, Justice Kennedy also used unanchored generalities when invalidating a Texas statute that prohibited “deviate sexual intercourse with another individual of the same sex.”35 Relying on the Due Process Clause of the Fourteenth Amendment, Justice Kennedy held that the statute violated the appellants’ substantive liberty interest “both in its spatial and in its more transcendent dimensions.”36 No one but Justice Kennedy can know what that sentence means. And that, in a nutshell, is the problem.

This type of language can be found throughout *Lawrence*. In one passage, Justice Kennedy emphasizes, which no reference to the Constitution, that, “at the heart of liberty is the right to define one’s own

---

34 133 S. Ct. at 2709 (Scalia, J., dissenting) (“How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.”).
36 539 U.S. at 562.
To be sure, there is nothing problematic with this language—if it were uttered at a political rally. But it is not, and does not, constitute legitimate constitutional law by a Court whose only power is to say what the law is, not what it should be. Indeed, while Lawrence “emphasized the stigmatic effects of the Texas law and petitioners’ dignity interests,” it did not give homosexuals as a group a corresponding constitutional right to equal treatment. As one scholar explained, in Lawrence “the offense to dignity was a consequence of inequality, not the inequality itself.” Lawrence is the perfect example using normative reasoning to establish legal doctrine, instead of using doctrine (and text) to establish constitutional norms.

This may explain why Justice Sandra Day O’Connor concurred in Lawrence, arguing that the Equal Protection Clause, not Justice Kennedy’s ethereal notions of liberty, warranted the statute’s invalidation. Justice O’Connor may have perceived the inherent problems with a liberty-driven analysis: it increases the likelihood that presidential elections, not the Constitution, will play the primary role in creating and expanding individual rights. After all, if a future Justice has a dramatically different definition of liberty, and uses that view to overturn Roe v. Wade, then who is to say, based on Justice Kennedy’s liberty jurisprudence, that this is outside the scope of judicial authority? That, again, is the problem—the lure of the ‘right’ result can blind us to the importance of judicial restraint. Some may argue that such a right does not “fit neatly into pre-existing substantive due process doctrine,” and thus requires “broader levels of generality.” They’re wrong. In Lawrence, the Texas statute gave Justice Kennedy a golden opportunity to recognize a substantive right to sexual
privacy under the Equal Protection Clause. Unlike its overruled predecessor, *Bowers v. Hardwick*, Texas prohibited sodomy *only* amongst same-sex couples and, like DOMA, the underlying rationale was the “promotion of morality.” Moralit-based justifications, however, are impermissible and equivalent to “unconstitutional animus,” which cannot “survive even the most deferential level of scrutiny under the Equal Protection Clause.”

Accordingly, rather than relying upon a notion of liberty “in its more transcendent dimensions,” Justice Kennedy should have held that the law constituted intolerable discrimination and was invalid under rational basis scrutiny. In doing so, his opinion would have been anchored in the Constitution’s text, and laid the groundwork for a decision premising a same-sex marriage *right* on the textual guarantee of equal protection.

Justice O’Connor’s concurrence got it right. Holding that the anti-sodomy law impermissibly discriminated against homosexuals by threatening “the creation of an underclass,”

Although Justice Kennedy’s sweeping language about liberty and “the mystery of human life” makes for powerful prose, the Fourteenth Amendment’s equality guarantee, when applied to same-sex marriage bans, can lead to transformative constitutional law. *Windsor’s* limitations are a consequence of *Lawrence’s* flaws. They also provide a glimpse into Justice Kennedy’s broader judicial philosophy concerning individual rights. As one scholar explains, by forcing legislatures and citizens to “respect a series of moralistic abstractions about liberty, equality, and dignity, judges, [Justice Kennedy] believes, can create a national consensus about American values that will usher in what he calls ‘the golden age of peace.’”

Indeed, a former clerk states that Justice Kennedy “thinks he is the living embodiment or transmitter of the

---

49 *Id.*
50 *Lawrence*, 539 U.S. at 562.
51 *Id.* at 584 (O’Connor, J., concurring) (quoting Plyer v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).
52 *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
nation’s bedrock values.”\textsuperscript{55} This may explain, as Professor Ilya Shapiro states, the “grand phrases and philosophical musings” that Justice Kennedy applies to individual liberty cases,\textsuperscript{56} which some argue cause him to “use the ideas of ‘dignity’ and ‘equality’ in a paternalistic way.”\textsuperscript{57}

This approach has the effect of “producing the type of standardless decisions that some would label inconsistent.”\textsuperscript{58} It could also “make Justice Kennedy’s balancing of liberty against other concerns into an imposition of his vision of where that balance should lie, rather than leaving that decision to the broader public through the political process.”\textsuperscript{59} Either of the above results are “neither modest nor libertarian.”\textsuperscript{60} Such a vision is anathema to a democratic society—and constitution—that places limits on judicial review and envisions equality as a safeguard against arbitrary legislation. Judicially created notions of liberty, on the other hand, threatens to introduce the same arbitrariness it seeks to solve.

Relying on the Equal Protection Clause is the most egalitarian, and constitutional, path to same-sex marriage recognition. This is not to say that the Equal Protection Clause is the answer to every injustice that individuals or groups have (or may) face. It is to say, however, that it is sufficient here because same-sex marriage bans do not satisfy the rational basis test. ..

For example, while the State’s interest in procreation supports the promotion of marriage as an institution, it does not justify a ban on same-sex marriages. Mercer Law School Dean and Professor Gary Simson states as follows:

The nexus, however, between encouraging procreation and banning same-sex marriage is far more attenuated than the above committee report and judicial opinion assume. Obviously, a same-sex marriage does not hold as much promise of producing offspring as an opposite-sex marriage because same-sex couples, unlike opposite-sex couples, will not be having children by sexual intercourse with one another. For present purposes, however, the relevant

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{56} Shapiro, supra note 53, at 350 (quoting JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 176, 182 (2007)).
    \item \textsuperscript{57} Id. at 354–55.
    \item \textsuperscript{58} Id. at 354.
    \item \textsuperscript{59} Id.
    \item \textsuperscript{60} Id. at 359.
\end{itemize}
\end{footnotesize}
question is not whether a same-sex marriage is more apt to produce offspring than an opposite-sex marriage. Rather, it is whether a society that allows same-sex marriage is less apt to procreate than a society that prohibits it. Almost certainly, the answer is “no.”

In fact, based on considerations similar to those of opposite-sex couples, the State’s procreative interest in marriage would likely benefit from same-sex marriage recognition based on considerations similar to those of same-sex couples. As Dean Simson explains, the “common opposite-sex decision to wait until marriage” reflects its significance as a “public promise of commitment that offers some assurance to each member of the couple that the other intends to be there for the long haul.”

The procreative interest could be furthered, therefore, due to the “probable increase in procreation by same-sex couples through modern reproductive technologies if those couples are allowed to marry.” Finally, “same-sex couples are highly unlikely to seek fulfillment of their individual desires to wed by breaking up, pairing off with and marrying opposite-sex partners, and producing offspring with them,” given that sexual orientation has a “substantial genetic component.”

Furthermore, states do not, as Justice Elena Kagan noted during the Hollingsworth oral argument, condition marriage on the fertility, age, or the intention of opposite sex couples to have children. In fact, 39.7% of births are to unmarried women, and a recent study showed that, of the 48% of households that comprise married couples, 28.2% do not have

---

62 Id. at 156.
63 Id.
64 Id. at 155.
65 Id. at 154.
66 Id.
68 See Corinne Blalock, Hollingsworth v. Perry: Expressive Harm and the Stakes of Marriage, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 217, 239 (2013). (“[p]etitioners’ assert the primacy of the childrearing aspect of marriage without addressing the obvious critique that heterosexual couples who are incapable of procreating (and therefore not furthering this interest) are allowed to marry.”)
70 Sabrina Tavernise, Married Couples Are No Longer a Majority, Census Finds, N.Y. TIMES, May 26, 2011, at A22.
children.\textsuperscript{71} The procreation argument, therefore, is neither persuasive nor rational.

Ultimately, rather than writing an opinion that centered upon liberty and said “little about equal protection,”\textsuperscript{72} Justice Kennedy should have held that DOMA constituted invidious discrimination, contrary to the Equal Protection Clause \textit{and} the Constitution’s unwritten guarantee of equality. In the future, by linking marriage equality to the Constitution’s text, rather than “Manichean platitudes about liberty,”\textsuperscript{73} the Court will be less vulnerable to the charges of judicial activism and anti-democratic overreaching. Justice Kennedy’s decision in \textit{Windsor} failed to do so, and left same-sex couples waiting—and wondering—when their right to equality will be fully realized.

### III. CONCLUSION

As an institution, marriage promotes a stable and nurturing environment, and confers substantial economic and social benefits upon its members. Denying marriage to same-sex couples deprives them of the tangible and intangible values that marriage brings, something that civil unions, which Justice Kennedy called “second tier marriage[s],”\textsuperscript{74} cannot rectify. The Constitution’s text—not its penumbras or unwritten emanations—contains an express guarantee of equality, and same-sex couples, like everyone else, are entitled to its protections.


\textsuperscript{72} Elmer, \textit{supra} note 33, at 322.

\textsuperscript{73} Rosen, \textit{supra} note 54.

\textsuperscript{74} \textit{Windsor}, 133 S. Ct. at 2694.