TOCQUEVILLE’S SLOW AND STEADY DEMOCRATIC ORDER IN LIGHT OF US v. WINDSOR: SAME SEX MARRIAGE, AND THE DILEMMA OF MAJORITY TYRANNY, FEDERALISM, AND EQUALITY OF CONDITIONS

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The purpose of this article is to consider Alexis de Tocqueville’s democratic order in Democracy in America (DA) (specifically written between 1835 and 1840) as it relates to the acceptance of same-sex marriage in America. I define Tocqueville’s democratic order as a dynamic process of socialization and democratization during the modernization of society by the advancement of equality of conditions and social order that balances liberty, authority, and equality of the individual in the community. The US Supreme Court in a 5 to 4 decision in US v. Windsor (2013) overturned Section 3 of the 1996 Defense of Marriage Act (DOMA), a federal law denying federal benefits to legally married same-sex couples. DOMA was enacted in 1996, and the federal law prevented the federal government from recognizing same-sex marriages lawfully enacted under state law before it was found unconstitutional (US v. Windsor; NCSL 2013). In Hollingsworth v. Perry (2013), the US Supreme Court in effect left intact a US district court’s ruling that California’s Proposition 8 was unconstitutional after a public referendum amended the state constitution to define marriage as a union between a man and a woman in a 5 – 4 decision. Although the US Supreme Court never reached the constitutionality of Proposition 8, its ruling has the effect of upholding same-sex marriage in California.

On account of the nationwide conversation that occurred before, during, and after oral argument held on March 26, 2013 in the Supreme Court, Tocqueville’s theory of democratic order is ripe for discussion in considering how Tocqueville’s democratic
order applies to the evolution and acceptance of same-sex marriage and the US Supreme Court’s decisions upholding same-sex marriage. The initial reaction concerning these Supreme Court decisions, especially the majority opinion in *US v. Windsor* as written by Justice Anthony M. Kennedy, is that the decision invalidating Section 3 of DOMA constituted a far-reaching affirmation of same-sex marriage that was written in broad constitutional terms (*US v. Windsor* 2013). The Supreme Court’s decision in *US v. Windsor*, however, leaves intact Section 2 DOMA, a provision that says that states are not required to recognize same-sex marriages performed in any other state. The applicability of Section 2 of DOMA to same-sex marriage will be debated, and ultimately its constitutionality will be tested, because some states recognize same-sex marriage performed in other states, while others do not (Schmitt 2013; Singer 2005). Article IV, Section 1 of the US Constitution, known as the Full Faith and Credit Clause, addresses the duties that states within the US have to respect the “public acts, records, and judicial proceedings of every other state” (Article IV, Section 1 of the US Constitution). Whether Section 2 of DOMA violates Article IV, Section 1 of the US Constitution will be determined in the future. Many people believe that the Full Faith and Credit Clause of the US Constitution requires the states to recognize marriages from other states. But this has never been the law. The clause requires states only to recognize other states’ judgments rendered after adversarial proceedings (Koppelman 2009). The debate on same-sex marriage is far from over, because both proponents and opponents will continue to raise their deeply held views on this much debated social and political issue on what some have called a redefinition of marriage, and whether the US Constitution requires
states to recognize same-sex marriages from other states (Feinberg 2012; Singer 2005; Koppelman 2009).

In this article, I focus on the legacy of Tocqueville and how he addressed the fundamental problem of maintaining a democratic order in America as it relates to the debate and acceptance of same-sex marriage in the 21st century. I discuss his concerns with maintaining an American democratic order and his thoughts on America’s major mechanisms to help maintain America’s democratic order by tempering majority tyranny, one of Tocqueville’s greatest concerns, with the dynamics of America’s institutions – the judiciary, executive, and legislature – and how these institutions through the application of federalism work in tandem to compromise positions, balance power, and mitigate the effects of majority tyranny in sustaining America’s democratic order.

**Tocqueville’s concept of traditional marriage and family in America**

Tocqueville believed that marriage in America was a valued and respected institution: “Of the world’s countries, America is surely the one where the bond of marriage is most respected, and where they have conceived the highest and most just idea of conjugal happiness” (DA 2002, p 279). Tocqueville’s conception that the family and marriage were central to the success of American representative democracy in the 19th century runs throughout DA (DA 2002 pp 558-76). At the time, the traditional concept of marriage was a social union and legal contract between two consenting persons of the opposite sex for the purpose of creating children (Eskridge 1993). Yet, even under the classical liberal political tradition in 1835, I doubt that Tocqueville or anyone at the time thought about same-sex marriage and its acceptance and adoption in America’s future. When Tocqueville discussed marriage and family relationships, they concerned the
accepted practices of his day between a man and a woman, parents and the mutual
relations of children, brothers and sisters, and so forth (DA 2002 pp 558-563, 569).

Tocqueville could not have predicted that public sentiment on same-sex
marriage would have changed so dramatically by the 21st century, so that a majority of
Americans now support the freedom to marry for same-sex couples. He remains silent on
the issue of same-sex marriage and homosexuality, because there was no such discussion
about these matters in the 1830s. He did not consider the possibility of same-sex
marriage and relationships and the rights of homosexuals in the 1830s, because the right
to same-sex marriage is not deeply rooted or ingrained in our nation’s history and
tradition (US v. Windsor 2013, dissenting opinions of CJ Roberts, J. Scalita, Thomas, and
Alito). His deep seated hope and expectation of human change and equality of conditions
runs throughout DA due to his belief that America’s goal was to attain an equality of
conditions for all cultures, races, and sexes, and the inevitability of modernization that
was beginning to take hold in America of the 1830s (DA 2002, pp 3, 6-7).

In the America of the 1830s, there were few, if any, civil rights issues being
discussed and debated. Tocqueville voices his concerns about what he sees in America
as a deep seated human tension about race and sex. On account of Tocqueville’s visit to
America, he observed and later discussed in DA his concerns about the perceived evils
that African Americans and Indians had been subjected to in America. Tocqueville notes
that among the three diverse races that existed in America of the 1830s:

“the first who attracts the eye, the first in enlightenment, in power, in
happiness, is the white man, the European, man par excellence; below him
appear the Negro and the Indian. These two unfortunate races have neither
birth, nor face, nor language, nor mores in common; only their misfortunes,
look alike. Both occupy an equally inferior position in the country that they inhabit; both experience the effects of tyranny; and if their miseries are different, they can accuse the same authors for them” (DA 2002, p 303).

African Americans were thought of as culturally devoid and racially degenerate, while Indians were considered as culturally saturated and racially proud, but attached to barbarism and cruelty (DA 2002, pp 302-6). Of course, the problem with this simple paradox by Tocqueville is that both races were brought into bondage by whites, and if they failed to follow demands by white Americans and sought to follow outright rebellion against white Americans, they would ensure their quick death (DA 2002, pp 302-48). He believed that African Americans would some day attempt to escape slavery as they became indignant at being deprived the rights of citizens (DA 2002, pp 341-8). He also believed that Indians would either seek to destroy their white, Europeans or become their equals (DA 2002, pp 307-25). In either event, while a minority, including African Americans and Indians, are subjected to majority tyranny and may initially be wasted by majority tyranny as they are brought to despair and trepidation, ultimately the minority will challenge the majority by war, violence, or revolution in an attempt to obtain equality of conditions. A challenge may take generations as it festers, but the essence of majority tyranny and its effects is that if revolution or war results, there will be far greater casualties on account of the majority if it has ignored the minority in its early stages (DA 2002, pp 239-264, 302-348).

Tocqueville voiced a different view about women and their future. Women were anything but free, and they were trapped in their own homage. Yet women might someday excel and grow into the mainstream customs of a white male dominated society in America (DA 2002, pp 563-76). It is important to understand that in the 1830s,
American society was dominated and controlled by white males. Yet, Tocqueville described the role of women as persons who rarely left the domestic surrounding of the home on account of their dependence on the institution of marriage (DA 2002, pp 558-67). He acknowledged that differences between the sexes existed on account of the “gender roles” accepted and assigned to men and women in America of the 1830s (DA 2002, pp 573-6). Although Tocqueville describes women as the subtler sex, the question is did he believe that women would ever receive the right to vote, be granted equal rights under the law, serve in high government positions and as CEOs of major private corporations, and that they would run for elective office in local, state, and federal elections in America (DA 2002, pp 558-67)? Tocqueville expected the mores of women to change on account of the spread of democratic education and values in America that was due to their connectivity to American tradition of marriage and family (DA 2002, pp 563-70). He suggested that democracy in America resulted in greater respect for women due in part to American values instilled in women from their willingness to expand into America’s West, the ultimate risk taking, hardship, and courage that everyone including women experienced when they moved from the rich dwellings of their parents to fragile huts in the middle of forests as families expanded into America’s western frontier (DA 2002, pp 558-76). He also admitted that American women were intellectually and morally similar to men (DA 2002, pp 573-5). Tocqueville observed that Americans, “…more and more, make her the equal of man” (DA 2002, p 573). He also stated that Americans respect the freedom of women, and they “judge that her mind is as capable as a man’s of discovering the naked truth…” (DA 2002, p 575). Thus, it is fair to suggest that Tocqueville was optimistic about the acceptance of women into the societal norms of
America as barriers to success and equality of conditions would be slowly broken down. He would not have been totally surprised of the changes that have occurred in the expanded role of women in America during the 20\textsuperscript{th} and 21\textsuperscript{st} centuries (DA 2002, pp 565-76).

Tocqueville’s notion of democratic progress and equality of conditions applies to all human beings, and he suggested that this was due to a natural similarity of all human beings, that would have to include women (DA 2002, pp 6-7; 573-6). This is contrasted with Tocqueville’s somewhat pessimistic view of African Americans and Indians, because of the place these races found themselves on account of the large number of white Americans, the existing political and social structures in the north and the south, bondage that existed from the onset of the relationship with whites, African Americans and Indians, and the goal of white Americans in sustaining the status quo (DA 2002, pp 307-25, 341-8). As pessimistic as his comments may sound, Tocqueville and his democratic order still remain hopeful on account of his view that democracy and its attendant equality of conditions was here to stay and that it would someday apply to everyone (DA 2002, pp 3, 6-7, 573-6).

DA remains a rich study on methods to maintain a democratic order in the 1830s and thereafter as America grew and matured. By discussing the roles of women, and his concerns about African Americans and Indians, Tocqueville had to have known that these racial and sexual human tensions would be dealt with by America’s social and political institutions. In addition, laced throughout DA is Tocqueville’s belief that America’s ultimate goal was to move toward accepting equality of conditions for all citizens, even though he did not expressly say so as to African Americans, Indians, and of
course gays and lesbians. Otherwise, he would not have raised these tensions and
concerns about African Americans, Indians, and women in DA that included discussions
about methods to temper majority tyranny in a democracy. His discussion about these
human tensions suggests that he left the issue of equality of conditions open for future
discussion and debate as America materialized and matured.

**Tocqueville’s majority tyranny and factions**

Tocqueville does not specifically define majority tyranny in DA, but he laces
DA with a number dynamic ways in which a majority may take control over a minority
under a strict majority rule if a slight majority of 50.001% or less enacts laws that treads
on the rights of a minority (DA 2002, pp 239-264). Some of these possibilities include
mob rule; powerful interests that control the legislature; weaker people who do not share
the mores of the majority, but who decide what is best; those who do not have freedom of
thought on account of a majority’s domination of minorities’ opinions; the well-
connected from the not so well-connected; monetary majorities of wealthy business and
property owners (control by economic status); popular opinion that results in self-
censorship of dissident opinions; intolerance against minorities attributable to private
persons as distinguished from government pressure; minority insiders vs. majority
outsiders; whites as distinguished from African Americans and Indians; and the greatest
number (DA 2002, pp 235-264; Maletz 2002; Roark 2004; Horwitz 1966). Tocqueville
left open for future discussion and research how these notions of majority tyranny may
apply, but his main concern remained how bad use of a majority’s power can have an
adverse effect on a democracy if the majority tyranny is not mitigated and tempered (DA
In the end a sustainable democratic order must find meaningful ways in which a majority and minority may peacefully live and govern together by participating in politics, and allow everyone to have an opportunity for personal and professional growth and gain. The danger to democratic stability presented by majority tyranny is a major problematical component of Tocqueville's larger purpose in DA, which is how to best maintain a proper and acceptable level of freedom for all (DA 2002, pp 6-14; Roark 2004).

Before and after the American Revolution, Madison argued that human nature inherently divides us into factions of similar minded persons with some shared objectives achievable by political means (Madison’s Federalist Paper No. 10). Factions can behave in a self-serving manner toward outsiders and those in rival factions, to the point of imposing majority tyranny on outsiders. Majority tyranny can attempt to alleviate the disruption by elimination of minority factions, but Madison earlier and Tocqueville later proclaimed that elimination and subordination of minority factions are unacceptable cures (Madison Federalist Paper No. 10; DA 2002, pp 108, 248-9).

In a democracy, which has a diversity of persons and their respective interests, it is best to minimize the potential damage, rather than ignore or overrule minority factions’ existence on account of the damage factions can do to one another and the entire nation’s citizenry. Tocqueville makes this point, when he suggested that democracy will only be harming itself if it ignores or disregards minorities’ interests (DA 2002, pp 235-64). On the nature of a democratic order and minorities’ interests, Tocqueville stated: “If ever freedom is lost in America, one will have to blame the omnipotence of the majority that will have brought minorities to despair…one will then see anarchy, but it will have come as a consequence of despotism” (DA 2002, p 249). His position in favor of considering
and even accepting minorities’ rights’ positions is further strengthened if you assume that in any heterogeneous democratic society, consideration of minorities’ interests is not optional, but rather mandatory, if a democracy is to remain intact and sustainable for the entire citizenry (Madison Federalist Paper No. 10; DA 2002, pp 235-49; Roark 2004; Maletz 2002).

Equal voting power to each citizen is important in a republican government. Should a minority fail to obtain enough votes to control an elected government, they will often go away and accept defeat, perhaps until the next election. But when a majority faction or party prevails, this can unfortunately set up a more difficult task and state of affairs. Here, the republican principle is that the majority rules and encourages takeover by an abusive majority or tyrannical minority that has control. How can a democracy guard against an overreaching faction or group of citizens having unwavering interests that are contrary to the rights of others or the interests of the whole community? Both Madison and Tocqueville acknowledged that a self-conscious elite minority can exist very easily and take over like a numerical majority if they are not tempered, which could have adverse effects on the entire democratic society (Madison’s Federalist Paper No.10; DA 2002, pp 199-204).

One solution is that a democracy may attempt to extend the sphere of the majority to include a greater variety of parties and interests in order to make it less likely that any one faction achieves majority status and power. One theorem is Duverger’s law that provides for a plurality rule for electing the winner of elections and that favors a two-party system (Duverger 1951; Riker 1982). Duverger (1951) suggested that in winner-take-all systems, many rational voters will not want to waste their votes on third parties,
because a party that fails to capture a plurality will be left empty-handed. Downs (1957) somewhat similarly suggested the median voter theorem, which provides that the two major parties will have centrist platforms, and that third parties occupying the ideological margins may force the parties to move away from the center to hold onto their bases (Downs 1957).

Another solution was discussed by Madison in Federalist Paper No. 51 in that separation of powers makes it harder for a faction to control everything (Madison’s Federalist Paper No. 51). The purpose here is to obtain equilibrium, so that a faction or party running the House of Representatives may face a rival faction or party in control of the Senate and/or the Executive branch of government. If both houses of Congress are controlled by one faction or party, the controlling faction or party might still face a defiant executive from a different faction or party, which has the power to temper the legislative faction or party. There could also be appointees in the judicial branch of government from a prior administration. Lifetime service on the US Supreme Court and the federal district and circuit courts of appeals are judicial mechanisms that can be used to temper majority tyranny located in the Executive and Congress regardless of the factions or parties entering elective office, so that there will continue to be diversified and divided control over republican governance.

**Two American governments or one: the doctrine of federalism**

The legal issues surrounding same-sex marriage in the US are complicated by the nation's federal system of government and the doctrine of federalism. Prior to the enactment of DOMA in 1996, the federal government did not define marriage. Any marriage recognized by a state was recognized by the federal government, even if that
marriage was not recognized by one or more other states. With the passage of DOMA in 1996, a marriage was defined under federal law as a union of one man and one woman, which had the effect of excluding same-sex marriages and lawful polygamous unions legitimized under state law. But Section 3 of DOMA also provided that there could be no benefits provided by the federal government to same-sex marriage couples, even if the marriages were lawfully permitted by the state (DOMA 1996; NCSL 2013; Knauer 2008).

The increasing readiness of states to recognize same-sex marriage and relationships illustrates that federalism provides states with the freedom to experiment with novel solutions to pressing social issues. The development of progressive policies seems to bear out Justice Brandeis’ optimistic vision of federalism, when he stated that, “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country” (New State Ice Co. v. Liebmann 1932, dissenting opinion, J. Brandeis; Knauer 2008). This political principle also governs American society according to Tocqueville, because a unique aspect of the American democratic order provides that states are allowed to experiment in novel matters before the federal government becomes involved (DA 2002, pp 55-6, 348-62).

Tocqueville placed a profound influence upon the Federalist Papers Nos. 10, 45, 51, as well as the American political doctrine of federalism, to support his opinion that states have the authority to properly direct governmental power from the ground up, that is, from the local government to the central government (DA 2002, pp 105-110, 130-149; 149-161; Knauer 2008; Roark 2004). By granting each sovereign state the authority
to enforce decisions against individuals, and by granting the national government all of the power it needed to meet its obligations of military defense and maintenance of national unity, the burdens and the benefits of America would be both separated and shared in accordance with the federal constitution (DA 2002, pp 107-110).

Tocqueville’s belief was that federalism was an important protection against a monetary and numerical majority tyranny that could be capricious and thereby act against minorities’ interests (DA 2002, pp 56-93, 108-113, 130-5, 141-61, 235-58). Federalism could temper a majority faction, so that a majority could not control the entire democratic government by involving itself into a single branch of government, and if it did, then a co-equal branch of government could temper a majority located in another branch. This would have the effect of lessening the opportunity for a majority tyranny to control and govern the entire American democratic government by undermining and destabilizing just and necessary minority interests (DA 2002, pp 149-161; 130-149; 105-110; Knauer 2008; Roark 2004).

Does federalism provide the states with a bona fide laboratory for investigation of significant issues, as long as they do not conflict with the jurisdiction of the federal government? Yes it does, because the US Constitution was set up to reserve power to the states, so long as they do not conflict with the federal government’s exclusive powers (DA 2002, pp 56-93,108-113). Is federalism more or less likely to hinder uniformity in social and political issues that may be important for a unified America? Federalism is more likely to hinder national uniformity, but Tocqueville’s democratic order suggests that in light of the state governments’ freedom in their own sovereign spheres, the US Constitution provides support for a separation of powers between the national and state
sovereigns that permits states to decide matters on their own democratic terms not exclusively granted to the federal government (DA 2002, pp 56-93, 108-113). Assuming that federalism permits a state to define marriage, will this hinder a national level of uniformity for an area of human relationships that should apply to the entire nation? Yes, but there are some caveats. One is that gays and lesbians are not now a politically oppressed class that deserves special judicial attention and protection, like racial integration and African Americans’, who fell within the Equal Protection Clause of the 14th Amendment. However, the US Supreme Court in *US v. Windsor* moved closer to acknowledging the stigma and animus existing against gays and lesbians, who enter same-sex marriages in states that legitimately permit same-sex marriage by finding that Section 3 of DOMA disparaged and harmed a politically unpopular group. In contrast, the traditional definition of marriage provides heterosexual married couples entitlement to receive federal benefits from the federal government, and is part of a status quo majority. This exists because heterosexual couples’ marriages have been deeply ingrained in historically recognized marriages in America, whereas same-sex marriages became legitimate only in 2003 in Massachusetts as a result of *Goodridge v. Department of Public Health* (2003) (US v. Windsor 2013, dissenting opinion CJ Roberts, Scalia, Thomas, and Alito). Yet, even in light of the federal government’s deference to the states’ tradition of defining marriage, the US Supreme Court saw fit to decide that such disparate treatment imposed by Section 3 of DOMA deprived same-sex married couples of the federal benefits and responsibilities that come with federal recognition of their marriages pursuant to state law contrary to the liberty provision of the Fifth Amendment of the US Constitution.
Another is that federalism is an institutional alternative that is permitted under the US Constitution, but it should not be used as a political ideology. Federalism can facilitate both a progressive and a conservative inclination and agenda, and in the case of same-sex marriage relationships and equality of conditions, it has done both. Despite considerable gains in the US states and public opinion polls, state level claims at reform have been calculated to deny legal recognition for same-sex marriage by the majority of the states (Feinberg 2012; Knauer 2008). Federalism offers a less than ideal structural and institutional choice for those seeking broad based minority rights for same-sex marriage, because state level protections at this time are not necessarily portable from one state to another under the reciprocity doctrine (DOMA 1996 Feinberg 2012; Knauer 2008). Section 2 of DOMA provides that no state is required to provide full faith and credit to a state permitting same-sex marriage. This long held standard of American case law is known as the "public policy exception", and it exempts any state from recognizing a law or judgment from another state if it is found to be "offensive" to the receiving state's public policy (Schmitt 2013; Singer 2005; Redpath 2013).

While the decision in US v. Windsor is significant for what the majority decided, there was no broad decision that declared same-sex marriage a constitutional right pursuant to the liberty provision of the Fifth Amendment of the US Constitution that applies to all 50 states. The US Supreme Court avoided that issue in dismissing Hollingworth v. Perry, the case involving California’s Proposition 8, on standing grounds. This broad constitutional question remains open for debate, and it is anticipated that this question will ultimately be raised in the lower state and federal courts and the US Supreme Court, when laws in states prohibiting same-sex marriage are
challenged as violating the Fifth Amendment, the 14th Amendment Equal Protection Clause, and Article IV, Section 1 Full Faith and Credit Clause of the US Constitution.

**History of same-sex marriage’s movement toward acceptability: institutions, public referendums, and public opinion in America**

The movement to obtain marriage rights and benefits for same-sex couples began in the US in the 1970s, when the US Supreme Court ruled in *Baker v. Nelson* (1971) that the definition of marriage as provided by the state of Minnesota was reserved to that state by dismissing the appeal “for want of a substantial federal question” (Baker v. Nelson, 1971). Same-sex marriage became prominent in 1993 when the Hawaii Supreme Court ruled in *Baehr v. Lewin* (1993) that the state’s prohibition against same sex marriage was unconstitutional (Baehr v. Lewin, 1993). The Hawaii judicial decision was overruled by enactment of a marriage amendment some years later.

Same-sex marriage became recognized at the state level after *Baker v. Nelson* (1971). The first US state to permit same-sex marriage was Massachusetts in 2003, when the Massachusetts Supreme Judicial Court as a result of *Goodridge v. Department of Public Health* (2003) held that limiting marriage to opposite-sex couples violated the state constitution (Goodridge v. Department of Public Health 2003; US v. Windsor, J. Alito, dissenting). Section 3 of DOMA barred federal recognition of same-sex marriage before *US v. Windsor*, but afterward Section 3 DOMA was found to intrude on the liberty of same-sex marriage couples that are legitimately permitted to marry in those states legitimizing same-sex marriage (US v. Windsor 2013; NCSL 2013; Knauer 2008, pp 10-13).
During the 21st century, public support for the legalization of same-sex marriage grew significantly, as more and more Americans decided that same-sex marriage was acceptable. Numerous national polls conducted since 2011 have shown that an estimated 55% of Americans support same-sex marriage. This is in contrast with 1996, when an estimated 25% of Americans supported legalization of same-sex marriage (PollingReport.com 2013; Tamman and Biskupic 2013). Barack Obama became the first US president to publicly endorse legalization of same-sex marriage on May 9, 2012 during an interview on national network TV (NCSL 2013; Tamman and Biskupic 2013). In the years since same-sex marriage cases began winding their way through the state and federal courts, President Obama and his Vice President, Joseph R. Biden Jr., endorsed same-sex marriage in the middle of a presidential re-election campaign. Former President Bill Clinton, who signed DOMA in 1996, later renounced DOMA and called for its repeal. Beginning in the lower court, and making its way up to the US Supreme Court in *US v. Windsor*, the Obama administration refused to defend DOMA’s constitutionality, and in fact the Obama administration challenged the constitutionality of DOMA (*US v. Windsor* 2013). As more and more Americans opened up about their sexual orientation rather than remained quiet, American public opinion increasingly grew in the 21st century. For one, US District Court Judge Vaughn Walker, a Republican appointee in 1989, and who ruled that Proposition 8 was unconstitutional, admitted upon retirement from the judiciary that he was gay and was in a long term relationship. Former Republican chairperson, Ken Mehlman, admitted in 2010 that he was gay. Newt Gingrich, who has an openly gay sister, suggested that he could accept civil same-sex marriages, and encouraged the Republican Party to accept the inevitability that same-sex
marriage would become legal. Former presidents Bill Clinton, Jimmy Carter, and former vice presidents Dick Cheney and Al Gore have voiced their support for same-sex marriage. Corporate America has been one of gay marriages’ most supportive groups in America for years (Knowledge@Wharton 2013). Many US senators and members of Congress from both parties have now voiced their support for same-sex marriage. Even Chief Justice John G. Roberts Jr., in questioning lawyers during oral argument in the same-sex marriage cases, noted just how much political support there was for same-sex marriage as of March, 2013 (US v. Windsor 2013, C.J. Roberts dissenting). As of July, 2013, the 13 states including California, Connecticut, Delaware, Maine, Massachusetts, Minnesota, New Hampshire, New York, Vermont, Washington, Maryland, Iowa, and Rhode Island, and the District of Columbia and three Native American tribes, have legalized same-sex marriage. Those jurisdictions represent approximately 30% of the US population. Another nine states permit same-sex unions, but not marriage (NCSL 2013; US v. Windsor 2013).

**Redefining same-sex marriage as a civil right, or a matter of states’ rights?**

Whether one considers same-sex marriage a civil right, there are similarities between the movement and progress in favor of same-sex marriage and the institution of racial integration. In many instances the states have been blatantly hostile to the enactment of same-sex marriage laws that show an eerie similarity to the repression and rejection of African Americans rights (Knauer 2008). Historically, same-sex marriage and union laws have been in danger of being overturned through majority rule measures, such as citizens’ referendums and legislative action (Knauer 2008; DOMA 1996; Shane 2013). The antisame-sex marriage sentiment that still exists in many states by legislators
and the public should serve as a reminder that there is nothing inherently progressive about state level attempts to address social issues such as same-sex marriage, even when public opinion accepts same-sex marriage. Instead, the structure of federalism has been used to justify some of the US’s most shameful and unconstitutional legal practices, specifically the Jim Crow laws that mandated de jure racial segregation in all public facilities in Southern states of the former Confederacy, and the anti-miscegenation laws that enforced racial segregation at the level of marriage and intimate relationships by criminalizing interracial marriage and sometimes also consensual sex between members of different races (Loving v. Virginia 1967; Plessey v. Ferguson 1896; Kousser 1974; Blackmon 2009).

Although Justice Kennedy has voted with the conservatives in federalism decisions, he has authored and sided with the liberal justices in every US Supreme Court decision advancing the rights of gays and lesbians. In 1996, Romer v. Evans was decided, and he wrote the opinion striking down a Colorado initiative which repealed all laws in the state protecting gays and lesbians from discrimination and which precluded the enactment of any new such laws. In 2003, in Lawrence v. Texas, he wrote the majority opinion declaring unconstitutional a Texas law that prohibited “deviant sexual behavior” which was defined as sexual activity between same-sex couples. In the decision, Justice Kennedy suggested that if privacy meant anything, it is that the government cannot control what consenting adults may do in their own bedroom. The Supreme Court decision expressly overruled an earlier decision in Bowers v. Hardwick that upheld Georgia’s state law making homosexual sodomy a crime (Romer v. Evans 1996; in Lawrence v. Texas 2003; Bowers v. Hardwick 1986). Had the merits of
Hollingsworth v. Perry been considered, rather than avoided on standing grounds as concerns California’s Proposition 8, the Supreme Court could have followed US v. Windsor and found Proposition 8 unconstitutional thereby paving the way to rule that marriage equality for same-sex marriage couples was required under the Equal Protection Clause of the 14th Amendment of the US Constitution. In accordance with Tocqueville’s democratic order, however, the Supreme Court refused to rule that same-sex marriage was constitutionally required in every state at this time. The rulings in US v. Windsor and Hollingsworth v. Perry, accordingly, reveal the justices conflicting positions about the reach of federalism. The 5 – 4 Supreme Court decision in US v. Windsor revealed just how divergent the opinions are between the justices when a bare majority found that Section 3 of DOMA was discriminatory and could not be applied to justify animus against gays and lesbians in states permitting same-sex marriage.

The Supreme Court’s majority opinion ruled that the full benefits of marriage to those gays and lesbians living in states that recognize same-sex marriage was required by the liberty provision of the Fifth Amendment. On the other hand, the Supreme Court failed to rule that there was an immediate constitutional entitlement of federal benefits to those gays and lesbians living in jurisdictions that do not authorize same-sex marriage. For now, each individual state has the right to refuse to permit same-sex marriages in their jurisdictions, and without the necessary connectivity of a state sanctioned same-sex marriage law, there is no right to receive the 1,100 federal benefits. If US v. Windor was based not only on the lack of federal authority over the constitutionally of same-sex marriage, but on overstated notions of state sovereignty flowing from the 10th amendment, then the latter rationales, which would cut against landmark US Supreme
Court decisions, such as those striking down unequal education, state miscegenation laws, and voting rights violations on account of the constitutional limits on state authority to regulate political matters and family life, could be a bad sign of things to come for proponents of same-sex marriage. The Equal Protection Clause of the 14th Amendment has been construed to require each state to provide equal protection under the laws to all people within its jurisdiction (Yoshino 2011; Hoy 2000). This clause was the basis for Brown v. Board of Education (1954), where the Supreme Court’s decision lead to the dismantling of racial segregation, and to many other decisions rejecting irrational or unnecessary discrimination against people belonging to various groups that have been discriminated against (Yoshino 2011; Hoy 2000). Still, a view favoring federalism in US v. Windsor is consistent with Tocqueville’s democratic order, but it can also be seen as too restrictive and contrary to his democratic order that forms the basis of equality of conditions. This latter view becomes especially apparent if same-sex marriage public opinion continues to remain favorable and in fact increases, but few states enact same-sex marriage laws (DA 2002, pp 3, 6-7, 577-8). Scholars can debate whether US v. Windsor constitutes a sword or a shield.

Is gradual development soft, slow, and deliberate, or rapid at a swift pace forward?

The tension between state sovereignty and federal superiority where a constitutional claim arises require us to fashion a result governing a complex society that is not easy to resolve. Tocqueville favors a democratic order involving “the gradual and progressive development of equality” (DA 2002, pp 6-7, 577-8). A slow, but steady ongoing move in favor of same-sex marriage is consistent with his democratic order. The Supreme Court avoided a broad constitutional ruling on same-sex marriages in US v.
Windsor. Instead, the Supreme Court followed a gradualist, incremental approach on questions that are still being debated by a somewhat divided public. In rendering its decision in *US v. Windsor*, the Supreme Court fostered rather than foreclosed public debate and discussion. The decision also suggests that the Supreme Court’s majority had concern about the impact of federalism, which allows the states to be laboratories of experimentation before a future US Supreme Court decision considers whether anti-same-sex marriage laws are unconstitutional and in violation of the liberty provision of the Fifth Amendment, the Equal Protection and Due Process Clauses of the 14th Amendment of the US Constitution, or some other federal constitutional provision. The Supreme Court also voiced its concern about the impact of federalism on same-sex marriage rights, due to federalism’s mixed history of being applied to severely impact minorities’ status and liberties by placing severe restraints and restrictions on individual liberties. The Supreme Court’s approach and procedure as decided in *US v. Windsor* will no doubt constitute a slow and deliberate process to any extension of same-sex marriage laws, but the process will occur in accordance with Tocqueville’s gradualist, incremental democratic order by allowing social and political change to play out as public opinion continues to debate the issue and perhaps shift.

One contemporary scholar has echoed Tocqueville in supporting a gradualist, incremental approach to issues where the public is somewhat evenly divided. Sunstein’s approach to social change in the US Supreme Court in *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001) recommended that the Supreme Court take a gradualist, incremental approach in dealing with issues that are still being debated by a somewhat evenly divided public. In taking a gradualist, incremental approach, the
Supreme Court decisions never seem to settle anything once and for all. However, what is settled in the process is the slow and steady development of the law. The incremental approach allows the legislative process to play out by enactment of laws that will hopefully comply with the public policy announced by the US Supreme Court, or stretch the Supreme Court’s decision by legislative enactment of statutes that may support an exception to a holding announced by the Supreme Court for future consideration by lower state and federal courts, until the exception is interpreted over time. Sunstein’s approach to the US Supreme Court does not rely on Tocqueville’s gradualist, incremental approach, nor does Sunstein use him as a model. However, in his book Sunstein’s contention sounds a great deal like Tocqueville’s gradualist, incremental approach in dealing with issues that somewhat equally divide America that includes same-sex marriage.

Federalism is an underlying means in gradually legitimizing social and political development and change, even if state sovereignty rights act as a crutch to support state-sanctioned same-sex marriage laws. But is the structure and use of federalism in enacting approval of same-sex marriage laws one state at a time Tocqueville’s only method in moving toward equality of conditions? I would argue that the broad doctrine of federalism is one of a number of ways to move forward toward equality of conditions for same-sex marriage in Tocqueville’s democratic order. None of the methods I discuss are exclusive to Tocqueville’s democratic order; rather they are part of his democratic order, perhaps a multifaceted core, so that his democratic order may be reached.

Another method is Article Five of the US Constitution that prescribes a process whereby the US Constitution may be altered by federal amendment. The amendment of
the US Constitution as proposed by Congress includes a two-thirds vote each in the House of Representatives and the US Senate, and then ratification by three-fourths of the State legislatures requiring 38 of the 50 states (Article 5 US Constitution). The Equal Rights Amendment (ERA) – designed to guarantee equal rights for women – was a proposed amendment to the US Constitution in 1972, but it failed to receive the required number of ratifications before the final deadline mandated by Congress of June 30, 1982 expired, so it was not adopted. There have been numerous attempts to revive the amendment process of the ERA without success. This is somewhat surprising, because the ideal of equality of conditions is part of America’s democratic order, so it would seem that enactment of the ERA should have been a foregone conclusion (Baldez, Epstein, and Martin 2006; Wharton 2005).

Still another method is enactment of state and federal laws, but the down side is that hard-won enacted laws against an issue such as gender discrimination do not rest on a strong constitutional foundation and can be considered almost short-lived and transient rather than permanent. Federal and state statutes and regulations can contain substantial loopholes, they can be inconsistently interpreted or ignored, place the burden of proof on the individual rather then the government, and may be diluted by amendment or repealed outright (Reed v. Reed 1971; Craig v. Boren 1976; Trimble v. Gordon, 1977; Hazen Paper Co. v. Biggins, 1993; US v. Virginia 1996).

Whether same-sex marriage is legitimized one state at a time pursuant to the federalism doctrine, a US Supreme Court decision applying the 14th Amendment’s Equal Protection Clause to the states and/or the Fifth Amendment’s liberty provision to same-sex marriage, the amendment process, or enactment of state and federal laws,
Tocqueville’s democratic order can be implemented by any of those methods. It just happens that the Supreme Court in *US v. Windsor* decided that federalism was an option in accordance with Tocqueville’s incremental, gradualist approach in moving toward an equality of conditions for gays and lesbians without interference from Section 3 of DOMA. No where does Tocqueville call for an immediate application of equality of conditions in a democratic order in DA, rather he emphasizes that America’s democratic strength results from its gradual, incremental, and progressive development of equality of conditions (*DA* 2002, pp 6-7, 567-73, 577-8). His notion is that the democratic order process must be flexible, not unyielding or rigid. In the final analysis, any application of a theory of democratic order is going to be concerned with the functioning and processes of the system to reach its goal of an equality of conditions. What Tocqueville objects to is a haphazard and disorganized democratic process and movement in attempting to achieve equality of conditions in lieu of calm and patient procedures and directions that are governed by laws and their democratic order and procedures as applied to those who govern and are governed, for both people who like the change and those who do not (*DA* 2002, pp 6-7, 567-73).

While federalism can be used to help support gradual development of equality of conditions, regrettably, federalism has been used in favor of states’ rights and against decisions by the US Supreme Court that could expeditiously resolve blatantly hostile and outdated social policies if the institutions allowed social and political change to be based on the application of the Equal Protection Clause of the 14\textsuperscript{th} Amendment (*Capers* 2010). Rather than painstakingly protract long term delays and disputes that serve to let stand mores that most of the public no longer accepts, rulings by the Supreme Court could
eliminate averse and antagonistic laws and rules with one swoop if it chose to do so pursuant to the Equal Protection Clause of the 14th Amendment as applied to the states (See for example, *Lawrence v. Texas* 2003; *Romer v. Evans* 1996; *Meritor Savings Bank v. Vinson* 1986; also see Capers 2011). Assuming for the sake of argument that a marriage was valid where the marriage occurred, it could be considered valid everywhere. There is a strong public policy behind this general rule, and there exists in the US a tendency to validate out-of-state marriages, if those marriages would have been permitted in the couple's home state, at least as to heterosexual marriages (Kramer 1997; Dent 2003-2004; Koppelman 2009). The reasons to validate out of state same-sex marriages are to confirm the parties' expectations of uniformity; provide stability in an area where stability is necessary and essential especially due to children, property, and other financial and medical issues; to avoid the potentially abhorrent problems' that will result if the legality of a couple's marriage differed from one state to the next as the couple crosses the US; and an understanding that Americans are very mobile making it common for us to get married in one jurisdiction and reside in another where both will reside (Brandzel 2005).

The Supreme Court in recent years has signaled a threat to retreat from its role as the US Constitution’s protector of civil rights (*University of Alabama v. Garrett* 2001; *National Federation Of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.* 2012; Capers 2011). What this may mean is that an equality of conditions will take even longer to become reality, and that movement toward equality of conditions will be even more protracted in Tocqueville’s gradual and progressive development of equality of conditions should the a subsequent US Supreme Court
decision defer same-sex marriage to each individual state. While most states recognize out of state marriage laws, a part of a historic American common-law rule suggests that generally marriage is valid where it is performed and is presumed to be valid everywhere. However, there may be some states where same-sex marriage will never be permitted, and anti-same-sex states will argue that an out of state marriage violates their state’s strong public policy against same-sex marriage making the home state’s same-sex marriage invalid in the anti-same-sex state (Nolan and Wardle 2006).

In light of US v. Windsor, same-sex marriage proponents have more optimism and hope for legislative, judicial, and referendum victories in additional states in the foreseeable future (Eckholm 2013; Hamby 2013). On the other hand, opponents of same-sex marriage are expected to fight against extensions of same-sex marriage laws into additional states by suggesting that same-sex marriage results in pernicious consequences, including introduction of teachings in school that parents consider immoral, forcing business owners like florists and caterers to participate in gay marriages against their will, and that homosexuality remains an unacceptable way of life that the majority of people should reject and be repulsed by (Eckholm 2013; Hamby 2013). Opponents of same-sex marriage, as well-meaning and sincere as some might believe they are, can be said to fall within Tocqueville’s majority tyranny of intolerance against those who do not share the conduct and mores as the majority. The lines are being drawn between states that stand with the traditional notion of marriage, as distinguished from those states that redefined marriage to include same-sex couples, or what some may call a dispute between conservative and liberal ideologies (Eckholm 2013; Hamby 2013). Attitudes and feelings against same-sex marriage remain high in parts of the US. It is
still expressly outlawed in 37 states, which will unquestionably set the stage for more legislative and referendum challenges and battles in the future. Disapproval of the Supreme Court’s decisions expressed across the country should be a reminder of how impulsive and emotional an issue same-sex remains for some.

Conclusions: *US v. Windsor* and its relationship to Tocqueville’s democratic order

Some scholars consider prohibitions against same-sex marriage as blatant discrimination (Economist 2013). However, gay rights lobby groups have achieved more than they could have hoped for within the past decade. Nationwide popular opinion has swung in favor of same-sex marriage, and more and more political figures, even some conservative legislators, now support same-sex marriage (Tamman and Biskupec 2013). However, their success may make it more difficult to present gays and lesbians as a politically oppressed class that deserves special attention and protection (*US v. Windsor* 2013, dissenting opinions of CJ Roberts, J. Scalia, Thomas, and Alito). Now that the Supreme Court has rendered its majority opinion in *US v. Windsor*, it can perhaps be stated that momentum in the political world for gay rights may actually limit momentum in the legal world, especially if public opinion continues to grow and more states enact same-sex marriage laws (Knauer 2008; Huffington Post 2013).

This line of reasoning is repugnant to Tocqueville’s equality of conditions, and the liberty provision of the Fifth Amendment of the US Constitution as applied to gays and lesbians living in same-sex marriage states as well as anti-same-sex marriage states. There is no conceptual reason why there should be any difference between gays and lesbians living in same-sex states, as distinguished from gays and lesbians living together
as if they are married in those states that do not permit same-sex marriages. If Justice Kennedy’s majority opinion in *US v. Windsor* means anything, it is that if gays and lesbians are able to join in same-sex marriages made lawful by same-sex marriage states that thereby make them entitled to the 1,100 federal benefits, how can anti-same-sex states single out a class of persons who *should* be able to marry in those states where same-sex marriage is not permitted (*US v. Windsor* 2013, pp 25-6 slip opinion)?

If all persons are entitled to equality of conditions according to Tocqueville’s democratic order, then states prohibiting same-sex marriages should not be permitted to prohibit gays and lesbians from marrying, because by doing so, they disparage and injure those who should have the right to marry in same-sex marriage states, especially when all 50 states provide civil marriage laws that date back to the early beginnings of America, and present day public opinion supports same-sex marriage. The only way to provide equality of conditions between same-sex marriage states and anti-same-sex marriage states is to replace the animus and disparagement existing in anti-same-sex marriage states’ laws with uniformity that allow all gays and lesbians to be treated equally and with dignity as are heterosexual couples, who are entitled to marry in all 50 states. If democracy requires equality of conditions as Tocqueville suggested, then everyone should be treated alike in such a fundamental union like marriage according to Tocqueville’s democratic order.

Justice Kennedy’s description of the Fifth Amendment liberty provision should transmit the liberty and dignity provision as provided in *US v. Windsor* to all persons – gays, lesbians, and heterosexuals – to all 50 states for marriage. As Justice Kennedy
suggested, dignity is part of the Fifth Amendment’s liberty provision. There cannot be a law that suggests animus and disparagement against a minority. His concept of liberty should include the right to marry by gays and lesbians in the entire union of states pursuant to the Equal Protection Clause of the 14th Amendment. If a majority of the justices conclude that civil marriage is a sufficiently important fundamental right that has existed in America for almost the entire nation’s history, and that civil marriage is part of a family structure for the entire nation – something that Tocqueville suggested in DA – then civil marriage for same-sex marriage couples should be treated equally to heterosexual couples’ marriages. This argument was suggested by Justice Kennedy in US v. Windsor, and it could especially gain traction should future research studies show that there is virtually no difference between same-sex married couples’ and heterosexual couples in marriage and co-habitation type relationships. Assuming that anti-same-sex state laws impugn the dignity of same-sex couples right to marriage, then such laws can be found unconstitutional and in violation of the Fifth and 14th Amendments of the US Constitution.

The US Supreme Court has already suggested in separate gay and lesbian rights cases that state and federal laws enacted with animus against gays and lesbians are unconstitutional as they do nothing more than justify discrimination (Romer v. Evans 1996; Lawrence v. Texas 2003; US v. Windsor 2013). There is also an abundance of authority and historic decisions by the US Supreme Court that supports the right of privacy by families to make decisions that are private and important to themselves. These historic decisions concern families’ rights, including rulings on marriage, contraception, police search of a home without a warrant, sex stereotypes, and right-to-
die cases (Griswold v. Connecticut 1965; Eisenstadt v. Baird 1972; Loving v. Virginia 1967; Phillips v. Martin Marietta Corp. 1971; Wisconsin v. Yoder 1972; Roe v. Wade 1973; Cruzan v. Director of Missouri Department of Health 1990; Georgia v. Randolph 2006). Thus, the US Supreme Court has already found that there exists a penumbra of family and marriage rights in the US Constitution, therefore, if the US Supreme Court could find that states’ anti-same-sex laws violate the 14th Amendment Due Process and Equal Protection Clauses, as well as the Fifth Amendment liberty provision, a subsequent decision could make the existing precedent apply to all marriages, whether they are same-sex or opposite sex marriages, in the entire nation of states. This is consistent with Tocqueville’s conception of family and marriage in 1830s America, which is a centerpiece to the success of American representative democracy that should support same-sex marriage in the 21st century. This is also consistent with Tocqueville’s notion of equality of conditions for all.

There is no specific time limit that Tocqueville requires for a democratic order to reach equality of conditions. In one instance, it took nearly a century to end slavery for African Americans, and for them to receive the right to vote and become citizens in civil rights legislation upon passage of the 13th, 14th, and 15th Amendments of the US Constitution during the 1860s. America’s states enacted the Bill of Rights in 1787, but the Founding Fathers totally ignored the rights of African Americans for nearly 80 years. Even after enactment of the US civil rights amendments in the 1860s, it took another 100 years to enact US civil rights legislation that occurred in the 1960s (Blackstone 2009; Karl 2000; Kousser 1974). Similarly, the 19th Amendment to the US Constitution granted women the right to vote after it was ratified in 1920. The amendment was
culmination of the women’s suffrage movement in the US, which fought at both state and national levels to achieve the right to vote for women, but the movement has also been the subject of vast criticism in scholarly research suggesting that the 19th Amendment failed to drive feminism and economic equality for women (Baldez, Epstein, and Martin 2006; Buechler 1990; DuBois 1987). Both civil rights movements had varying time spans that ran their course in “the gradual and progressive development of equality” (DA 2002, pp 3, 6-7). In granting African Americans and women the right to vote, there was equality in voting by respective US Constitutional amendments, but that was only the beginning of a supplementary drive toward greater economic opportunities for African Americans and women. The same can be said for gays and lesbians and same-sex marriage, except that the time span has been much shorter for gays and lesbians rights to marriage than it was for African Americans and women, and US v. Windsor is just the start of what may be the beginnings of greater equality of conditions for gays and lesbians, or on the other hand it might only be a blimp if the US Supreme Court ultimately decides or refuses to decide the question of whether same-sex marriage should be deferred to the states on account of federalism or that the 14th Amendment Equal Protection Clause applies to same-sex marriage. For now, DOMA has no bearing and has been eliminated in same-sex marriage states, but there are still 37 states where same-sex marriage remains unlawful. The question is how long should it take to allow gays and lesbians the right to marry in all 50 states in a Tocquevillian democratic order that backs gradual and progressive development on a piecemeal basis toward equality of conditions?

Notwithstanding Justice Kennedy’s dictum in US v. Windsor, the US Supreme Court opted for now to allow each state’s democratic process to play out in a state by
state approval or disapproval of same-sex marriage (US v. Windsor 2003). Such a procedure is consistent with Tocqueville’s democratic order as a method to defend against majority tyranny by the application of federalism and allows each state to decide on its own democratic terms without a blanket approval of same-sex marriage nationally (DA 2002, pp. 56-93). The downside to this procedure is that there will be no uniform, national consensus now, in the near future, or perhaps ever on account of the federalism basis applied by the US Supreme Court that appears to at least for now acknowledge and support many strongly held feelings and views of Americans in the 50 states. There will always be some states’ as a matter of principle that will abide by state sovereignty views that will refuse to permit adoption of same-sex marriage laws in their states. The unfortunate result is that by strictly following federalism, or the 10th Amendment, assuming that it is the latter means that grants states the right to enact or refuse to enact same-sex marriage laws, there will be married same-sex couples from lawful same-sex marriage states that currently exist in Massachusetts and Iowa that will not be accepted in Mississippi and Alabama, which promises to hinder a national consensus of what constitutes marriage. In fact, the enactment of same-sex marriage laws may begin to look like a map of red and blue states not unlike what has become standard in recent presidential elections in the US. Red states are recognized as being conservative, with the majority of their vote going to support Republican candidates. Blue states are viewed as being more liberal, with the majority of their vote going to support Democratic candidates. Thus, by determining that states may determine their own destiny on same-sex marriage, the US Supreme Court constitutionally deferred decision-making authority on the definition of marriage to the states for now, and until the US Supreme Court
decides whether same-sex marriage should be constitutionally permissible and elevated to the same rights and obligations as heterosexual marriages in light of the liberty provision of the Fifth Amendment and the Equal Protection Clause of the 14th Amendment. The result also suggests that the Supreme Court found it unwise to judicially intervene during a nationwide conversation and debate on same-sex marriage that appears to be heading toward greater and widespread legal recognition of same-sex marriage and unions in much of America according to the change in public opinion in the 21st century (Fowler 2013; Toppo 2013).

Whether one considers the Supreme Court decision in a liberal/expansive or conservative/restrictive mold, Justice Kennedy’s majority opinion emphasized that human dignity is part of the Fifth Amendment’s liberty clause and is a constitutional value, one that stands at the heart of our longstanding commitment to equal protection of the laws. This viewpoint aligns with Tocqueville’s equality of conditions, and the views expressed by both Justice Kennedy and Tocqueville are that marriage is a fundamental institution and right in America that is central to the success of American representative democracy (DA 2002, pp 3, 6-7; 46-55; US v. Windsor, slip opinion, pp 3, 25-6). Justice Kennedy used the word “dignity” in reference to marriage no less than nine times. He strongly suggests that since the states are authorized to define marriage, and that there has been a dramatic increase of jurisdictions permitting same-sex marriage, those states have conferred on same-sex couples a “dignity and status of immense import” that DOMA seeks to disparage, malign, and financially impair by differentiating between lawful marriages in all 50 states whether they are same-sex or heterosexual (DA 2002, pp 3, 6-7; US v. Windsor 2013, slip opinion, pp 3, 25-6). In essence, Section 3 of DOMA demeans
and disparages same-sex couples without children and does the same for same-sex couples with children now being raised by same-sex parents according to Justice Kennedy’s majority opinion (US v. Windsor 2013, slip opinion pp 23-4). In using dignity to describe same-sex marriage and state laws permitting same-sex marriage, Justice Kennedy was attempting to further advance the rights and privileges of gays and lesbians, which the state, by its marriage laws, sought to protect in personhood and dignity (US v. Windsor 2013, pp 19-26). His use of animus – a feeling of animosity, ill will, or usually prejudiced and often spiteful or having malevolent ill will – suggests that a law based on animus removes the dignity that those state laws seek to provide to same-sex marriage (US v. Windsor 2013). Thus, he concludes that Section 3 of DOMA was invalid, as it served no useful purpose other than to effectively “disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity” (US v. Windsor 2013, pp 25-6).

Justice Kennedy’s declaration sounds much like a condemnation of majority tyranny, which acts to condemn gays and lesbians who are legitimately married. DOMA constitutes a majority tyranny by the law’s intolerance and prejudice that is attributable to private persons and legislators whose views have been incorporated into a federal law that has become obsolete. In essence, DOMA seeks to dominate and disparage minorities’ mores and behavior that the US Constitution prohibits. He also seeks to connect liberty and dignity that is protected by the liberty provision of the Fifth Amendment and perhaps the Equal Protection Clause of the 14th Amendment to same-sex marriage rights and obligations. His pronouncement also sounds a great deal like Tocqueville’s equality of conditions that should be provided to all married couples no
matter what their sexual orientation. The decision attempts to ensure against second class
citizenship rights of gays and lesbians, as well as against the public expression of
contempt for gays and lesbians, while leaving a degree of flexibility to the states’ and
their democratic political processes. If Justice Kennedy’s opinion does not sound like
vintage Tocqueville’s majority tyranny and equality of conditions, then what does?

Tocqueville stressed the power and authority of the US Supreme Court in DA
(DA 2002, pp 93-9, 130-42). Scholars have increasingly acknowledged a
contemporaneous relationship between public opinion and US Supreme Court decisions
(Giles 2008; Epstein 2010). Does public opinion directly influence Supreme Court
decisions, or do justices simply respond to the same forces that at the same time shape the
public disposition? Are justices sensitive to the dynamics of public opinion on important
social and political issues in society? Do Supreme Court decisions’ influence public
opinion, or does public opinion influence Supreme Court decisions? There is no hard and
fast answers to these questions, but it should be apparent that the US Supreme Court can
be persuasive in influencing public opinion and legitimizing challenged, nonconforming
conduct and behavior (See Atkins v. Virginia 2002; Texas v. Johnson 1989; Tinker v.
Des Moines Independent Community School District 1969). However, what is also
important is that the Supreme Court needs public support of its decisions if it is to be
effective: “Their [US Supreme Court] power is immense; but it is a power of opinion.
They are omnipotent as long as the people consent to obey the law; they can do nothing
when they scorn it” (DA 2002, p 142).
Whether the US Supreme Court leads or responds to changes in public opinion – a question left open by Tocqueville – the Supreme Court takes a center stage as a “republican schoolmaster” or “teacher to the republic” for other institutions, such as the legislature and the executive, as well as the public at large, and it serves to decide the law of the land (Marbury v. Madison 1803). It has the power show its favor or disfavor on political and social issues, so that institutions and public referendums follow Supreme Court interpretations and decisions (Brown v. Board of Education 1954; Plessy v. Ferguson 1896). We are all impressed with the tremendous power of the US Supreme Court, and so was Tocqueville, but he was also ambivalent about how compelling its power and authority should be. He left open for future consideration the question of whether the US Supreme Court influenced the public, or the public influenced the US Supreme Court in its decision-making processes (Casillas, Enns, Wohlfarth 2010; Epstein and Martin 2010; Giles 2008), except to suggest that the US Supreme Court and the public have to work in tandem to help support a democratic order (DA 2002, p 142). What he does insist upon is that in these federal justices, “one must find statesmen in them; they must know how to discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry away with them the sovereignty of the Union and the obedience due to its laws” (DA 2002, p 142). What this means is that the US Supreme Court must know what to do and when to do it, because it has the power as the final arbiter of America’s democratic order to drive, guide, and push the executive, legislature, and the public into public action.

The Supreme Court’s decision in US v. Windsor suggests many underlying rationales and interpretations in the 5 – 4 majority opinion. I have only raised and
discussed a number of them as they pertain to Tocqueville’s democratic order and same-sex marriage. The debates concerning possible avenues of change and movement toward equality of conditions in Tocqueville’s democratic order that has been incorporated in US v. Windsor will no doubt continue, as scholars attempt to interpret hidden meanings and implications. My discussion should be considered as a starting point for future discussions of the relationship between Tocqueville’s democratic order and same-sex marriage after US v. Windsor.

REFERENCES


Wisconsin v. Yoder, 406 U.S. 205 (1972)