

IS THE CONSTITUTION ONLY LIBERTARIAN AND
NOT SOCIALLY CONSERVATIVE?
U.S. v. WINDSOR AND THE UNCONSTITUTIONALITY OF
DOMA'S DEFINITION OF MARRIAGE TO EXCLUDE
SAME-SEX COUPLES—REQUIEM FOR A HEAVYWEIGHT**?

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INTRODUCTION

The case of *United States v. Windsor* has once again placed tax practitioners and professors in the arena of constitutional questions.¹ In *Windsor*, the United States Supreme Court in a 5-4 decision authored by Justice Kennedy held that the Defense of Marriage Act (DOMA)² was unconstitutional in defining marriage as between a man and woman because it excluded same-sex partners from thousands of benefits accorded to married individuals under federal laws.³ In particular, the *Windsor* Court held that the estate of Thea Spyer was entitled to a marital deduction for property passing to her same-sex spouse and executor, Edith Windsor, and the estate was owed a refund of \$363,053.00 of estate taxes.⁴

Part I of this Article will examine whether *United States v. Windsor* is an inevitable step in what has been called a libertarian revolution in interpreting the U.S. Constitution. This revolution has been

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** REQUIEM FOR A HEAVYWEIGHT, (Columbia Pictures Corp. 1962). REQUIEM FOR A HEAVYWEIGHT (CBS Television broadcast Playhouse 90 1956). Trainer Maishe to fighter Mountain, "I figure you owe me. What do you figure?"

¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013), *aff'g* 699 F.3d 169 (2d Cir. 2012).

² *Windsor*, 133 S. Ct. at 2696 (holding 1 U.S.C. §7 (2012) unconstitutional).

³ *Id.* at 2695-96.

⁴ *Id.* at 2682.

discussed since *Lawrence v. Texas*, in which the U.S. Supreme Court held unconstitutional a Texas statute criminalizing same-sex sodomy.⁵ In Part II, this Article will review the dissents in *Lawrence* and *Windsor*, which argue for traditional due process and equal protection analysis and seem to support a socially conservative constitution. Part III of this Article will briefly review the pre-*Lawrence* and pre-*Windsor* traditional analyses of substantive due process and equal protection for holding unconstitutional legislation such as DOMA. In Part IV, this Article will examine whether there is any rational basis under any constitutional analysis for legislation such as DOMA banning same-sex marriage, especially in light of the suggested libertarian revolution and apparent libertarian philosophy of a government's right to prevent or regulate conduct only when it may harm another.⁶ Finally, Part V of this Article will examine whether or not gay marriage is inevitably constitutional, particularly under the apparently libertarian constitution in contrast with a socially conservative constitution. In Part VI, this Article will examine original meaning and original intent.

This author has discussed elsewhere tax professors' and tax practitioners' reluctance to take up tax constitutional questions. However, undoubtedly such questions have been in the forefront recently in cases such as *United States v. Windsor*, *National Federation of Inde-*

⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see generally Randy E. Barnett, *Is the Constitution Libertarian?*, 2008-2009 CATO SUP. CT. REV. 9 (2008-09); see also Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002-2003 CATO SUP. CT. REV. 21 (2002-03) [hereinafter Barnett, *Justice Kennedy's Libertarian Revolution*]; Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582 (2005); Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL'Y 29 (2006) [hereinafter Barnett, *The Presumption of Liberty*]; Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5 (2012). But see Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004).

⁶ See generally Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in VARIETIES OF CONSERVATISM IN AMERICA 51, 73 (Peter Berkowitz ed., 2004) [hereinafter Barnett, *Moral Foundations*] ("A libertarian natural rights approach undertakes to identify, largely successfully, a law that is common to all: prohibiting murder, rape, theft, and so on."). Professor Barnett also states that, "[f]or comprehensive moralists of the Right or Left, using force to impose their morality on others might be their first choice among social arrangements. Having another's comprehensive morality imposed upon the moralists by force is their last choice." *Id.* at 74. Humorist and author Mark Twain is credited with having said, "[n]othing so needs reforming as other people's habits." MARK TWAIN, PUDD'NHEAD WILSON, 88 (Bantam Classic, 2005).

pendent Business v. Sebelius, *Citizens United v. Federal Election Commission*—based on *Speiser v. Randall*—and *Commissioner v. Warren*.⁷

Others have noted that it is normal that tax professors—and tax practitioners—are somewhat isolated from such weighty issues as constitutional questions.⁸ Professor Eric Jensen stated, “issues of race, gender, and class have not been addressed very much by tax professors, who have instead ‘focused on more narrow and technical issues in business and financial taxation.’”⁹ Professor Jensen also emphasized the “tax academy’s traditional insistence on connection with the real world of practice” and the often separation of tax and constitutional questions. “But raise one tax question with a con law person, and he’s gone”¹⁰

⁷ See generally *Windsor*, 133 S. Ct. 2675 (2013), *aff’g* 699 F.3d 169 (2d Cir. 2012); see Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566 (2012); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); see also *Speiser v. Randall*, 357 U.S. 513 (1958); see also *Warren v. Comm’r of Internal Revenue*, 114 T.C. 343 (2000), *amicus curiae appointed and supplemental briefs requested*, 282 F.3d 1119 (9th Cir. 2002), *motion for extension of time granted*, 284 F.3d 1322 (9th Cir. 2002), *appeal dismissed*, 302 F.3d 1012 (9th Cir. 2002).

⁸ John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV. 19, 20 & n.4 (2007) [hereinafter Dorocak, *Same-Sex Couples*] (citing Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1756 & n.17 (1998)); John R. Dorocak, *The Income Tax Exclusion of the Housing Allowance for Ministers of the Gospel per I.R.C. Section 107: First Amendment Establishment of Religion or Free Exercise Thereof—Where Should the Warren Court Have Gone?*, 54 S.D. L. REV. 233, 236 n.10 (2009); John R. Dorocak, *Recent Constitutional Questions in Taxation: Toward a Legislative Solution to Constitutional Problems of Same-Sex Couples and Ministers of the Gospel?*, 19 TEMP. POL. & CIV. RTS. L. REV. 223, 224 (2009) [hereinafter Dorocak, *Recent Constitutional Questions*] (citing Dorocak, *Same Sex Couples*, at 20 (quoting Jensen, *supra* note 8, at 1756)); John R. Dorocak & Lloyd E. Peake, *Political Activity of Tax-Exempt Churches, Particularly After Citizens United v. Federal Election Commission and California’s Proposition 8 Ban on Same-Sex Marriage: Render Unto Caesar What is Caesar*, 9 N.C. 1st A. L. REV. 448, 480 & n.152 (2011) [hereinafter Dorocak, *Political Activity of Tax-Exempt Churches*].

⁹ Jensen, *supra* note 8, at 1756 (citing Edward McCaffery, Statement at “Taxation and the Family” Conference at Lewis and Clark Northwestern School of Law (Oct. 6, 1995), quoted in Rebecca S. Rudnick, *Taxation and the Family*, 69 TAX NOTES 421 (1995)).

¹⁰ *Id.* at 1753, 1756; see John R. Dorocak, *Tax Constitutional Questions in “Obamacare”*: National Federation of Independent Business v. *Sebelius* in *Light of Citizens United v. Federal Election Commission and Speiser v. Randall: Conditioning a Tax Benefit on the Nonexercise of a Constitutional Right*, 11 U.N.H. L. REV. 189, 190 & nn.2-4 (2013) [hereinafter Dorocak, *Tax Constitutional Questions*].

I. THE LIBERTARIAN CONSTITUTION - *LAWRENCE v. TEXAS*,
 PROFESSOR RANDY E. BARNETT, JUSTICE ANTHONY M.
 KENNEDY, AND *UNITED STATES v. WINDSOR*

A. *Introduction – Lawrence and Windsor*

To determine whether the Constitution is libertarian only and not socially conservative by examining *United States v. Windsor*, it is helpful to discuss *Lawrence v. Texas* and the views of Professor Randy E. Barnett and Justice Anthony M. Kennedy. It has been well documented¹¹ that in *Lawrence v. Texas*, the U.S. Supreme Court held a Texas statute criminalizing same-sex sodomy to be unconstitutional.¹² The most surprising aspect of *Lawrence v. Texas* was not so much the decision itself, although the Supreme Court had previously upheld a similar statute in *Bowers v. Hardwick*,¹³ but the court's reasoning in the majority opinion authored by Justice Anthony M. Kennedy. Some tried to fit the *Lawrence* opinion within traditional due process analysis,¹⁴ while others found that the *Lawrence* majority opinion advanced a new analysis.¹⁵ Many appeared to agree that the *Lawrence* reasoning was unique and had not been followed, at least until *United States v. Windsor*, in which Justice Anthony M. Kennedy penned another majority opinion.¹⁶

B. *United States v. Windsor – Justice Kennedy's Majority Opinion*

Justice Kennedy, writing for the 5-4 majority in *Windsor*, describes DOMA's Section 3 definition of marriage as follows:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by age marriage laws sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living

¹¹ A LexisNexis search for "Lawrence v. Texas" in law review titles turned up 158 articles (last checked Aug. 24, 2013).

¹² *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia statute criminalizing sodomy).

¹⁴ See, e.g., Carpenter, *supra* note 5, at 1161-63.

¹⁵ See, e.g., Barnett, *Justice Kennedy's Libertarian Revolution*, *supra* note 5, at 33-36.

¹⁶ See, e.g., Randy Barnett, *Federalism marries liberty in the DOMA's decision*, SCOTUS-BLOG (June 26, 2013), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/> [hereinafter Barnett, *Federalism marries liberty*].

in marriages less respected than others, this federal statute is in violation of the Fifth Amendment. This opinion in holding those confined to those lawful marriages.¹⁷

Although Justice Kennedy's opinion is relatively clear and concise, the judicial reasoning to reach the holding is not as clear. Many have read the opinion as based on equal protection embedded in the due process clause of the Fifth Amendment.¹⁸ Others have read the case as both a due process and equal protection ruling.¹⁹ In fact, Justice Kennedy's own language indicates the case involves both due process and equal protection: "DOMA seeks to injure the very class New York seeks to protect. By doing so, it violates basic due process *and* equal protection principals applicable to the federal government. See U.S. Const., Amdt 5"²⁰

In fact, two leading constitutional scholars, who interestingly enough likely fall on opposite ends of the political spectrum, agree that Justice Kennedy had fused the due process and equal protection analysis in the predecessor case, *Lawrence v. Texas*, upon which Kennedy relied in *United States v. Windsor*.²¹ It may be helpful to describe Justice Kennedy's reasoning in the majority opinion in *Windsor* as compared to his reasoning in the *Lawrence* case. Scholars have speculated that Justice Kennedy and his reasoning in *Lawrence*, and likely *Windsor*, are libertarian, as is the Constitution, suggesting that the Constitution is only libertarian, and not socially conservative.²² The dissenting Justices, however, have raised the more traditional due process and equal protection analyses in both *Windsor* and *Lawrence*,²³ which seems to suggest that those analyses are still applicable and the libertarian revolution is not consummated. Part IV of this

¹⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

¹⁸ See, e.g., *Proposition 8 and DOMA: The Supreme Court rules*, SPIDELL'S CALIFORNIA TAXLETTER (Spidell Publishing Inc., California), Aug. 1, 2013, at 90-91, available at <http://www.caltax.com/spidellweb/public/editorial/TL/2013/print/TXL0813-print.pdf>.

¹⁹ Barnett, *Federalism marries liberty*, *supra* note 16.

²⁰ *Windsor*, 133 S. Ct. at 2693 (citing U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954)) (emphasis added).

²¹ Barnett, *Grading Justice Kennedy*, *supra* note 5, at n.4; see Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speaking Its Name*, 117 HARV. L. REV. 1893, 1902-16 (2004) (contending that the Court's decision in *Lawrence* is really a "synthesis" of Substantive Due Process and Equal Protection).

²² See *supra* note 5 and accompanying text.

²³ See *Windsor*, 133 S. Ct. at 2696-2719; *Lawrence v. Texas*, 539 U.S. 558, 586-606 (2003) (Scalia, J., dissenting).

Article will reexamine those traditional analyses within the context of the question posed by this Article about the Constitution.

How then does Justice Kennedy reason in *Windsor* and *Lawrence*? Justice Kennedy devotes about six pages in his opinion to the due process and equal protection analysis *per se* in part IV of the opinion.²⁴ Certainly, Justice Kennedy is drawing upon his opinion in *Lawrence v. Texas*.²⁵ He cites *Lawrence* once in part III of his opinion, which many regard as the federalism discussion, for the fact that it is “the State’s interest in defining and regulating the marital relation, subject to constitutional guarantees” which the federal government’s power does not reach.²⁶ Justice Kennedy also cites *Lawrence* once in part IV for the proposition that DOMA’s “differentiation [in treating same-sex marriages] demeans the couple, whose moral and sexual choices the Constitution protects”²⁷

When Justice Kennedy reaches the actual application of due process and equal protection principals to the DOMA legislation, he devotes approximately one and a half pages to the analysis. Justice Kennedy appears to echo the *Lawrence* discussion of liberty and the libertarian reading of *Lawrence*.²⁸ He begins the final portion of his opinion by stating “. . . Congress . . . cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”²⁹ Justice Kennedy then frames the Court’s holding as “the principal purpose and necessary effect of this law are to demean those persons who are in a lawful same-sex marriage,” thereby finding DOMA unconstitutional “as a deprivation of liberty.”³⁰

Justice Kennedy continues to explain that there is also an equal protection violation in the DOMA legislation as he seemingly fuses the equal protection and due process analyses.

The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws [T]he equal protection guarantee of

²⁴ *Windsor*, 133 S. Ct. at 2693-93 (2013).

²⁵ *Lawrence*, 539 U.S. at 562-578.

²⁶ *Windsor*, 133 S. Ct. at 2692.

²⁷ *Id.* at 2694.

²⁸ *Id.* at 2693-96; *cf. Lawrence*, 539 U.S. at 564-68.

²⁹ *Windsor*, 133 S. Ct. at 2695.

³⁰ *Id.*

the Fourteenth Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved.³¹

Concerning the level of scrutiny to be applied—whether Congress must have a compelling governmental interest, an interest substantially related to governmental objectives, or merely some rational basis for DOMA to be constitutional³²—Justice Kennedy merely states that:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect that disparate and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. . . . This opinion and its holding are confined to those lawful marriages.³³

Justice Kennedy's analysis may seem relatively straightforward. However, in the context of Supreme Court precedent and the usual due process and equal protection analyses discussed in the next Section of the article, Justice Kennedy's analysis stands out and seems to follow his analysis in *Lawrence v. Texas*—thus, the calls for Justice Kennedy's libertarian revolution and the libertarian constitution.³⁴

C. *Lawrence v. Texas* – Justice Kennedy's Majority Opinion

Certainly there is much quotable language of Justice Kennedy in the *Lawrence* opinion and possibly the actual holding of the opinion is based more directly on Justice Stevens' dissenting opinion in *Bowers v. Hardwick*. Justice Kennedy's opinion for the majority in *Lawrence* stated: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."³⁵ Justice Kennedy's quoting in *Lawrence* from Justice Stevens' dissent in *Bowers* includes the following:

First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting the miscegenation from constitutional

³¹ *Id.*

³² *See id.* at 2717 (Alito, J., dissenting).

³³ *Id.* at 2696.

³⁴ *See infra* Part III; *see also* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

³⁵ *Lawrence*, 539 U.S. at 578.

attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce off-spring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover this protection extends to intimate choices by unmarried as well as married persons.³⁶

For all the credit Justice Kennedy has rightfully been given for advancing the so-called libertarian revolution and libertarian constitution, Justice Stevens also has to be given credit for framing arguably the conflict between the libertarian and socially conservative constitution: can the majority legislate morality or does the minorities’ liberty interests trump such majoritarian moralism? Nowhere is that conflict more sharply drawn than between the majority and dissenting opinions written by Justices Kennedy and Scalia respectively in both *Lawrence* and *Windsor*. And, perhaps this conflict can be summarized by the title of Professor Randy E. Barnett’s conclusion in a chapter in *Varieties of Conservatism in America*, “How Libertarianism Differs from Conservatism.”³⁷

What observers may be witnessing in the Supreme Court opinions in *Lawrence* and *Windsor* is really a struggle for the right of transcendence between majoritarian moralism and individual liberty. Perhaps then America has not strayed too far from the traditional narrative of its origins. Our society was founded on a conservative revolution and the thought that protection in society of individual rights is most sharply focused on the right or conservative end of the political and judicial perspective.

Justice Kennedy, of course, did have some memorable and quotable language of his own in the *Lawrence* opinion. He began with a prologue on liberty,³⁸ and on the question of legislating majoritarian moralism regarding homosexual conduct. He wrote that the role of the Court was to “define the liberty of all, not to mandate our own moral code.”³⁹

³⁶ *Id.* at 577-78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

³⁷ Barnett, *Moral Foundations*, *supra* note 6, at 72-74.

³⁸ *Lawrence*, 539 U.S. at 562 (2013) (“Liberty protects the person from unwarranted government intrusions . . . liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. The instant case involves liberty of the person both in its spatial and its more transcendent dimensions.”).

³⁹ *Id.* at 571 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

Justice Kennedy explained that “two principal cases” since the prior *Bowers* decision lead to the *Lawrence* Court’s reversal of *Bowers*.⁴⁰ His opinion also borrowed the following from *Planned Parenthood of Southern Pennsylvania v. Casey*:

These matters, involving the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.⁴¹

Following the quote from *Casey*, Justice Kennedy’s majority opinion stated, “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁴² Justice Kennedy also explained that in a second case, *Romer v. Evans*, “We concluded that the provision [an Amendment to Colorado’s Constitution which named . . . homosexuals . . . and deprived them under state anti-discrimination laws] was born ‘of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate government purpose.”⁴³ Borrowing from *Casey* and *Romer*, Justice Kennedy has perpetuated a libertarian interpretation of the U.S. Constitution.

II. THE SOCIALLY CONSERVATIVE CONSTITUTION- DISSENTERS IN *LAWRENCE* AND *WINDSOR*

Clearly Justice Kennedy drew on his language and analysis in *Lawrence* in the *Windsor* opinion. In addition, Justice Scalia, dissenting in both *Lawrence* and *Windsor*, responded to Justice Kennedy’s libertarian language and analysis from a socially conservative position. Justice Scalia, in his *Lawrence* dissent, criticized Justice Kennedy’s majority opinion’s reliance on the *Casey* “dictum of its famed sweet-

⁴⁰ *Id.* at 573-74 (citing *Casey*, 505 U.S. at 851 and *Romer v. Evans*, 517 U.S. 620, 624 (1996)).

⁴¹ *Id.* at 574 (citing *Casey*, 505 U.S. at 851).

⁴² *Id.*

⁴³ *Id.* (citing *Romer*, 517 U.S. at 634 (1996)).

mystery-of-life passage.”⁴⁴ Justice Scalia also admitted that *Romer* has eroded *Bowers*, but stated that *Washington v. Glucksberg* eroded *Roe* and *Casey* in holding “that only fundamental rights which are ‘deeply rooted in the nation’s history and tradition’ qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process.’”⁴⁵

Justice Scalia also unequivocally stated the position of social conservatism: “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”⁴⁶ It is precisely Justice Scalia’s belief that a very deferential judicial review of state police powers shows that any rational basis can be suggested for legislation regulating morals. A libertarian law professor, Randy Barnett, criticizes Justice Scalia’s analysis.⁴⁷ Professor Barnett stated in a leading law review article that judicial conservatives like Chief Justice Rehnquist and Justice Scalia, who may be identified with the social conservatives, “want to see no further extension of substantive due process to other [un]enumerated rights.”⁴⁸ Professor Barnett explains Justice Kennedy’s majority opinion’s departure from Justice Scalia’s dissent in *Lawrence* as “reject[ing] an open-ended conception of the police power of states and [finding] that the particular statute was illegitimate or improper.”⁴⁹

Professor Barnett explains further the dichotomy between the opinions of the libertarian Kennedy and socially conservative Scalia. He proposes that Kennedy’s joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* reflects a shift from privacy to lib-

⁴⁴ *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

⁴⁵ *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁴⁶ *Id.* at 589-90 (citing *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001); *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *Owens v. State*, 352 Md. 663, 683 (Ct. App. 1999); *City of Sherman v. Henry*, 928 S.W.2d 464, 469-73 (Tex. 1996)).

⁴⁷ Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1493-95 (2008).

⁴⁸ *Id.* at 1493.

⁴⁹ *Id.* at 1495.

erty based on the Ninth Amendment—the amendment that the opinion specifically cites.⁵⁰

Professor Barnett's criticism of Justice Scalia continues:

By allowing a Court to reject any unenumerated rights claim it might care to the *Glucksberg* Two-Step limited the protection of additional liberties As Tribe and Dorf observed, "Justice Scalia is aware that the method . . . would severely curtail the Supreme Court's role in protecting individual liberties. Indeed that seems to be his purpose."⁵¹

Professor Barnett summarizes Justice Kennedy's approach in *Lawrence* by noting that Justice Kennedy's approach focuses on the Court's role in "protecting a 'presumption of liberty,'" whereas Justice Scalia's "Two Step" approach would significantly curtail the Supreme Court's role in protecting individual liberties.⁵² Professor Barnett explains that the "Two Step" approach in *Glucksberg* improperly restricted the doctrine of fundamental rights to those (1) narrowly defined liberties that are (2) deeply rooted in tradition and history.⁵³ Of course, at the time Professor Barnett was writing in *Michigan Law Review*, *United States v. Windsor* had not made its appearance.

Next, this article will demonstrate that the reasoning in *United States v. Windsor* follows from *Lawrence*, with *Romer v. Evans* as the lynchpin connecting *Lawrence* and *Windsor*. To make this connection, it is helpful to understand the dichotomy of the libertarian and socially conservative constitutions, to review Justice Scalia's dissents almost in response to Tribe's and Dorf's criticism, and to also review Justices Thomas's and Alito's dissents in support of Justice Scalia. Thereafter, this Article will look back at the traditional due process and equal protection analyses before beginning the inquiry as to whether there was any rational basis for DOMA in *Windsor* in light of current research in other fields, which might offer an expert opinion.

Justice Scalia explains his position in the *Lawrence* dissent as follows:

⁵⁰ *Id.* at 1493 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992); Linda Greenhouse, *Adjudging a Moral Harm from Abortions*, N.Y. TIMES, Apr. 20, 2007, at A1 (identifying the discussion of liberty in *Casey* as the "portion of the opinion usually attributed to Justice Kennedy.")).

⁵¹ *Id.* at 1496 (citing Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Right*, 57 U. CHI. L. REV. 1057, 1093 (1990)).

⁵² *Id.* at 1495-96.

⁵³ See Barnett, *Scrutiny Land*, *supra* note 47, at 1488.

[T]he Texas Penal Code . . . undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroine, and, for that matter, working more than 60 hours per week in a bakery. But there was no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim. . . . The Fourteenth Amendment *expressly allows* that State’s to deprive their citizens of “liberty” *so long as “due process of law” is provided*

Our opinions applying the doctrine known as “substantive due process” hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg* We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called “heightened scrutiny” protection – that is, rights which are “‘deeply rooted in this Nation’s history and tradition,’” *Ibid.* . . . All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law is that it is rationally related to a legitimate state interest.⁵⁴

Justice Scalia summarized his preference for democratic decisions over judicial in the area of police power majoritarian moralism as follows:

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means But persuading one’s fellow citizens is one thing, and imposing one’s and one’s view in absence of democratic majority will is something else What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and when that happens, later generations can repeal those laws. What is the premise of our system that those judgments had to be made by the people, and not imposed by a governing cast that knows best.⁵⁵

⁵⁴ *Lawrence v. Texas*, 539 U.S. 558, 592-93 (2003) (Scalia, J., dissenting).

⁵⁵ *Id.* at 603 (citations omitted).

In support of Justice Scalia in *Lawrence*, Justice Thomas dissented quite succinctly:

I write separately to note that the law before the Court today “is . . . uncommonly silly . . .” If I were a member of the Texas legislature, I would vote to repeal it

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to “decide cases ‘agreeable to the Constitution and the laws of the United States’” And, just like Justice Stewart [whom Justice Thomas cited dissenting in *Griswold v. Connecticut*], I “can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,” . . . or as the Court terms it today, the “liberty of the person both in its spatial and more transcendent dimensions”⁵⁶

Similarly, in *United States v. Windsor*, Justice Scalia, as well as Justices Thomas and Alito and Chief Justice Roberts, dissented.⁵⁷ Justice Kennedy, as previously discussed, wrote the *Windsor* majority opinion citing *Lawrence* and *Romer v. Evans*.⁵⁸ As suggested, *Romer v. Evans* is the lynchpin connecting *Windsor* and *Lawrence*. Certainly, Justice Kennedy’s concluding portion of his majority opinion in *Windsor* recalls the liberty protected by *Lawrence* when he states, “. . . Congress . . . cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment,”⁵⁹ although Justice Kennedy’s two citations to *Lawrence* precede this conclusion by several pages.⁶⁰ The holding, as the majority opinion nears its conclusion, appears to recall *Romer v. Evans*. The majority opinion states “the federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁶¹ In *Windsor*, Justice Kennedy relied on *Romer v. Evans*, quoting “discriminations of an

⁵⁶ *Id.* at 605-06 (Thomas, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 527, 530 (1965) (Stewart, J., dissenting)).

⁵⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2696-2719 (2013).

⁵⁸ *Id.* at 2692-94.

⁵⁹ *Id.* at 2695.

⁶⁰ *Id.* at 2692-94.

⁶¹ *Id.* at 2696.

unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”⁶²

Of course, in *Romer v. Evans* the Supreme Court held unconstitutional a Colorado state constitutional amendment prohibiting homosexuals from benefiting from anti-discrimination laws within the State. In *United States v. Windsor*, the Court held unconstitutional DOMA as passed by Congress defining marriage to exclude homosexual unions. Justice Scalia would likely point out, as he did in the *Lawrence* dissent, that both the Colorado constitutional amendment and DOMA were democratically passed legislation invalidated by a Court which did not find a fundamental right or a suspect classification.⁶³ And again, the provisions passed and held unconstitutional in each case were attempts by the majority to impose their will on the minority. So, the issue arises whether the constitution is libertarian and protective of liberty or socially conservative and protective of the majority’s democratic will.

The dissents in *Windsor*, particularly Justice Scalia’s and Justice Alito’s, echoed the dissent of Justice Scalia in *Lawrence*. In addition, Justice Alito’s dissent calls attention to the traditional due process and equal protection analyses.⁶⁴ In *Windsor*, Justice Scalia not only dissented from the holding that the Court had jurisdiction of the case,⁶⁵ but also dissented from the majority’s holding that DOMA is unconstitutional. Justice Scalia criticizes the majority opinion for not clearly applying the Court’s precedents on equal protection and due process, noting his “previously expressed skepticism about the Court’s ‘tiers of scrutiny’ approach.”⁶⁶ Justice Scalia indicates that he would review for rational basis only in that the majority opinion did not apply strict scrutiny.” He notes as follows:

The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, perhaps with some amorphous federalism com-

⁶² *Id.* at 2697 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38, (1928))).

⁶³ *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

⁶⁴ *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

⁶⁵ *Id.* at 2698-2703 (Scalia, J., dissenting).

⁶⁶ *Id.* at 2706 (Scalia, J., dissenting).

ponent playing a role) because it is motivated by a “bear . . . desire to harm” couples in same sex marriages.⁶⁷

Next in *Windsor*, Justice Scalia succinctly summarizes his view that legislation may be socially conservative and enforce a majoritarian moralism:

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas*, 539 U. S. 558, 599 (2003) (Scalia, J., dissenting). . . . It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires or forbids us to approve of no fault divorce, polygamy, or the consumption of alcohol.⁶⁸

Thus, having framed the case for a socially conservative constitution in which legislation can be constitutionally valid for seemingly any rational basis, Justice Scalia continues:

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case.⁶⁹

Justice Scalia then suggests two possible rational basis justifications for DOMA:

To choose just one of these defender's arguments, DOMA avoids the difficult choice of law issues that will now arise absent a uniform federal definition of marriage.

. . . .

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance.⁷⁰

In response to the majority opinion's conclusion “[t]hat the only motive for this Act was the ‘bare desire to harm a politically unpopular group,’” Justice Scalia states that the legislation was not that of

⁶⁷ *Id.* at 2707 (Scalia, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2708 (Scalia, J., dissenting).

⁷⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting).

“some once-Confederate Southern state (familiar objects of the Court’s scorn. . .) but our respected coordinate branches, the Congress and the Presidency.”⁷¹ Justice Scalia continues, “[i]t is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.”⁷² Further, Justice Scalia states, “[t]he result will be a judicial distortion of our society’s debate over marriage”⁷³ In support of his statement, Justice Scalia cites to several state voter initiatives on same-sex marriage.⁷⁴ Leading constitutional scholar Laurence H. Tribe characterized Justice Scalia’s dissent as intemperate, although another argument can be made that Justice Scalia’s view is just different from Justice Kennedy’s.⁷⁵ Both Justices are likely on the right end of the political spectrum, which is the opposite end of the spectrum from Professor Tribe.⁷⁶

Justice Alito, dissenting in *Windsor*, took up the task of explaining the traditional due process and equal protection analyses in his criticism that those analyses were absent from the majority’s opinion in *Windsor*.⁷⁷

III. THE TRADITIONAL ANALYSES OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

In his dissent in *Windsor*, Justice Alito admits politely and subtly that whether the rationale of the majority opinion is due process or equal protection or something else may not be entirely clear:

Windsor and the United States argue that §3 of DOMA violates equal protection principles that the Court has found in the Fifth Amendment’s Due Process Clause. The Court rests its holding on related arguments.⁷⁸

⁷¹ *Id.* at 2707 (Scalia, J., dissenting).

⁷² *Id.* at 2709 (Scalia, J., dissenting).

⁷³ *Id.* at 2710 (Scalia, J., dissenting).

⁷⁴ *Id.* at 2710-11 & nn.6-9.

⁷⁵ Laurence H. Tribe, *DOMA, Prop 8, and Justice Scalia’s Intemperate Dissent*, SCOTUS-BLOG (June 26, 2013, 2:24 PM), <http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalia-intemperate-dissent/> (referencing Scalia as “intemperate”).

⁷⁶ *Id.*

⁷⁷ *Windsor*, 133 S. Ct. at 2714 (Alito, J., dissenting).

⁷⁸ *Id.*

Justice Alito then discusses substantive due process:

The Court has sometimes found the Due Process Clauses to have a substantive component But it is well established that any “substantive” component to the Due Process Clause protects only “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” . . . as well as “‘implicit in the concept of ordered liberty,’”⁷⁹

In his dissent in *Windsor*, Justice Alito continues: “It is beyond dispute that the right to same-sex marriages is not deeply rooted in this Nation’s history and tradition . . . [n]or is the right to same-sex marriages deeply rooted in the traditions of other nations.”⁸⁰

Then, Justice Alito begins in part III of his dissent, “Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, *Windsor* and the United States couch their arguments in equal protection terms.”⁸¹ However, Justice Alito indicates, “But [our equal protection] framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.”⁸² Still, Justice Alito proceeds to evaluate the tiers of scrutiny: “The modern tiers of scrutiny—on which *Windsor* and the United States relies so heavily—are a heuristic to help judges determine when classifications have that ‘fair and substantial relation to the object of the legislation.’”⁸³ Justice Alito explains the three tiers of scrutiny as follows:

So, for example, those classifications subject to strict scrutiny—*i.e.*, classifications that must be “narrowly tailored” to achieve a “compelling” government interest . . . are those that are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.”

. . .

⁷⁹ *Id.* at 2714-15 (Alito, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

⁸⁰ *Id.* at 2715 (Alito, J., dissenting).

⁸¹ *Id.* at 2716 (Alito, J., dissenting).

⁸² *Id.*

⁸³ *United States v. Windsor*, 133 S. Ct. 2675, 2716 (2013) (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

In contrast, those characteristics subject to so-called intermediate scrutiny—*i.e.*, those classifications that must be “substantially related” to the achievement of “important government objective[s],” Are those that are *sometimes* relevant considerations to be taken into account by legislators but “generally provid[e] no sensible ground for different treatment,”

. . . .

Finally, so-called rational basis review applies to classifications based on “distinguishing characteristics relevant to interests the State has the authority to implement As a result, in rational-basis cases, where the Court does not view the classification at issue as “inherently suspect” “the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize the legislative choices as to whether, how, and to what extent those interests should be pursued.”⁸⁴

Justice Alito continues his dissent as follows:

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve the debate between two competing views of marriage.

The first an older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. . . .

The other, newer view, is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons. . . .

The Constitution does not codify either of these views of marriage The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to

⁸⁴ *Id.* at 2717 (Alito, J., dissenting) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *United States v. Virginia*, 518 U.S. 515, 524, 567-68 (1996) (Scalia, J., dissenting); *Adarand Constructors, Inc. v. Pana*, 515 U.S. 200, 218 (1995) (internal citations omitted); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 452-53 (1985) (Stevens, J., concurring)); *see also* Barnett, *Scrutiny Land*, *supra* note 47, at 1493.

ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.⁸⁵

In concluding his dissent, Justice Alito finds a rational basis for Section 3 of DOMA, which does not encroach on prerogatives of the state:

All that §3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law poses certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits some special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom laws apply.⁸⁶

Apparently, Justice Alito believes Congress has a rational basis for Section 3 of DOMA in the absence of any type of heightened scrutiny triggered by a finding of a suspect classification under equal protection analysis or of a fundamental right under due process analysis.⁸⁷

The next section of this Article will explore briefly whether there appears to be any sort of rational basis for legislation to continue to define marriage as between a man and a woman and thereby exclude same-sex couple unions from the definition of marriage particularly in the light of the judicial analyses that have been discussed thus far. Those analyses include not only the traditional equal protection and due process analyses, but also Justice Kennedy's analysis in *Lawrence* and *Windsor*, which leans toward a libertarian constitution, and Justices Scalia's, Thomas's, and Alito's dissents in *Lawrence* and *Windsor*, which lean toward a socially conservative constitution.

⁸⁵ *Id.* at 2718 (Alito, J., dissenting).

⁸⁶ *Id.* at 2720 (Alito, J., dissenting).

⁸⁷ *Cf.*, Barnett, *Scrutiny Land*, *supra* note 47, at 1494 (discussing the application of rational basis scrutiny in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

IV. IS THERE ANY “RATIONAL BASIS” FOR LEGISLATION
DEFINING MARRIAGE AS BETWEEN A MAN AND A
WOMAN AND THEREBY BANNING SAME-SEX
MARRIAGE

In his dissent in *Windsor*, Justice Alito suggests that the conflict between the traditional view of marriage and consent-based view of marriage, or between heterosexual and same-sex—and some heterosexual—marriage, is a question for experts in other disciplines than the law.⁸⁸ One might ask how much evidence has been developed by these other disciplines and how clear is it? When this author was writing on the subjects of same-sex couples and married filing jointly or head of household tax filing status and comparing the tax benefits of such couples with the benefits of ministers of the gospel in 2007 and 2009 respectfully, there was not much developed evidence on the impact of same-sex couples on, for example, children raised in a same-sex family structure.⁸⁹ Recently, Professor Mark Regnerus of the Department of Sociology and Computation Research Center at the University of Texas at Austin authored an article titled *How different are the adult children of parents who have same-sex relationships? Findings of the New Family Structure Study*,⁹⁰ which has garnered some attention in the media.

In the results section of his paper, Professor Regnerus indicated that “[a]t a glance, the number of statistically-significant differences between respondents from IBFs [still intact, biological families] and respondents from the other seven types of family structures/experiences is considerable, and in the vast majority of cases the optimal outcome—where one can be readily discerned—favors IBFs.”⁹¹ In the conclusion to his article, Professor Regnerus states as follows:

American courts are finding arguments against gay marriage decreasingly persuasive. . . . This study is intended to neither undermine nor affirm any legal rights concerning such. The tenor of the last 10 years

⁸⁸ *Windsor*, 133 S. Ct. at 2718 & n.7 (Alito, J., dissenting); see also Dorocak, *Same-Sex Couples*, *supra* note 8, at 37-39 (suggesting the need for further expert research); John R. Dorocak, *Recent Constitutional Questions*, *supra* note 8, at 257-58.

⁸⁹ Dorocak, *Same-Sex Couples*, *supra* note 8, at 37-38; Dorocak, *Recent Constitutional Questions*, *supra* note 8, at 37-39.

⁹⁰ Mark Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structure Study*, 41 SOC. SCI. RES. 752 (2012).

⁹¹ Regnerus, *supra* note 90, at 761.

of academic discourse about gay and lesbian parents suggest that there is little to nothing about them that might be negatively associated with child development, and a variety of things that might be uniquely positive. . . .

Although the findings reported herein may be explicable in part by a variety of forces uniquely problematic . . . child development in lesbian and gay families—including a lack of social support for parents, stress exposure resulting from persistence stigma, and modest or absent legal security for their parental and romantic relationships statuses—the empirical claim that no notable differences exist must go. . . .

. . . . But the NFSS [New Family Structure Study] also clearly reveals that children appear most apt to succeed well as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day. Insofar as the share of intact of biological mother/father families continues to shrink in the United States, as it has, this portends growing challenges within families, but also heightened dependence on public health organizations, federal and state public assistance, psychotherapeutic resources, substance use, prevention programs and the criminal justice system.⁹²

Early on in his article, Professor Regnerus reviews previous literature and summarizes, “[s]uffice it to say that the pace at which the overall academic discourse surrounding gay and lesbian parents’ comparative competence has shifted—from slightly-less adept to virtually identical to more adept—is notable and rampant.”⁹³ Perhaps Professor Regnerus’s conclusion that “the empirical claim that no notable differences exist must go” is that which garnered the attention from

⁹² *Id.* at 766. After discussing in more detail the differences between IBFs and other family structures in his article, Professor Regnerus summarizes the differences as follows:

Of the 239 possible between-group differences here – not counting those differences within Group 1 (IBFs) already described earlier – the young-adult children of lesbian mothers display 57 (or 24% of total possible) that are significant . . . and 44 (or 18% of the total) that are significant after controls . . . The majority of these differences are in suboptimal directions, meaning that LMs [Lesbian Mothers] display worse outcomes. The young-adult children of gay men, on the other hand, display only 11 (or 5% of total possible) between-group differences that are statically significant . . . and yet 24 (or 10% of the total) that are significant after controls[.] *Id.* at 764.

⁹³ *Id.* at 754.

the popular media.⁹⁴ The milder critics of Professor Regnerus's study, from both the left and right of the political spectrum, pointed out that his data really compared stable heterosexual family structures with less stable parents who had a same-sex relationship. Therefore, the conclusion of the research, with further research still to come, might be that family stability in a heterosexual or same-sex couple household might have better outcomes for the children raised in those settings.⁹⁵ At least one letter writer to the *Chronicle of Higher Education*, "an openly bisexual father and son of a lesbian," expressed appreciation that "Mark Regnerus was the first person who gave me a chance to speak honestly about how hard it was and how ambivalent I felt about placing other children in such a situation."⁹⁶

On the other hand, at least one law professor who filed an amicus brief in *Hollingsworth v. Perry*, the case contesting the unconstitutionality of California's Proposition 8 banning same-sex marriage and which case the Supreme Court declined to hear on jurisdictional grounds, argued for "unique goods offered by opposite-sex marriage" which the majority opinion in *Windsor* appeared to deny, thereby harming children along the lines supported by Professor Regnerus's

⁹⁴ *Id.* at 766. See William Saletan, *A Liberal War on Science? Don't bury Mark Regnerus' Study of Gay Parents. Learn What It Can Teach the Left and Right*, SLATE.COM (June 24, 2012, 10:49AM), http://www.slate.com/articles/health_and_science/human_nature/2012/06/don_t_let_criticism_of_the_new_gay_parents_study_become_a_war_on_science.single.htmlhttp://www.slate.com/articles/health_and_science/human_nature/2012/06/don_t_let_criticism_of_the_new_gay_parents_study_become_a_war_on_science.single.html; Jennifer Marshall, *Case Closed at UT Austin: Regnerus Exonerated*, HERITAGE.ORG (Aug. 31, 2012, 12:30PM), <http://blog.heritage.org/2012/08/31/case-closed-at-ut-austin-regnerus-exonerated/> (last visited Aug. 16, 2013); Christian Smith, *An Academic Auto-da-Fe, A Sociologist Whose Data Find Fault with Same-sex Relationships is Savaged by the Progressive Orthodoxy*, THE CHRONICLE OF HIGHER EDUCATION (July 23, 2012), <http://chronicle.com/article/An-Academic-Auto-da-F-/133107/>; Letter to the Editor, *Son of a Lesbian Mother Backs Regnerus Study*, THE CHRONICLE OF HIGHER EDUCATION (August 29, 2012), <http://chronicle.com/article/Son-of-a-Lesbian-Mother-Backs-133992/>; Doug W. Allen, *The Regnerus Debate: Most Gay-Parenting Studies are Long on Bias and Short on Hard Data*, NATIONAL REVIEW ONLINE (June 14, 2012, 4:00AM), <http://nationalreview.com/articles/302749/regnerus-debate-douglas-w-allen><http://nationalreview.com/articles/302749/regnerus-debate-douglas-w-allen>; Jason Richwine and Jennifer A. Marshall, *The Regnerus Study: Social Science on New Family Structures Met with Intolerance*, 2736 BACKGROUND (Oct. 2, 2012), available at <http://report.heritage.org/bg2736><http://report.heritage.org/bg2736>; Sofia Resnick, *University Of Texas Professor Behind Controversial Study Wades Further Into Gay Marriage Debate*, THE AMERICAN INDEPENDENT (Apr. 10, 2013, 10:37AM), http://www.huffingtonpost.com/2013/04/10/mark-regnerus-university-of-texas_n_3049309.html.

⁹⁵ Saletan, *supra* note 94; Marshall, *supra* note 94; Smith, *supra* note 94.

⁹⁶ Letter to the Editor, *supra* note 94.

research.⁹⁷ In her amicus brief Professor Alvare argues, “[t]hese goods include both the integration of men and women in society, and the birth and rearing of children in family settings in which the benefits of genealogical connection and opposition-sexed parenting are preserved.”⁹⁸ Professor Alvare cites a number of Supreme Court cases contrary to *Windsor*, which she believes:

feels arbitrary because the Court ignored over 125 years of its own family law decisions repeatedly recognizing with approval governmental interests in the procreative features of marriage: childbirth and child rearing by the adults who conceived them, and the contribution of that child rearing to a stable democratic society.⁹⁹

Professor Alvare also indicates that she believes, as Justice Scalia, that the Court after *Windsor* may invalidate state statutes banning same-sex marriage. Professor Alvare suggests that the Court can “choose to ignore a State’s essential interests in supporting the only institution that links children with their mothers and fathers.” Professor Alvare goes on to argue that if the Court takes this position, “children and vulnerable Americans will suffer over time far more than privileged adults.”¹⁰⁰

Professor Alvare does acknowledge that the Supreme Court majority in *Windsor* expresses concern for the children of same-sex couples in three instances: (1) the same-sex couple’s possible desire to “affirm their commitment” in front of their children, (2) “the children’s claimed feelings of humiliation because federal law and state law treat adults who are rearing them differently,” and (3) “that children in same-sex households are financially harmed by DOMA.”¹⁰¹ Professor Alvare finds:

[t]he first point of ambiguously child-focused . . . [t]he second is speculative, especially given that the majority of children reared in same-sex households have legal mothers and fathers from prior heterosex-

⁹⁷ Helen Alvare, *Taking Sides on the Meaning of Marriage*, SCOTUSBLOG (Jun. 26, 2013, 5:40PM), <http://www.scotusblog.com/2013/06/taking-sides-on-the-meaning-of-marriage/>.

⁹⁸ *Id.*

⁹⁹ *Id.* (discussing *Turner v. Safley*, 482 U.S. 78 (1987); *Butler v. Wilson*, 415 U.S. 953 (1974); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535 (1942); *Reynolds v. United States*, 98 U.S. 145 (1879)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

ual relationships . . . [a]nd the third point is also uncertain given that marital status comes not only with financial advantages, but also disadvantages.”¹⁰²

Thus, both the *Windsor* court and Professor Alvare may both look at harm to children as a possible rational basis, either in support of or against same-sex marriage.

Bland and scientific as Professor Regnerus’s study might seem to be, it invoked a number of heated, partisan, political responses in the media. Maybe the nature of those responses indicate what Justices Scalia and Alito were indicating that the issue of same-sex marriage is best left to the political process. In another law review article, Professor Richard E. Redding, who holds both a J.D. law degree and a Ph.D. in psychology, sought to review some of the same-sex marriage research as it was in January 2008.¹⁰³ Perhaps one of the most interesting contributions of Professor Redding’s article is that there is a psychology of disgust which may inform the intuitive moral feelings against same-sex activities such as male homosexual intercourse and which may derive from ancient concepts of cleanliness.¹⁰⁴

Despite their different political views, Professor Redding seems to reach a conclusion similar to that of Professor Regnerus. In concluding his article, Professor Redding states as follows:

We now have a sufficient body of research to permit the conclusion that growing up in a lesbigay [“lesbian and gay (hereinafter “lesbigay”)] household does not cause psychological harm to children. But that is different from concluding that growing up in a homosexual household is as positive an experience for children as is growing in a heterosexual household. Probably the most controversial issue is that children benefit from having a mother and a father as opposed to same-sex parents. A plausible reading of the research is that fathers and mothers can make a unique—though not essential—contribution to children’s social, emotional and intellectual development. In particular, boys raised in father-absent homes are more likely to exhibit behavioral problems and involvement in delinquency, than boys raised in homes with fathers.

¹⁰² *Id.*

¹⁰³ Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbigan Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127 (2008).

¹⁰⁴ *Id.* at 187-88 & nn.341-421.

Given the methodological limitations of the existing research on lesbian parenting, as well as research suggesting that dual-gender parenting may be modestly advantageous for children, laws prohibiting same-sex marriage or adoption on the theory that lesbian parenting disadvantages children can (and probably should) pass constitutional muster under the highly deferential rational basis test for judicial review of legislative action. . . .¹⁰⁵

Professor Redding then quotes from the then-leading New York case, *Hernandez v. Robles*: “In the absence of conclusive scientific evidence, the Legislature could rationally proceed on a common-sense premise that children would do best with a mother and father in the home.”¹⁰⁶

On the other hand, Professor Redding adds, “As a matter of sound public policy, however, the extant research fails to support the theory that denying marriage or parenting rights to same-sex couples serves the welfare of the children.”¹⁰⁷ Finally, Professor Redding concludes as follows:

Why, then, do legislators persist so strongly in their efforts to limit lesbian marriage and parenting rights in the face of research data demonstrating that children are not harmed when raised by lesbian parents? Research findings and outcomes will not override the moral emotion of many that homosexual behavior is disgusting and therefore immoral.¹⁰⁸

Presumably even a libertarian constitution would require that no harm to another be shown before lack of any rational basis for legislation so that it might be invalidated.¹⁰⁹ Presumably even libertarians would find a rational basis for legislation that prohibited harm to others such as murder, rape, and incest.¹¹⁰

The problem then in the conflict between the socially conservative constitution and the libertarian constitution is whether there is sufficient evidence to prove any rational basis for governmental legislation or no rational basis for such legislation. Or, to phrase the analy-

¹⁰⁵ *Id.* at 191-92.

¹⁰⁶ *Id.* at 192 & n.422 (citing *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006)).

¹⁰⁷ *Id.* at 192.

¹⁰⁸ *Id.* at 192-93.

¹⁰⁹ *See, e.g.*, Barnett, *Moral Foundations*, *supra* note 6, at 72-73.

¹¹⁰ *Id.*

sis differently, whether the restriction on individual liberty would constitutionally invalidate legislation enacting majoritarian moralism, as has been previously discussed.¹¹¹ Describing the analysis again as Justices Alito, Scalia, and Thomas have, the question may be whether the courts are the appropriate institution to invalidate democratic majority moralist legislation, which limits minorities' liberties. As Justices Scalia in *Windsor* and Thomas in *Lawrence* have suggested, through the political process, future legislation may overturn what later appear to be "silly" laws.¹¹²

Another possible constitutional analysis that might be cited in cases such as *Windsor* is the doctrine of constitutional conditions.¹¹³ This concept appears to have been resuscitated in a revised form by *Citizens United v. FEC*, in which Justice Kennedy cited Justice Scalia's dissent in an earlier case but not Justice Scalia's citation to *Speiser v. Randall*.¹¹⁴ Scalia cited and quoted *Speiser v. Randall* in the earlier case of *Austin v. Mich. Chamber of Commerce*, stating, "[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."¹¹⁵ In *Windsor*, the benefit of course would be the tax benefit of the estate tax marital deduction for property passing to the surviving spouse thereby reducing the taxable federal *estate*. The problem in this analysis is the determination of which constitutional right is forfeited.¹¹⁶ Seemingly,

¹¹¹ See *supra* text accompanying note 36 (discussing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); *supra* text accompanying note 39 (discussing *Lawrence*, 539 U.S. at 571 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

¹¹² See *supra* text accompanying note 55 (quoting *Lawrence*, 593 U.S. at 603 (Scalia, J., dissenting)); *supra* text accompanying note 56 (quoting *Lawrence*, 593 U.S. at 605-06 (Thomas, J., dissenting)).

¹¹³ See Dorocak, *Tax Constitutional Questions*, *supra* note 10, at 195 n.50 (citing Richard A. Epstein, *Judicial Engagement with the Affordable Care Act. Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 933-34 (2012) (lamenting the decline of the doctrine of constitutional conditions); Samuel C. Salganik, Note, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Presumption: Is It Possible to Consistently Identify "Coercive" Pay-or-Play Schemes?*, 109 COLUM. L. REV. 1482 (2009) (citing much of the existing scholarship concerning the constitutional conditions doctrine)).

¹¹⁴ Dorocak, *Political Activity of Tax-Exempt Churches*, *supra* note 8, at 469 & n.102 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

¹¹⁵ *Austin*, 494 U.S. at 680 (Scalia, J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

¹¹⁶ See Dorocak, *Tax Constitutional Questions*, *supra* note 10, at 198-204 & nn.60-93 (attempting to utilize *Citizens United* and *Speiser* to question the constitutionality of "Obamacare").

the resort would be to an unenumerated natural liberty right, at least somewhat akin to Justice Kennedy's use of such liberty rights in *Lawrence* and *Windsor*. If the existence of such liberty rights is accepted, at least this analysis seemingly does not utilize a scale of tiers of legislative rationales, but instead adopts an approach more similar to Professor Barnett's where "the government would have the burden to justify its restrictions on liberty" ¹¹⁷

Phrasing the conflict between the libertarian constitution and the socially conservative constitution in these various ways may help more sharply define the conflict. Another way that this conflict is styled is whether individual liberty is always paramount or the will of the majority expressed through the political process should rarely be overturned by the least democratic institution of the courts. All of this phrasing may suggest that, rather than searching in still-conflicting and developing scientific research for rational basis for legislation, the answer to the conflict of the two constitutions may be in the original intent or meaning of the Framers of the Constitution for the roles of the different branches of government. The next section of this Article will take up some of that analysis of original meaning and intent particularly by asking whether or not gay marriage is inevitably constitutional in the libertarian constitution.

V. IS GAY MARRIAGE INEVITABLY CONSTITUTIONAL IN THE LIBERTARIAN CONSTITUTION: ORIGINAL INTENT OR ORIGINAL MEANING?

The issue which framed this paper—whether the Constitution is only libertarian and not socially conservative—may reveal that the decision on the constitutionality of DOMA's definition of marriage to exclude same-sex couples really comes down to a question of constitutional philosophy. There appear to be at least two inquiries at play: (1) whether the courts or the legislatures are the better protectors of liberty and, (2) whether or not liberty for the minority should be valued above societal majoritarian norms.

Professor Barnett offers a constitutional interpretation concerning the police power of the states and whether that power includes the power to regulate private morality from a libertarian constitutionalist

¹¹⁷ See *id.* at 204-05 & nn.95-96 (citing Barnett, *The Presumption of Liberty*, *supra* note 5, at 43).

position.¹¹⁸ Seemingly, a necessary prerequisite to democratic majoritarian moralism regulating private morality and restricting individual liberty would be the fact that the police power extends to such regulation. Professor Barnett believes that the text of the Constitution at least implicates police power for the states:

While a police power of states is nowhere expressed in the Constitution, its existence may well be implicated by what the Constitution says. In particular, the Fourteenth Amendment’s guarantee that no state shall “deny any person within its jurisdiction the equal protection of the laws” may presuppose a state power of “protection.”¹¹⁹

Professor Barnett continues with his explanation of assumptions about the police powers of the states versus their textual support at least by implication in the Constitution:

With the enactment of the Fourteenth Amendment’s new restrictions on states, there arose an imperative to define the scope of their police powers more clearly. The same year that the Amendment was enacted, Justice Thomas Cooley of the Michigan Supreme Court and a professor of law at the University of Michigan published a treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the United States of the American Union.

. . . .

After Cooley, the leading nineteenth-century theorist of the police power was Professor Christopher Tiedeman. In his 1886 *Treatise on the Limitations of Police Powers in the United States*, Tiedeman began his explanation of the police powers and its limits with the concept of “private” rights. . . . According to Tiedeman, these private rights that are recognized in civil society are none other than natural rights. “They belong to man in a state of nature, they are natural rights, rights recognized and existing in the law of reason.”¹²⁰

¹¹⁸ See Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 Nw. U. L. Rev. 615, 653-56 & n.124 (2009) [hereinafter Barnett, *The Misconceived Assumption*].

¹¹⁹ *Id.* at 654 & n.153.

¹²⁰ *Id.* at 654-55 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTRUCTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (Little, Brown, & Co. 1868)); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 1 (F.H. Thomas Law Book Co. 1886)).

Professor Barnett continues as follows:

Government protects and develops these rights by preventing people from violating the rights of others: "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. . . . The power of the government to impose this restrict is called the Police Power."¹²¹

Professor Barnett further explains the constitutional implication of the police power with the statement that he believes that it does not include the regulation of private morality:

There are two assumptions with which I am concerned. The first is the assumption that the scope of the police power includes the protection of individual rights. The second is that the police power also includes the regulation of private morality.

That the scope of the police power includes the protection of individual rights seems consistent with, if not implicated by, the text of the Constitution. First and foremost, it is consistent with the original meaning of the Ninth Amendment's implication that there are natural individual liberty rights that shall not be denied or disparaged. Second, it is consistent with the Privileges or Immunities Clause of the Fourteenth Amendment, which extends federal jurisdiction to protect these unenumerated natural rights or "immunities" from the states. In addition, the Fourteen Amendment's prohibition against the state "denying to any person within its jurisdiction the equal protection of the laws" implicates the existence of an underlying duty of a government to provide the protection of the laws.

The historical claim that the police power of states was assumed also to include a power to regulate morality is both far more problematic and much more complex.¹²²

¹²¹ Barnett, *The Misconceived Assumption*, *supra* note 118, at 656 (citing TIEDMAN, *supra* note 120, at 1-2).

¹²² *Id.* (alteration in the original). Professor Barnett has written much more on the unenumerated rights of the Ninth Amendment. See, e.g., Barnett, *The Presumption of Liberty*, *supra* note 5. Professor Barnett would likely enjoy the support of former Supreme Court Justice Goldberg who wrote concurring in *Griswold v. Connecticut*, 381 U.S. 479, 490 (1965) ("[The] statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."). On the other hand, Professor Barnett has much about which to

Finally, Professor Barnett concludes rather strongly that, although the police power of the states exists to protect individual liberty rights, a constitutional construction of it does not extend to regulating private morality, which does not violate or threaten the rights of other:

To sum up, while the existence of a duty by states to protect individual rights may be implicated from what the text of the Constitution says, the exact scope of this power of protection is not textually fixed and is open to construction. There is nothing in the text of the Constitution that intimates a power of the states to regulate private morality. Whatever one concludes about the legitimacy of punishing persons for engaging in conduct that cannot be characterized as violating or threatening the rights of others, it cannot be claimed that such a power is part of the original meaning of what the Constitution either says or implies. Therefore, the bare fact that some or all persons alive when the Fourteenth Amendment was enacted would have assumed that morals legislation was consistent with the Privileges or Immunities Clause does not make it so. To reach this conclusion would require the sort of normative reasoning in which Cooley, and especially Tiedeman, engaged. It is not a matter to be settled historically as a matter of original meaning.¹²³

In concluding his article, Professor Barnett explains that there are two normative bases for originalists, as there are for other constitutional theorists: “Those who based the legitimacy of the written constitution on the consent of the governed and those who believed the legitimacy of the constitution is founded on a justice or natural rights theory.”¹²⁴ For those who base the legitimacy of the constitution on consent, Professor Barnett believes that they are likely to construe such a constitution in light of prevailing background assumptions such as that the police power includes legislating morality.¹²⁵ For those who base the legitimacy of a constitution on a justice or natural liberty

quarrel with Justice Scalia concerning the Ninth Amendment. See, e.g., Barnett, *Scalia's Infidelity: A Critique of "Faint Hearted" Originalism*, 75 U. CIN. L. REV. 7, 11 & n.17 (“In the case of *Troxel v. Glanville*, he dismissed the unenumerated rights ‘retained by the people’ to which the Ninth Amendment expressly refers as subject only to the protection of majorities in legislature bodies.”).

¹²³ Barnett, *The Misconceived Assumption*, *supra* note 118, at 658.

¹²⁴ *Id.* at 660-61.

¹²⁵ *Id.* at 661.

rights theory, Professor Barnett believes that such “originalism is a commitment to what a written constitution says and implies—nothing more nothing less.”¹²⁶

It may well be that the social conservatives are consent-based constitutionalists who believe, as Justice Scalia, that the police power of the states includes the power to legislate majoritarian moralism in even private spheres so as to regulate liberty. This viewpoint is based on assumptions about the prevailing historical background concerning the police power.¹²⁷ Surely, Justice Scalia and Professor Alvare could find rational basis for legislation limiting same-sex marriage in the threat to and the threat of harm to children in same-sex households. Also, Professor Alvare has argued against and critiqued the same finding of harm in support of same-sex marriage in the majority's opinion in *Windsor v. United States*.¹²⁸ However, Professor Regnerus's research, suggesting there might be harm to children in same-sex family structures, was met with much criticism. In fact, critics on both the right and left suggested that Professor Regnerus's research actually suggested that it was the instability in households where a parent had a same-sex relationship, when compared to the stability in opposite-sex parent households, that might contribute to the harm to the children.¹²⁹

Professor Barnett in his previously discussed article on originalism, when quoting from nineteenth-century Professor Tiedeman, explained the difference between crime and vice:

There he distinguished between a crime, which is “a trespass upon some right, public or private,” and a vice, which “consists in an inordinate, and hence immoral, gratification The primary damage is to one's self.”¹³⁰

On this issue of private vice versus public crime, Professor Barnett has quoted elsewhere no lesser authority than Thomas Aquinas:

¹²⁶ *Id.*

¹²⁷ See, e.g., *United States v. Windsor*, 113 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (citing *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (“As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms.”))

¹²⁸ See Alvare, *supra* note 97.

¹²⁹ See Richwine, *supra* note 94.

¹³⁰ Barnett, *The Misconceived Assumption*, *supra* note 118 (citing TIEDEMAN, *supra* note 118, at 149).

Now human laws framed for a number of human beings, the majority of which are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the most grievous vices, from which it is possible for the majority to abstain, and *chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits murder, theft and the like.*¹³¹

CONCLUSION

All of this discussion of constitutional interpretation concerning any sort of constitutionally rational basis for legislation, whether from a libertarian or socially conservative perspective, seems to presuppose that harm to another, for example, the children, must be found or private conduct cannot be regulated or prohibited due to a violation of liberty rights. An alternate rationale is advanced by Justices Scalia and Alito dissenting in *Windsor*. They suggest that protection of federal fiscal resources could be a rationale supporting DOMA's definition of marriage and that DOMA might be unconstitutional under an equal protection argument.¹³² That is, how does the legislature constitutionally decide on the apportionment of benefits such as the marital deduction for estate tax at issue in *Windsor*? Here, the suggestion is that it may not be possible to show harm to children raised in same-sex households or to distinguish between same-sex and opposite-sex couples for purposes of enjoying federal benefits such as the estate tax marital deduction. To state that excluding same-sex couples from a federal benefit—such as the marital deduction for estate tax—protects fiscal resources may presuppose the answer that excluding same-sex couples does not violate equal protection. Therefore, under a deferential rational basis review, equal protection would not be violated. But the application of this standard defeats the desire of *Windsor* and supporters for a heightened scrutiny of DOMA and Justice Kennedy's fusing of federalism, states' rights to define marriage, equal protection, due process, and liberty rights.¹³³

¹³¹ Barnett, *Justice Kennedy's Libertarian Revolution*, *supra* note 5, at 38 & n.52 (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA*, in *GREAT BOOKS OF THE WESTERN WORLD* 232a (Robert Hutchins ed., Encyclopedia Britannica 1952) (emphasis added)).

¹³² See *United States v. Windsor*, 133 S. Ct. 2675, 2717, 2720 (2013) (Alito, J., dissenting).

¹³³ See *id.* at 2682-96.

From a pragmatic and practical standpoint, a position which tax professors and practitioners have been said to occupy,¹³⁴ it is more likely that the courts have protected individual liberty rights than legislatures. For example, in an analogous case, *Loving v. Virginia*, the Supreme Court held unconstitutional a statute barring marriages across racial lines.¹³⁵ Perhaps the Supreme Court is not experiencing a libertarian revolution, but rather an evolution, as both sides of the political spectrum have suggested. Dale Carpenter has stated, “[t]he Court rarely strays far from a national consensus on any given issue I cannot think of another time the Court has done that in modern times, with the instructive and chastening exception of *Roe v. Wade*.”¹³⁶ On the other end of the political spectrum, William Saletan has suggested that, from Professor Regnerus’s research, it might be possible to conclude that same-sex marriage should be favored for family stability: “[t]he left’s enlightenment about sexual orientation can be married to the right’s wisdom about family values.”¹³⁷ Professor Redding also suggested that the psychology of disgust, which may form the basis of some intuitive moral reasoning, may have served a purpose at one time.¹³⁸ Thus, it is possible that social conservatism has and will continue to provide some societal benefits. Perhaps the chief contribution of Professor Tribe on *The Constitutional Inevitability of Same-Sex Marriage* in his aptly titled article is that not only are public opinion polls now showing a slight majority favoring same-sex marriage, but also that the younger generation aged 18 to 34 favors gay marriage in a 2011 poll by 70%.¹³⁹ This statistic validates Dale Carpenter’s observation that “[t]he Court rarely strays far from rational consensus on any given issue. . . .”¹⁴⁰

In the film and television production of *Requiem for a Heavyweight*, there is no doubt that prize fighter Mountain has fought many

¹³⁴ See Dorocak, *Recent Constitutional Questions*, *supra* note 8, at 18, 20.

¹³⁵ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹³⁶ Dale Carpenter, *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 81 (2004) cited in Dorocak, *Same-Sex Couples*, *supra* note 8 and Dorocak, *Recent Constitutional Questions*, *supra* note 8.

¹³⁷ Saletan, *supra* note 94.

¹³⁸ Redding, *supra* note 103, at 190-91.

¹³⁹ Laurence H. Tribe and Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 479 & n.29 (citing Michael Klarman, *Why Gay Marriage is Inevitable*, L.A. TIMES (Feb. 12, 2012), <http://articles.latimes.com/2012/feb/12/opinion/la-oc-klarman-gay-marriage-and-the-court-2012.0212>).

¹⁴⁰ Carpenter, *supra* note 136, at 83.

a good fight. Still trainer and manager Maishe says to him, “I figure you owe me. What do you figure?”¹⁴¹

¹⁴¹ REQUIEM FOR A HEAVYWEIGHT, (Columbia Pictures Corp. 1962); REQUIEM FOR A HEAVYWEIGHT (CBS Television broadcast Playhouse 90 1956).