

**NOTE****FEDERALISM, DUE PROCESS, AND EQUAL PROTECTION:  
STEREOSCOPIC SYNERGY IN *BOND* AND *WINDSOR****Lide E. Paterno*\*

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## INTRODUCTION

FEW constitutional themes have galvanized popular political factions—and, consequently, have been perceived to be in natural tension with each other—as much as federalism, on one side, and the due process and equal protection doctrines, on the other. Although the concepts are not inherently conservative or liberal, they have assumed these polarized and competing public associations through their practical interactions over the twentieth century, often serving as both the targets and the weapons of charges of judicial activism. However, the U.S. Supreme Court’s recent opinions in *United States v. Windsor*<sup>1</sup> and *Bond v. United States*,<sup>2</sup> read together, reconcile these two seemingly disparate constitutional themes. Specifically, Justice Kennedy’s writings in both cases suggest an ironic conservative salvaging of the fundamental interest strand of the equal protection doctrine, a legal concept of which conservatives historically have been quite skeptical. In this modern take on

<sup>1</sup> 133 S. Ct. 2675 (2013).

<sup>2</sup> 131 S. Ct. 2355 (2011). The Court issued a second opinion in the *Bond* case in 2014, see *Bond v. United States*, 134 S. Ct. 2077 (2014), but this Note’s attention rests on the Court’s earlier standing decision.

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the doctrine that first gained popularity under the Warren and Burger Courts but has attracted little attention since, an individual's fundamental interest in the rights created by her state within its reserved powers is fused with equal protection concerns to motivate a heightened tier of judicial scrutiny.

Academics, judges, and popular commentators continue to struggle to understand the confluence of federalism, liberty, and equal protection in the *Windsor* decision. This new application of an old analysis helps to explain *Windsor*'s rationale. In overturning Section 3 of the Defense of Marriage Act ("DOMA"),<sup>3</sup> the Court implicitly pointed to the "stereoscopic synergy"<sup>4</sup> provided by the convergence of the individual's interest in her state's traditional right to regulate marriage and the individual's membership in a quasi-suspect class seeking equal treatment under the law. This Note argues that such stereoscopic synergy may serve as a value-free, representation-reinforcing mechanism for the judiciary to correct defects in the political process.<sup>5</sup> Accordingly, conflating these liberal and conservative understandings of judicial review advances a

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<sup>3</sup> Section 3 of DOMA provided:

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

Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), invalidated by *Windsor*, 133 S. Ct. 2675. Hereinafter, this Note will refer to "Section 3 of DOMA" and "DOMA" interchangeably since this Section was the only provision in the law at issue in the case.

<sup>4</sup> Professor Pamela Karlan first applied the terms "stereoscopic" and "synergy" to constitutional analysis of the substantive due process and equal protection principles. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *McGeorge L. Rev.* 473, 474 (2002). Advocating for an approach in which the two constitutional principles inform each other, Karlan wrote, "sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself." *Id.*

<sup>5</sup> Professor John Hart Ely famously advocated a process theory of equal protection whereby the Fourteenth Amendment serves to empower courts to correct flaws in the political process that emerge when legislators fail to perceive overlapping interests with minorities. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 81–88, 153 (1980). In this model, Ely articulates a framework for understanding Justice Stone's well-known concern for "discrete and insular minorities" in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Ely, *supra*, at 75–77. This Note will argue that courts should correct defects in the political process that occur when the federal government's discriminatory recognition of validly enacted state regulations inadequately accounts for minorities' interests.

new analytical framework that disrupts the popular culture's perception of federalism and due process-equal protection as necessarily conflicting doctrines.

This Note will proceed in four Parts. Part I will examine whether the judicial principles of federalism and due process-equal protection<sup>6</sup> are necessarily competing concepts. Although singularly conservative or liberal ideology is not inherent to these legal terms, their political and historical interactions throughout the last century have yielded the popular perception that they are in conflict with each other. Fueling this perception are the frequently repeated charges of judicial activism, with the concepts of federalism and due process-equal protection serving as both the objects of such criticism and the means by which the criticism is deployed. This apparent tension was made particularly evident in the Court's brief use of the fundamental interest-equal protection doctrine, an analysis cheered by liberals and highly criticized by conservatives.

Part II will discuss the Supreme Court's fusion of federalism, due process, and equal protection principles in *Windsor*. None of these constitutional arguments singularly suffices to explain the Court's holding, and commentators and lower courts have struggled to offer a satisfying rubric underpinning the decision.

Part III will propose that the *Windsor* holding actually reflects a new application of the old fundamental interest-equal protection doctrine, based largely on the standing reasoning in *Bond*. In *Bond*, the Court implied that an individual has a personal legal interest in the rights created by her state's regulation in spheres traditionally reserved to the states. This Note will argue that this fundamental interest generates particular

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<sup>6</sup> Of course, due process and equal protection are not the same concept. This Note does not mean to elide the distinctions between these constitutional principles or to suggest that they are interchangeable. Consider, for example, Professor Sydney Morgenbesser's famous testimony about alleged police brutality: "They beat me up unjustly, but since they did the same thing to everyone else, it was not unfair." George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 *Lewis & Clark L. Rev.* 547, 548 (2005) (internal quotation marks omitted) (recounting Morgenbesser's anecdote to support a particular conception of justice and equality wherein "[j]ustice is about what we deserve—individually" and "[f]airness is about the way we are treated in comparison to others"). At the same time, many scholars have extolled the reinforcing benefits of doctrines based on liberty and equal protection. See, e.g., Rebecca Brown, *Liberty, The New Equality*, 77 *N.Y.U. L. Rev.* 1491, 1494 (2002) (describing liberty as "the traditional companion of equality in rights discourse"). Because contemporary popular culture often places advocacy of both of these principles opposite advocacy of federalism principles, this Note will tend to refer to due process and equal protection as a collective "set" of concepts, often cited as "due process-equal protection."

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stereoscopic synergy with equal protection considerations because the liberties that emerge from federalism enhance the representation of minorities' interests in the political process. This representation process is threatened when federal law refuses to recognize a validly enacted state regulation based on the classification of the affected group, triggering the need for value-free judicial review. The Court's *Windsor* analysis leaned on this fundamental interest to elevate the scrutiny it applied to DOMA, reconciling federalism, due process, and equal protection principles in striking down Section 3 of the Act.

Part IV will explore how this analysis might bear on other legal contexts in which the federal government discriminates in its recognition of state rights. Application of the new federalism-based fundamental interest-equal protection doctrine to challenge two sets of restrictions on either end of the political spectrum—prohibitions on medical marijuana use and limits on private gun ownership—blurs the popular perception of federalism and due process-equal protection as strictly conservative or liberal notions. A few obvious criticisms, however, cast doubt on the future impact of this approach, including the legal realists' argument that this new framework simply enables the same judicial activism that first put these constitutional principles in popular conflict with each other.

#### I. FEDERALISM AND DUE PROCESS-EQUAL PROTECTION: COMPETING CONCEPTS?

##### A. *Tension in Popular Constitutionalism*

Several popular commentators have noted the increasingly partisan nature of U.S. political culture.<sup>7</sup> While one may question whether the current political climate is any more charged than in past generations,<sup>8</sup> one hardly needs to argue the descriptive claim that popular politics

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<sup>7</sup> See, e.g., Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. Times FiveThirtyEight Blog (Dec. 27, 2012, 9:46 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/> (arguing that redistricting has led to an intensified partisan climate).

<sup>8</sup> See, e.g., Leslie Bennetts, *America, the Dysfunctional*, Daily Beast (Aug. 15, 2011, 12:19 AM), <http://www.thedailybeast.com/articles/2011/08/15/why-american-politics-and-government-has-always-been-dysfunctional.html> (quoting historian William F. Connelly, Jr.'s statement that "[t]he argument that partisanship is worse today than ever before falls flat on its face if you look back historically").

have seeped into the judiciary,<sup>9</sup> and, in turn, certain judicial themes have seeped into popular political discourse. No two sets of constitutional concepts seem to have captured the attention of contemporary political factions and motivated their bases more than notions of federalism, on one hand, and guarantees of due process and equal protection, on the other.

Held as badges of membership and tools for ideological advancement by popular conservative and liberal political groups alike, these constitutional concepts appear to exist in cultural silos that only interact in competition with each other. For example, various Tea Party Patriot groups have formed a national conservative grassroots network based on “Core Values” that include “constitutionally limited government,” arguing that “[g]overning should be done at the most local level possible.”<sup>10</sup> Conversely, MoveOn, a collection of affiliated entities seeking to “lead, participate in, and win campaigns for progressive change,”<sup>11</sup> presents at least forty-six petitions on its website that reference the term “equal protection” to demand a range of political action, from reauthorization of the Violence Against Women Act to repeal of Stand Your Ground laws.<sup>12</sup> This volume contrasts starkly with the just ten petitions on the MoveOn website that reference the term “states’ rights,”<sup>13</sup> three petitions that reference “limited government,”<sup>14</sup> and one petition that references “federalism”<sup>15</sup>—in most instances, making the references only to negatively describe the purported rationale of the laws or policies the petitions oppose.<sup>16</sup>

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<sup>9</sup> See, e.g., Jonathan Remy Nash, *Prejudging Judges*, 106 *Colum. L. Rev.* 2168, 2184 (2006) (discussing the close scrutiny of the politics of any nominee to the Supreme Court in the modern era).

<sup>10</sup> See, e.g., About, Phila. Tea Party Patriots, <http://www.philateapartypatriots.com/About.html> (last visited Sept. 4, 2014).

<sup>11</sup> The MoveOn “community” encompasses both a nonprofit organization and a federal political action committee (“PAC”). What is MoveOn?, MoveOn.org, <http://front.moveon.org/about/> (last visited Nov. 1, 2013).

<sup>12</sup> Petitions, MoveOn.org, <http://petitions.moveon.org/find/> (enter “equal protection” into search box) (last visited Sept. 4, 2014).

<sup>13</sup> Id. (enter “states’ rights” into search box).

<sup>14</sup> Id. (enter “limited government” into search box).

<sup>15</sup> Id. (enter “federalism” into search box).

<sup>16</sup> For example, a petition urging repeal of an immigration law in Alabama declares that “[t]he call for states rights’ [sic] is a time-honored tradition for laws that oppress and disenfranchise people of all types in the southern United States.” Petition: Accept the 11th Circuit’s Ruling on HB 56, MoveOn.org, <http://petitions.moveon.org/sign/accept-the-11th-circuits/> (last visited Nov. 1, 2013). A petition requesting that Arizona extend certain bene-

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Indeed, it is telling that the two legal organizations most readily identified with conservative and liberal legal positions in popular culture, the Federalist Society and the American Civil Liberties Union (“ACLU”), have adopted the respective constitutional concepts, federalism and liberty, in their names.<sup>17</sup> Even academic commentaries largely project this perceived automatic dichotomy between the two constitutional notions. For example, Professor Calvin Massey writes in his mainstream legal casebook that “[a]ny discussion of the merits of federalism . . . must be tempered by the preemptive effect of fundamental constitutional rights. . . . The effect on federalism is that constitutional liberties negate the preferences of local . . . majorities.”<sup>18</sup>

### *B. Theoretical Reconcilability*

The popular perception of these two sets of constitutional themes as opposing concepts and competing partisan tools confuses the reality that federalism and due process-equal protection, as principles divorced from their political affiliations, could, and often do, reinforce each other to serve both conservative and liberal ends. For example, federalism and equal protection principles both restrain excessive government action and stunt the state’s ability to enact dramatic change, typically considered a conservative interest. Federalism advances this goal by reserving certain government functions to local entities, thereby placing a check on the national government’s power. “[P]recisely because the states are

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fits to same-sex partners of state employees characterizes the state’s decision not to do so as “yet another instance of Arizona lawmakers promoting bigotry and a conservative ‘state’s [sic] rights’ agenda at the expense of the citizens they are sworn to serve.” Petition: Governor Brewer, Respect the Dignity of All Arizonans, MoveOn.org, <http://petitions.moveon.org/sign/governor-brewer-respect/> (last visited Nov. 1, 2013). A petition in Oregon demands full disclosure of a group, the American Legislative Exchange Council, that the petitioner suspects is not complying with state law, describing the organization as a “‘nonpartisan’ group for ‘conservative state lawmakers’ interested in ‘limited government, free markets, federalism, and individual liberty.’” Petition: ALEC Accountability and Disclosure, MoveOn.org, <http://petitions.moveon.org/sign/alec-accountability-and/> (last visited Nov. 1, 2013).

<sup>17</sup> Nadine Strossen, former president of the ACLU, has commented on the popular perception of the two organizations: “For those who don’t really know what they do, the ACLU can be shorthand for the liberal agenda and the Federalist Society can be shorthand for the conservative legal agenda.” Michael A. Fletcher, What the Federalist Society Stands For, Wash. Post (July 29, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072801779.html> (internal quotation marks omitted).

<sup>18</sup> Calvin R. Massey, *American Constitutional Law: Powers and Liberties* 132 (3d ed. 2009).

governmental bodies that break the national authorities' monopoly on coercion[, federalism] constitute[s] the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression."<sup>19</sup> Adherence to equal protection norms furthers this same goal because public sentiment inherently regulates any broadly applied treatment in a democratic system. As Justice Jackson once expounded, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."<sup>20</sup>

Similarly, both federalism and equal protection principles accommodate the government's role in fostering pluralistic practices that may ultimately counter majoritarian tendencies, typically thought to be a liberal interest. Federalism cultivates such diversity by allowing states and local governments to adopt varying policies to appeal to a range of differing preferences and ideologies, expanding citizen choice through competition among jurisdictions.<sup>21</sup> As Justice Brandeis famously recognized in his nod to the state laboratory model, federalism also enables disruption of the status quo through its allowance of state experimentation, which may yield new practices adopted elsewhere in the nation.<sup>22</sup> Equal protection guarantees advance pluralism by limiting the oppressive effects of "mischiefs of faction,"<sup>23</sup> especially when a faction includes a majority, and by ensuring "sufficient incentive for all such groups to advance their agendas."<sup>24</sup> Subsequent Sections of this Note will build on these two ex-

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<sup>19</sup> Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *Sup. Ct. Rev.* 341, 389; see also Erwin Chemerinsky, *The Values of Federalism*, 47 *Fla. L. Rev.* 499, 526–27 (1995) ("For example, it might be better to have most policing done at the local level and avoid a national police force because of the dangers to civil liberties if there is a capture by autocratic rulers at the national level.").

<sup>20</sup> *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

<sup>21</sup> See, e.g., Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J.L. & Econ.* 23, 33–35 (1983) (discussing how interstate competition may lead to better regulation because the possibility of people's and corporations' movements between the states pressures governments to enact laws that are beneficial to their respective populations).

<sup>22</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system 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.").

<sup>23</sup> *The Federalist* No. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>24</sup> William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 *U. Pa. J. Const. L.* 1239, 1249 (2009).



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amples with a third, examining how the two sets of constitutional principles can work together to promote individual liberty.

### *C. Historical Interactions*

Given this theoretical reconcilability, why have federalism and due process-equal protection come to stand for necessarily conflicting concepts? The historical context of these principles' practical interactions likely explains the popular perception of tension between them. Politically fraught events attached charges of judicial activism to the decline of federalism principles in the first half of the twentieth century, the emergence of due process and equal protection doctrines in the second half of the century, and the resurgence of structural arguments over the past two decades.

#### *1. Decline of Federalism*

Justice O'Connor aptly coined "discerning the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law."<sup>25</sup> Fierce disagreement over whether the states or the national government would actually be sovereign in the constitutional system, and over whether a truly federalist system was even possible, was one of the hallmarks of the ratification period.<sup>26</sup> The framers settled on a notion of federalism whereby, "Within its

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<sup>25</sup> *New York v. United States*, 505 U.S. 144, 149 (1992). This Note largely focuses on the nature of the federalism debate, rather than on the equally important question of which organ of government should resolve the issues within that debate. While this Note assumes a modest role for the courts, there are several compelling arguments for diminished judicial review in this respect. For example, some academics argue that "the national political process in the United States—and especially the role of the states"—both in the composition of Congress and in the selection of the President, makes the country "intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558 (1954). Part III of this Note develops a framework in which the judiciary's role is motivated by defects in this political process. According to this proposed framework, courts may apply limiting principles based on federalism to correct these flaws in the political process that inhibit the fair representation of minorities' interests at a national level.

<sup>26</sup> For example, Thomas Tredwell, an Anti-Federalist, argued: "The idea of two distinct sovereigns in the same country, separately *possessed* of sovereign and supreme power, in the same matters, at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference." 1 *The Debates, Resolutions, and Other Proceedings, in Convention, on the Adoption of the Federal Constitution* \*6 (Jonathan Elliot ed., 1827) (Supp.). At the same time, Alexander Hamilton, a Federalist, cautioned

sphere the general government is a complete national government, but that sphere is limited; and within their own spheres the states act as constitutionally independent entities.”<sup>27</sup> As James Madison described in his urging for its adoption, “The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both.”<sup>28</sup>

The Supreme Court spent several of its first decades locating fault lines in that composition. Since *McCulloch v. Maryland*'s assertion of “implied powers” granted to a supreme federal government<sup>29</sup> and *Gibbons v. Ogden*'s recognition of Congress's right to regulate interstate commerce,<sup>30</sup> federalism questions occupied a major role in constitutional jurisprudence throughout the nineteenth century. A doctrine of “dual federalism” initially predominated, whereby the respective spheres of equal sovereignty within the state and the national governments were understood to be in constant tension.<sup>31</sup> However, this view waned as the Supreme Court, with a few notable exceptions,<sup>32</sup> “largely facilitated and validated the expansion of federal power” into the twentieth century.<sup>33</sup> From the New Deal through the 1970s, “the political branches of the federal government acted on the assumption, invariably confirmed by the Supreme Court, that there is no ‘legal substance, [no] core of constitutional right’ limiting national power in the interests of federalism.”<sup>34</sup>

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about “the political monster of an *imperium in imperio*.” The Federalist No. 15, at 93 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>27</sup> 1 Herbert Storing, *The Complete Anti-Federalist* 32 (1981).

<sup>28</sup> The Federalist No. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>29</sup> 17 U.S. (4 Wheat.) 316, 406 (1819).

<sup>30</sup> 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>31</sup> Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950).

<sup>32</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (holding that child labor laws involving products not entering interstate commerce exceeded congressional reach); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13–14 (1895) (holding that manufacturing was a local activity not subject to congressional regulation).

<sup>33</sup> Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 Harv. J.L. & Pub. Pol'y 761, 763 (2008); see, e.g., *Houston E. & W. T. Ry. Co. v. United States* (The Shreveport Rate Case), 234 U.S. 342, 350–51 (1914) (holding that the federal government can regulate purely intrastate commerce when such regulation is necessary to regulate interstate commerce); *Champion v. Ames* (Lottery Case), 188 U.S. 321, 354–55 (1903) (holding that Congress has the power to regulate the transport of goods in interstate commerce).

<sup>34</sup> H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 634 (1993) (quoting Charles L. Black, Jr., *Perspectives in Constitutional Law* 29 (rev. ed. 1970)); see, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (declaring

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The court explicitly indicated as much in the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*: “State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>35</sup>

## 2. *Federalism Confronted by Due Process and Equal Protection*

As federalism principles lost favor on the bench, the Court increasingly articulated “judicially created limitations” on *state* power through strong opinions concerning the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>36</sup> The concept of legal due process can be traced to the earliest constitutional forms,<sup>37</sup> but the Court molded substance onto the Due Process Clause at various points during the twentieth century.<sup>38</sup>

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the NLRB Act constitutional, effectively ending any resistance to New Deal legislation and expanding Congress’s power under the Commerce Clause).

<sup>35</sup> 469 U.S. 528, 552 (1985).

<sup>36</sup> Section 1 of the Fourteenth Amendment reads, in part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Through an incorporation debate that is more extensive than the scope of this Note, the Court has applied several provisions of the Bill of Rights to the states by way of the Due Process Clause of the Fourteenth Amendment. See Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 363–74 (17th ed. 2010).

Of course, the Court also imposed limits on federal power: Through “reverse incorporation,” the Equal Protection Clause has been applied to the federal government by way of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[D]iscrimination may be so unjustifiable as to be violative of due process.”).

<sup>37</sup> Magna Carta prohibited the taking or prosecution of any free man except *per legem terrae* (“by the law of the land”). See William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 375 (2d ed. 1914). This prohibition is recited in the 1628 Petition of Right, followed with the Old English phrase, “due pcesse of Lawe.” 5 *Statutes of the Realm* 23, 24 (1625–1680). Magna Carta similarly contains a precursor to the Equal Protection Clause. See McKechnie, *supra*, at 398 (“[Chapter 40 of Magna Carta] has been interpreted as a universal guarantee of impartial justice to high and low.”).

<sup>38</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well . . .”). This is not to imply that the Court’s use of a substantive due process doctrine was uniform throughout the twentieth century. Rather, as explained more thoroughly in this Section, the doctrine generally waxed in the first third of the century (that is, the *Lochner* era, see *infra* note 45 and accompanying text), waned during the New Deal era, and waxed again in the second half of the century.

The Court asserted a number of rationales to explain why particular liberty interests are fundamental and therefore “protected by the Federal Constitution from invasion by the States”:<sup>39</sup> because the rights are “implicit in the concept of ordered liberty”;<sup>40</sup> because the rights are “deeply rooted in this Nation’s history and tradition,”<sup>41</sup> “in the traditions and conscience of our people,”<sup>42</sup> or in the “notions of justice of English-speaking peoples”;<sup>43</sup> and because failing to protect the rights would “shock[] the conscience.”<sup>44</sup> While the Court’s brief foray into the concept of economic rights eventually faltered under accusations of judicial activism,<sup>45</sup> the Court’s discussion of “penumbras” and “emanations” in *Griswold v. Connecticut*,<sup>46</sup> the landmark case establishing a framework for personal rights, ignited similar charges.<sup>47</sup> To many conservatives, the decision—and the modern substantive due process doctrine it foreshadowed—posed an affront to state legislatures’ (and state courts’) power to freely regulate in areas over which the states had previously been considered sovereign.<sup>48</sup> Any restraint the Court had exercised in not explic-

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<sup>39</sup> *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”).

<sup>40</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>41</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>42</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>43</sup> *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

<sup>44</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>45</sup> See, e.g., Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 *Law & Hist. Rev.* 249, 250 (1987) (explaining that *Lochner v. New York*, 198 U.S. 45 (1905), and its line of cases are “still shorthand in constitutional law for the worst sins of subjective judicial activism”).

<sup>46</sup> 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

<sup>47</sup> See, e.g., Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 32–33 (1977) (“The Supreme Court’s suspect classifications and fundamental interests decisions have both come under attack, from within and without the Court, on the ground that they amount to the same sort of judicial usurpation of the legislative role that was abandoned when the Court closed the book on economic due process.”).

<sup>48</sup> The majority opinion in *Griswold* was not itself strictly based on the Due Process Clause; in fact, Justice Douglas explicitly “decline[d] that invitation” because of its association to the *Lochner* era, and instead recognized a “zone of privacy created by several fundamental constitutional guarantees.” *Griswold*, 381 U.S. at 482–85. Conversely, Justice Harlan’s concurrence expressly relied on the Due Process Clause. *Id.* at 500 (Harlan, J., concurring) (“While the relevant inquiry may be aided by resort to one or more of the provi-

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itly relying on substantive due process in *Griswold*—and, in turn, any measure of restraint federalism-minded critics may have practiced—disappeared just a few years later when, in *Roe v. Wade*, the Court expressly declared that the Due Process Clause protects a right to privacy.<sup>49</sup>

The Court's first real effort to enforce the Equal Protection Clause similarly took place in a political and legal climate in which the issue of states' rights stood front and center. While the Court flexed its muscle in a few early cases to strike down state laws that discriminated against African Americans,<sup>50</sup> the Court's tepid approach to equal protection claims through the first half of the twentieth century seemed to fit Justice Holmes's famous description of such claims as "the usual last resort of

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sions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."). Nevertheless, *Griswold* is now regarded as the beginning of the substantive due process phase of the Court's constitutional jurisprudence. Part of the reason for this may be that Justice Black devoted much of his dissent to criticizing Harlan's substantive due process argument, a criticism that carried particular weight because of its direct inference to the rejected *Lochner* era. Black tied this criticism to his view that the Court's decision, finding a "right to privacy," infringed upon the powers of state governments:

The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.

*Id.* at 513 (Black, J., dissenting). Scholars have similarly pointed out this tension between the Court's development of a robust substantive due process doctrine and limiting principles based on federalism. Professor Lucas Powe, for example, wrote that, "By nationalizing rights and reducing federalism to an empty concept . . . the Warren Court reflected the view that states were impediments to the achievement of a better, fairer America." Lucas A. Powe, Jr., *The Warren Court and American Politics* 494–95 (2000).

<sup>49</sup> 410 U.S. 113, 164, reh'g denied, 410 U.S. 959 (1973) ("A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.").

<sup>50</sup> See, e.g., *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641–42 (1950) (striking down Oklahoma's restrictions on African Americans' attendance at graduate school with white students as violations of the Equal Protection Clause); *Sweatt v. Painter*, 339 U.S. 629, 633–36 (1950) (striking down, under the Equal Protection Clause, Texas's maintenance of a separate and inferior law school for African Americans); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–51 (1938) (requiring Missouri to provide equal, in-state legal education opportunities for African Americans); *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1879) (reversing a state criminal conviction on the grounds that exclusion of African Americans from juries violates the equal protection rights of African American defendants).

constitutional arguments.”<sup>51</sup> That changed in 1954: *Brown v. Board of Education*<sup>52</sup> immediately became the seminal case that, in popular opinion, placed the federal government over the states so as to effect equal protection of the laws.

This occurred literally in some instances, most notably in Little Rock, Arkansas, as federal troops ensured schoolhouse entry for African American students.<sup>53</sup> But in most cases, the ramifications of the Court’s decision on the federal government’s relationship to the states played out in official declarations, legislative battles, and public commentaries throughout the country, especially in the South. Various officials from southern states echoed the views of many of their constituents that the Warren Court’s unanimous decision represented an activist use of the equal protection doctrine. For example, Georgia Governor Herman Talmadge announced that the judicial opinion had reduced the Constitution to a “mere scrap of paper”;<sup>54</sup> Senator James Eastland of Mississippi declared, “the South will not abide by or obey this legislative decision

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<sup>51</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927). In the post-Civil War era, the Court narrowly applied the scope of the new Amendment, continuing to grant to the states a significant degree of sovereignty with respect to the states’ treatment of their citizens. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82 (1872) (reading the Equal Protection Clause to apply only to discrimination against African Americans and narrowly interpreting the Privileges and Immunities Clause to apply only to national citizenship, not state citizenship). In *The Slaughter-House Cases*, the Court wrote, “Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government.” *Id.*

The role of slavery, its abolition, and the states’ rights issues that formed the basis for the Civil War certainly form a pivotal backdrop to any discussion of U.S. federalism. Similarly, the plight of African Americans in the nineteenth century holds central footing in the history of the Fourteenth Amendment. Because of my inability to adequately conquer such massive topics in the narrow scope of this Note, as well as my recognition of and respect for the importance of these issues, I have left such questions to others.

<sup>52</sup> 347 U.S. 483 (1954).

<sup>53</sup> After Arkansas officials refused to integrate Little Rock Central High, President Eisenhower issued an executive order “federalizing the Arkansas National Guard and sending the Army into Little Rock.” Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992*, at 46–51 (2005).

<sup>54</sup> Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 *Wm. & Mary L. Rev.* 1261, 1266 (1996).

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by a political court”;<sup>55</sup> and the Louisiana legislature resolved to censure the Court’s “usurpation of power.”<sup>56</sup>

Similarly, state officials and public commentators in the South defiantly asserted that their vindication of their states’ rights would win out against such a perceived affront by the federal government. For example, editorials in the *Richmond News Leader* supported the Virginia General Assembly’s resolution of interposition, arguing such action was necessary to “protect and preserve” the “concept of dual sovereignty” in the Constitution, which reserves residual powers “not to the States jointly, but to each respective State in its separate, individual sovereign capacity.”<sup>57</sup> Over one hundred congressional politicians signed a “Declaration of Constitutional Principles” (known as the “Southern Manifesto”), arguing that *Brown* “climaxe[d] a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people,” and “commend[ing] the motives of those States which have declared the intention to resist forced integration by any lawful means.”<sup>58</sup> The political and public aftermath of *Brown* and the decisions that followed it—*Brown v. Board of Education of Topeka (Brown II)*<sup>59</sup> and *Cooper v. Aaron*<sup>60</sup>—more than the opinions themselves or the constitutional principles those opinions espoused, placed the doctrines of federalism and equal protection in tension as each side held tightly to its respective argument to justify its stance. Indeed, the political climate did not allow for much space in the middle, at least in the South: As massive re-

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<sup>55</sup> Michael J. Klarman, *Why Massive Resistance?*, in *Massive Resistance: Southern Opposition to the Second Reconstruction* 21, 21 (Clive Webb ed., 2005) (internal quotation marks omitted).

<sup>56</sup> *Id.* (internal quotation marks omitted).

<sup>57</sup> Editorial, *Interposition: Yesterday and Today*, *Richmond News Leader*, Feb. 2, 1956, at 12.

<sup>58</sup> 102 Cong. Rec. 4515–16 (1956). This Note’s admittedly brief references to the Southern Manifesto, the editorial provided *supra* note 57, and the quotations provided *supra* notes 54–56, are simply meant to illustrate that federalism was used as a prominent argument to criticize the Court’s decision. In fact, resistance to *Brown* was likely as much (if not more) about race as about constitutional principles built on states’ rights. However, even if many of these officials and their constituents were primarily motivated by race concerns, their use of federalism principles to support their claims of judicial activism illustrates how federalism came to be perceived as opposite to the Court’s equal protection doctrine.

<sup>59</sup> 349 U.S. 294 (1955).

<sup>60</sup> 358 U.S. 1 (1958).

sistance campaigns quickly gained steam, “‘Moderation’ became ‘a term of derision,’ as the political center collapsed.”<sup>61</sup>

In the wake of its monumental decisions regarding racial desegregation, the Court expanded its equal protection analysis. The *Slaughter-House Cases* had cabined the Equal Protection Clause to its most apparent contemporaneous purpose, outlawing discrimination strictly against African Americans.<sup>62</sup> However, beginning with the Warren Court and continuing with the Burger Court, a majority of Justices extended heightened judicial scrutiny to classifications beyond race, including gender, alienage, and illegitimacy. Many conservatives perceived these decisions as reflective of the Court’s overreaching into areas reserved to legislatures and into spheres traditionally reserved to states. For example, dissenting from the majority’s holding that Connecticut had committed an equal protection violation by refusing to admit resident aliens to the Connecticut state bar, Chief Justice Burger, joined by Justice Rehnquist, wrote:

The fundamental factor, however, is that the States reserved, among other powers, that of regulating the practice of professions within their own borders. If that concept has less validity now than in the 18th century when it was made part of the “bargain” to create a federal union, it is nonetheless part of that compact.<sup>63</sup>

### *3. The Fundamental Interest-Equal Protection Doctrine: Stereoscopic Synergy or Judicial Activism?*

Given such reactions to the Court’s applications of the Due Process Clause and the Equal Protection Clause, it is hardly surprising that conservatives perceived the Court’s insertion of a substantive due process analysis *into* the equal protection inquiry as a particularly egregious form of judicial activism. Under the fundamental interest-equal protection framework developed by the Warren Court and carried over in the

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<sup>61</sup> Klarman, *supra* note 55, at 22.

<sup>62</sup> 83 U.S. (16 Wall.) 36, 81 (1872) (“The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”).

<sup>63</sup> *In re Griffiths*, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting); see also *id.* (“But the question for the Court is not what is enlightened or sound *policy* but rather what the Constitution and its Amendments provide; I am unable to accord to the Fourteenth Amendment the expansive reading the Court gives it.”).



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early years of the Burger Court, a law that discriminates based on a classification that would otherwise receive rational-basis review may receive elevated scrutiny if the law also implicates an interest that, though untied to a concrete constitutional guarantee, is nonetheless determined to be “fundamental.” The doctrine finds its roots in *Skinner v. Oklahoma*.<sup>64</sup> *Skinner* was expressly based on equal protection grounds, but the Court emphasized that “strict scrutiny of the classification which a State makes in a sterilization law is essential” because “[m]arriage and procreation are fundamental to the very existence and survival of the [human] race.”<sup>65</sup>

The Warren Court expanded this analysis and made it explicit, holding unlawful the different treatment of certain classifications that had never before received any significant judicial scrutiny, such as those based on wealth<sup>66</sup> or urban/rural residency,<sup>67</sup> by identifying fundamental interests in state voting,<sup>68</sup> access to judicial processes,<sup>69</sup> and interstate migration.<sup>70</sup> While the Court never held that a state was constitutionally required to grant these fundamental interests, the Court implied that once a state does provide these interests to some individuals, the state

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<sup>64</sup> 316 U.S. 535, 541 (1942) (invalidating the Habitual Criminal Sterilization Act, a state statute that mandated sterilization after a third conviction for a felony involving “moral turpitude” but excepted certain felonies like embezzlement).

<sup>65</sup> *Id.*

<sup>66</sup> See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that parties may not be denied access to divorce due to inability to pay court costs).

<sup>67</sup> See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that states must make a good faith effort to construct legislature districts that are roughly equal in population).

<sup>68</sup> See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969) (striking down various requirements for eligibility to vote in school board elections); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding Virginia’s poll tax unconstitutional); *Reynolds*, 377 U.S. at 561–62 (positing the right to vote as fundamentally important in a democratic society and holding that individual votes cannot be diluted in the process of drawing legislative district boundaries).

<sup>69</sup> See *Boddie*, 401 U.S. at 374; *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (plurality opinion) (holding that a criminal defendant may not be denied his right to appeal due to inability to pay for a trial transcript). The Court picked up this doctrinal strand in a few later cases. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (ruling that the state must provide counsel to criminal defendants seeking to appeal to the state appellate court); *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that in matters regarding the termination of parental rights, a party may not be denied a right to appeal due to inability to pay court fees).

<sup>70</sup> See *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 269 (1974) (finding residency requirements for indigent medical treatment to be unconstitutional infringements on the right of interstate travel); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (striking down Tennessee’s durational residential requirement for voting); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (declaring durational residential requirements for welfare benefits unconstitutional).

must demonstrate that any discrimination in such provision, at the very least, constitutes means that are *substantially related to important ends*.<sup>71</sup>

Commentators have used the term “substantive equal protection”<sup>72</sup> to describe the fundamental interest-equal protection doctrine, either positively or pejoratively depending on the viewpoint of the commentator. For liberals, the fusion of the two concepts helps achieve a fairer, more ideal outcome. In contrast to scholars who view the Fourteenth Amendment’s Due Process and Equal Protection Clauses as virtually fungible,<sup>73</sup> or scholars who argue that one clause or the other is a better tool to achieve progressive ends,<sup>74</sup> Professor Pamela Karlan asserts that the two clauses inform each other, and in so doing, collectively expand their scope and embolden their power beyond what either clause could singularly achieve.<sup>75</sup> Karlan points to cases in which the Court approached the two clauses “stereoscopically” by using the fundamental interest-equal protection doctrine to strike down laws that otherwise would have passed rational review.<sup>76</sup> To make her point, she also highlights later cases in which she believes the Court’s “monocular” approach “blinded [the Court] to the mismatch between the violation it found and the remedy it ordered”<sup>77</sup> or prevented its opinion from reaching “firmer footing.”<sup>78</sup> Karlan argues that a “stereoscopic approach to the Fourteenth Amendment,” whereby liberty and equality principles inform each other,

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<sup>71</sup> See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. Pa. L. Rev. 1375, 1417–19 (2010) (illustrating how this framework operated in the contexts of voting rights and criminal defendants’ right to appeal).

<sup>72</sup> Sullivan & Gunther, *supra* note 36, at 654 (internal quotation marks omitted).

<sup>73</sup> See, e.g., Karst, *supra* note 47, at 27.

<sup>74</sup> For example, compare Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385–86 (1985) (arguing that a “constitutionally based sex-equality” argument would have been a more preferable basis for the Court to have decided *Roe v. Wade* than an “autonomy idea”), with Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1061–63 (1979) (arguing that the Due Process Clause would have been a more appropriate basis for several cases in which the Warren and Burger Courts instead based their decisions on equal protection grounds).

<sup>75</sup> Karlan, *supra* note 4. Of course, Karlan is not the only scholar to have argued that liberty and equal protection inform each other. See, e.g., Brown, *supra* note 6, at 1494 (describing liberty as “the traditional companion of equality in rights discourse”).

<sup>76</sup> Karlan, *supra* note 4, at 476–83 (discussing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1966)).

<sup>77</sup> *Id.* at 492 (discussing *Bush v. Gore*, 531 U.S. 98 (2000)).

<sup>78</sup> *Id.* at 477 (discussing *Romer v. Evans*, 517 U.S. 620 (1996)).

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brings about “synergistic effects” that yield “fuller and more just answers.”<sup>79</sup>

Whereas liberals might champion any synergy created by viewing the two clauses of the Fourteenth Amendment holistically, conservatives would likely counter that two halves do not make a whole—especially when conservatives already are skeptical of the Court’s approach to each half. Indeed, Chief Justice Burger captured this view in his dissent in *Plyler v. Doe*: “[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.”<sup>80</sup> In *Plyler*, the majority struck down a Texas statute that denied “to undocumented school-age children the free public education that [the state] provide[d] to children who [were] citizens of the United States or legally admitted aliens.”<sup>81</sup> While recognizing that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution,” the Court nevertheless applied heightened scrutiny because of its view that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>82</sup> Though the four conservative dissenting Justices agreed with the policy promoted by the majority’s decision, they stressed that it was not the Court’s role to design social policy for the states and certainly not by such an “unabashedly result-oriented approach” based on “quasi” constitutional principles.<sup>83</sup> For conservatives, the fundamental interest-equal protection analysis only compounded the institutional and interpretive problems they already found in the Court’s independent applications of the due process and equal protection doctrines.

Perhaps because of these concerns, the force of the fundamental interest-equal protection doctrine was seemingly short-lived. In later cases, as the Court’s composition shifted toward the right, the Court used other constitutional arguments to uphold the fundamental interests it had previously recognized under the convergence of substantive due process and equal protection. For example, in *Saenz v. Roe*, the majority located the right to interstate travel in the Privileges and Immunities Clause, in-

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<sup>79</sup> Id. at 474, 492.

<sup>80</sup> 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting).

<sup>81</sup> Id. at 205, 230.

<sup>82</sup> Id. at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

<sup>83</sup> Id. at 242–44 (Burger, C.J., dissenting).

stead of using an equal protection analysis.<sup>84</sup> Alternatively, the Court decided cases strictly on equal protection grounds without appealing to the due process dimensions of the issues involved.<sup>85</sup> Except for a few cases in which the Court wove together discussions of rights and equality and tried to cabin such an analysis to a limited set of facts,<sup>86</sup> the fundamental interest-equal protection doctrine lost steam over the past few decades, becoming a vestige of the more liberal Warren and early Burger Courts.

#### 4. Federalism Revived

Following the Warren and Burger Courts' expansion of the due process and equal protection doctrines, "[t]he revival of federalism," as Professor Michael McConnell characterized the conservative majority's embrace of the limiting principle in the 1990s, became "the most striking feature of the constitutional jurisprudence of the Rehnquist Court."<sup>87</sup> Given the Court's apparent disavowal throughout much of the twentieth century of any constitutional limits based on federal power arguments,<sup>88</sup> the Court shocked observers with its assertion in *United States v. Lopez* of a judicially enforceable restriction on Congress's ability to regulate interstate commerce.<sup>89</sup> The majority of conservative Justices had intimated in earlier cases its willingness to enforce federalism principles,<sup>90</sup>

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<sup>84</sup> 526 U.S. 489, 502–03 (1999). To see the difference in the Court's approach, compare *Saenz* with the cases listed supra note 70.

<sup>85</sup> See, e.g., Karlan, supra note 4, at 477 (arguing that the Court did not see "fatal flaws" in its approach in *Bush v. Gore*, 531 U.S. 98 (2000), or *Romer v. Evans*, 517 U.S. 620 (1996), because it withheld a due process analysis).

<sup>86</sup> See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 119–24 (1996) (basing its decision that parents should have a right to counsel in parental termination cases on the "commanding" importance of a parent's interest in having a continued relationship with his or her child (internal quotation marks omitted)).

<sup>87</sup> Michael W. McConnell, Rule of Law: Let the States Do It, Not Washington, *Wall St. J.*, Mar. 29, 1999, at A27.

<sup>88</sup> See supra notes 32–35 and accompanying text.

<sup>89</sup> 514 U.S. 549, 567–68 (1995) (striking down the Gun-Free School Zones Act of 1990, which had made it a crime "knowingly to possess a firearm" in a school zone); see also Benjamin Block, Note, The Strange Career of VAWA: Chief Justice Rehnquist and the Shift from "Political" to "Constitutional" Federalism 1990–2000, 16 *J.L. & Pol.* 499, 537 (2000).

<sup>90</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress cannot require the states to implement a federal program); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (requiring that Congress provide a "plain statement" when it seeks to preempt a state's historic powers); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (invalidating the application of a federal wage control law to state employees on the grounds of state immunity from direct federal regulation).

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but in *Lopez*, the Court actually invalidated a law as having exceeded Congress's constitutional power.<sup>91</sup>

Chief Justice Rehnquist argued that upholding the Gun-Free School Zones Act of 1990 “would require [the Court] to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local.”<sup>92</sup> The majority’s holding was grounded in a fear that expanding the reach of the Commerce Clause would empower Congress to govern areas constitutionally reserved to the states, citing family law as a particular example.<sup>93</sup> *Lopez* produced a deluge of scholarship highlighting the significance of the opinion and wondering what its implications may be.<sup>94</sup>

Indeed, the implications were quick and profound. In *Morrison v. United States*, the Court built on *Lopez* to invalidate the Violence Against Women Act.<sup>95</sup> The majority rested its rationale on federalism concerns, maintaining that “[t]he Constitution requires a distinction between what is truly national and what is truly local” and asserting that it is the Court’s responsibility to respect the powers “which the Founders denied the National government and reposed in the States.”<sup>96</sup> Unlike the legislative history of the statute at issue in *Lopez*, Congress had assembled a “mountain of data” to demonstrate the effects of violence against women on interstate commerce.<sup>97</sup> Nevertheless, the Court, again, emphasized its concern that adopting a broad conception of the Commerce Clause, such as one that incorporated this “aggregate effect[s]” rationale, might permit the national government to interfere with traditional state regulation of areas like marriage.<sup>98</sup> The dissenting Justices, and many scholars, were surprised by the majority’s embrace of a “theory of traditional state concern as grounding a limiting principle,” which they believed the Court had “rejected previously.”<sup>99</sup>

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<sup>91</sup> 514 U.S. at 567–68.

<sup>92</sup> *Id.* (citation omitted).

<sup>93</sup> *Id.* at 564.

<sup>94</sup> See Block, *supra* note 89, at 537 n.200.

<sup>95</sup> 529 U.S. 598, 609, 627 (2000).

<sup>96</sup> *Id.* at 617–18.

<sup>97</sup> *Id.* at 628–29 (Souter, J., dissenting).

<sup>98</sup> *Id.* at 615–16 (majority opinion).

<sup>99</sup> *Id.* at 645 (Souter, J., dissenting). Additionally, Justice Souter accused the majority of ignoring “the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests” as the national economy grew. *Id.* at 647.

*Morrison* compounded the perceived tension between federalism and equal protection principles: As the majority used federalism arguments to strike down the law, it also refuted the petitioners' assertion that the Enforcement Clause (Section 5) of the Fourteenth Amendment granted Congress the power to provide for the civil remedy outlined in the Act.<sup>100</sup> The petitioners had contended that "pervasive bias in various state justice systems against victims of gender-motivated violence" denied these victims equal protection of the laws, and therefore lent Congress the power to enact a civil remedy against the perpetrators.<sup>101</sup> The majority rejected this argument, asserting that "certain limitations on the manner in which Congress may attack discriminatory conduct . . . are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."<sup>102</sup> Even though the dissenting Justices did not need to address the equal protection argument because they would have upheld the law under the Commerce Clause, Justice Breyer went out of his way to repeatedly cast "doubt [on] the Court's reasoning."<sup>103</sup>

Not all of the subsequent opinions handed down by the Rehnquist Court contained the same judicial reach as the holdings in *Lopez* and *Morrison*.<sup>104</sup> These two seminal cases signaled, however, that a concern for federalism, and an apparent conflict between its limiting principle and the equal protection doctrine, would carry over to the modern Roberts Court.<sup>105</sup>

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<sup>100</sup> Id. at 627 (majority opinion).

<sup>101</sup> Id. at 619–20.

<sup>102</sup> Id. at 620.

<sup>103</sup> Id. at 664–66 (Breyer, J., dissenting) (arguing that the majority misapplied precedent and held Congress to an inappropriately high standard regarding the sufficiency of the findings that motivated the legislation).

<sup>104</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 6–9 (2005) (holding that the Controlled Substances Act can be enforced against individuals who grow marijuana in their homes for personal medical use or who acquire medical marijuana for personal use from local growers).

<sup>105</sup> For example, Chief Justice Roberts's plurality opinion in *National Federation of Independent Business ("NFIB") v. Sebelius*, 132 S. Ct. 2566 (2012), demonstrated the modern Court's willingness to apply federalism-limiting principles by rejecting the use of the Necessary and Proper Clause to uphold the individual healthcare mandate, even while upholding the law under Congress's power to tax. Id. at 2591–93, 2599–2600 (plurality opinion). The dissenting Justices agreed that the Commerce Clause did not give Congress the power to enact this legislation, and portrayed such an attempt as an infringement upon state sovereignty. Id. at 2644–47 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

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*D. Constitutional Concepts as the Targets and Weapons of Accusations of Judicial Activism*

Tracing this history of federalism, due process, and equal protection reveals that these concepts successively seized the majority's attention as accusations of "judicial activism" eventually supplanted one principle with the other. The public, politicians, and dissenting Justices used one set of these doctrines to push against the perceived activist use of the other; later, the constitutional argument that had motivated the earlier charge of activism subsequently became the object of the same critique. Such a charge was so commonplace over the twentieth century that nearly four thousand journal and law review articles cited the terms "judicial activism" or "judicial activist" in the 1990s alone,<sup>106</sup> illustrating that the concept itself had become "notoriously slippery."<sup>107</sup>

In truth, these doctrinal shifts were likely motivated by several factors: perhaps political circumstances the Court could not ignore (for example, Roosevelt's threat to pack the Court); perhaps genuine beliefs in the legal, social, and moral necessity of a certain outcome (for example, the Court may have resolved to take on the segregation question because it recognized the disastrous effects of its former decisions); or perhaps simple personnel changes on the bench (for example, Rehnquist's views on federalism likely did not change; he simply realized he had enough votes to advance the doctrine he had always favored). Whatever the reasons underlying the Court's dynamic jurisprudence throughout the twentieth century, the popular discourse surrounding these decisions positioned federalism and due process-equal protection as politically laden principles opposed to each other.

II. FEDERALISM, DUE PROCESS, AND EQUAL PROTECTION IN *WINDSOR*

Federalism, due process, and equal protection principles uniquely intertwine in the Court's recent decision, *United States v. Windsor*.<sup>108</sup> In the highly anticipated case, the Court struck down Section 3 of DOMA,

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<sup>106</sup> Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 Calif. L. Rev. 1441, 1442 (2004).

<sup>107</sup> Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1401 (2002) ("When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. . . . When conservatives are ascendant on the Court, liberals . . . denounce 'conservative judicial activism.'").

<sup>108</sup> 133 S. Ct. at 2693.

which defined marriage as the union between one man and one woman for purposes of federal law.<sup>109</sup> Central to the Court's decision was the fact that the State of New York had deemed the Ontario marriage of two women, Edith Windsor and Thea Spyer, "to be a valid one."<sup>110</sup> When Windsor sought to claim an estate tax exemption following Spyer's death, she was barred from doing so because, under DOMA, Windsor could not qualify as Spyer's "surviving spouse."<sup>111</sup> In an opinion written by Justice Kennedy, the Court invalidated the federal statutory provision's definition of marriage, allowing the Internal Revenue Service to refund Windsor the taxes she had paid to the national government.<sup>112</sup>

While the facts of the case are fairly straightforward, Kennedy's reasoning, and the implications of that reasoning for other issues likely to face the Court, are less immediately clear. Echoing several commentators' early confusion over the Court's convergence of federalism, due process, and equal protection, Justice Scalia asked in his dissent, "What to make of this? The opinion never explains."<sup>113</sup> Responding to his own question, Scalia asserted that the majority's discussion of federalism was really just "rhetorical . . . pretense"<sup>114</sup> for an actual holding that rested "maybe on equal-protection grounds, maybe on substantive-due-process grounds."<sup>115</sup> Conversely, Chief Justice Roberts, in a separate dissent, argued that "it is undeniable that [the majority's] judgment is based on federalism."<sup>116</sup> Scholars commenting on *Windsor* soon after it was decided similarly struggled to pin down which constitutional doctrine car-

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<sup>109</sup> Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), invalidated by *Windsor*, 133 S. Ct. 2675.

<sup>110</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>111</sup> *Id.* (internal quotation marks omitted).

<sup>112</sup> *Id.* at 2682.

<sup>113</sup> *Id.* at 2705 (Scalia, J., dissenting).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2707 (highlighting the majority assertion that the law was motivated by a "bare . . . desire to harm" (internal quotation marks omitted)).

<sup>116</sup> *Id.* at 2697 (Roberts, C.J., dissenting).



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ries the most weight in the opinion.<sup>117</sup> Likewise, lower courts have wrestled with this same question.<sup>118</sup>

A. *Windsor Is Not Exclusively Based on Federalism Principles*

No one constitutional concept, asserted alone, would suffice to reach the Court's outcome in *Windsor*. Several popular commentators, and even some amicus briefs filed by scholars and conservative public interest groups, advocated for the Court to overturn DOMA on federalism grounds.<sup>119</sup> Their positions leaned on traditional enumerated powers arguments: The Tenth Amendment requires that the national government act within the scope of powers granted to it by the Constitution; the Constitution contains no directly enumerated power to define marriage; therefore, to be upheld, the Act must have been "necessary and proper" to Congress's exercise of its other enumerated powers to regulate commerce, tax, or spend money. Given the Court's resolve to restrict the

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<sup>117</sup> See, e.g., Sandy Levinson, A Brief Comment on Justice Kennedy's Opinion in *Windsor*, Balkinization (June 26, 2013, 11:50 PM), <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> (characterizing much of the federalism discussion as "some blather about traditional state sovereignty and marriage"); The Method in Kennedy's Muddle, The Dish (June 27, 2013, 10:30 AM), <http://dish.andrewsullivan.com/2013/06/27/the-method-in-kennedys-muddle/> (describing the opinion as "obscure and muddled in its rationale(s)").

<sup>118</sup> See, e.g., *Bostic v. Schaefer*, No. 14-1167, slip op. at 46-47 n.8 (4th Cir. July 28, 2014) ("In *Windsor*, the Court did not label the type of constitutional scrutiny it applied, leaving us unsure how the Court would fit its federalism discussion within a traditional heightened scrutiny or rational basis analysis. The lower courts have taken differing approaches, with some discussing *Windsor* and federalism as a threshold matter, and others . . . considering federalism as a state interest underlying the same-sex marriage bans at issue." (citations omitted)).

Given this Note's submission deadline, the Note is unable to more closely examine the case law emerging in the lower courts from challenges to state marriage laws. Where the editing and publication process made possible, a few references to these cases have been inserted; however, these references are simply meant to augment the Note's discussion and do not represent an extensive or nuanced overview of recent case law or a position on the question of the constitutionality of these state marriage laws. The opinions seem to generally reflect the scattered doctrinal explanations that surfaced in commentaries immediately following *Windsor*. Additional examination of these lower courts' interpretations of *Windsor* is a logical area for further research.

<sup>119</sup> See, e.g., George F. Will, DOMA Infringes on States' Rights, Wash. Post (Mar. 20, 2013), [http://articles.washingtonpost.com/2013-03-20/opinions/37870263\\_1\\_doma-defense-of-marriage-act-general-police-power](http://articles.washingtonpost.com/2013-03-20/opinions/37870263_1_doma-defense-of-marriage-act-general-police-power); Brief of Federalism Scholars as Amici Curiae in Support of Respondent *Windsor* at 7-8, *Windsor*, 133 S. Ct. 2675 (No. 12-307), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/2858](http://scholarship.law.duke.edu/faculty_scholarship/2858).

Commerce Clause in *Lopez*<sup>120</sup> and *Morrison*,<sup>121</sup> and the Court's determination to rein in what it perceived to be the extravagant use of the Necessary and Proper Clause in *National Federation of Independent Business* ("*NFIB*") v. *Sebelius*,<sup>122</sup> the federalism argument carried some promise. And the majority opinion certainly lends considerable attention to it, devoting several pages to a discussion of the strong "history and tradition" by which the "definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."<sup>123</sup>

However, the Court's opinion does not rest solely on federalism grounds for at least three reasons. First, no lower court had relied on a federalism argument and the Supreme Court had granted certiorari on the petitioner's equal protection challenge alone.<sup>124</sup> Second, although the Court cited past precedent for the holding that "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States,'"<sup>125</sup> such a claim is qualified by several instances in which the Court has permitted the federal government to enact laws bearing on marital rights and privileges. For example, the Court pointed to permissible federal statutes that apply family law to insurance practices,<sup>126</sup> that address the interaction of marriage and immigration laws,<sup>127</sup> and that define the scope of marriage for the establishment of income-based criteria for social security benefits.<sup>128</sup> Justice Scalia, in dissent, ar-

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<sup>120</sup> See supra notes 91–93 and accompanying text.

<sup>121</sup> See supra notes 95–103 and accompanying text.

<sup>122</sup> See supra note 105.

<sup>123</sup> *Windsor*, 133 S. Ct. at 2689–90.

<sup>124</sup> Ernest A. Young & Erin C. Blondel, Federalism, Liberty, and Equality in *United States v. Windsor*, in *CATO Supreme Court Review* 117, 127–28 (2013), available at <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/youngblondel.pdf>.

<sup>125</sup> *Windsor*, 133 S. Ct. at 2691 (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)); see also *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."); *Haddock v. Haddock*, 201 U.S. 562, 575 (1890) ("[T]he States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."); *In re Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

<sup>126</sup> *Windsor*, 133 S. Ct. at 2690 (citing a recent case, *Hillman v. Maretta*, 133 S. Ct. 1943, 2690 (2013), in which the Court upheld a federal law under which a former spouse retained life insurance proceeds instead of a subsequent surviving spouse).

<sup>127</sup> *Id.* (discussing 8 U.S.C. § 1186a(b)(1) (2006 ed. and Supp. V)).

<sup>128</sup> *Id.* (discussing 42 U.S.C. § 1382c(d)(2) (2012)).

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gued that it would have been “impossible” for the Court to hold that defining marriage is strictly outside the federal government’s enumerated powers “given the Federal Government’s long history of making pronouncements regarding marriage,” noting as an example Congress’s conditioning Utah’s entry into the Union upon Utah’s prohibition of polygamy.<sup>129</sup>

Third, a legal realism perspective suggests that overturning DOMA fully on federalism grounds was always unlikely with the current composition of the Court. The Justices who supported the Court’s federalism arguments in *NFIB v. Sebelius*,<sup>130</sup> with the important exception of Justice Kennedy, are also those most comfortable with the government’s legal enforcement of moral norms.<sup>131</sup>

### B. *Windsor Is Not Exclusively Based on Due Process Principles*

Likewise, at the time of writing *Windsor*, the Court was not prepared to base its conclusion wholly on due process arguments.<sup>132</sup> Of course, the Court has frequently highlighted the heightened scrutiny it applies to laws that implicate the privacy concerns of one’s marital relationship; the holding in *Griswold v. Connecticut* was in part premised on its limited application to married couples.<sup>133</sup> The *Windsor* opinion frequently

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<sup>129</sup> Id. at 2705 n.4 (Scalia, J., dissenting).

<sup>130</sup> See supra note 105.

<sup>131</sup> For example, see Scalia’s discussion, in his dissent in *Lawrence v. Texas*, of the legislature’s ability, but not the Court’s, to “not carry things to their logical conclusion.” 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). Writing of the “fear [of impending] judicial imposition of homosexual marriage,” Scalia stated that it is a “benefit[]” for “the people,” which the Court does not possess, to distinguish between forbidding the criminalization of homosexual acts and forbidding homosexual marriage. Id. Contra id. at 577–78 (majority opinion) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” (internal quotation marks omitted)).

<sup>132</sup> Since *Windsor* was handed down, the legal landscape has shifted as several lower courts have invalidated state marriage laws based, in part, on arguments for a constitutional right to marriage that includes same-sex marriage. See, e.g., *Bostic v. Schaefer*, No. 14-1167, slip op. at 41 (4th Cir. July 28, 2014) (“[W]e conclude that the fundamental right to marry encompasses the right to same-sex marriage . . .”). As discussed supra note 118, this Note is unable to more closely examine the case law emerging in the lower courts considering challenges to state marriage laws.

<sup>133</sup> 381 U.S. 479, 486 (1965). As mentioned supra note 48, *Griswold* is now thought to have kicked off the substantive due process revolution, even though this understanding is based more on Justice Harlan’s concurrence and critics’ readings of the decision than on the majority opinion’s own assertions.

dives into the language of this doctrine, expressing, for example, that Section 3 of DOMA violated “basic due process” principles<sup>134</sup> and represented “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”<sup>135</sup> As will be proposed, however, in the next Part of this Note, the liberty interest the Court stresses is not the right to enter a same-sex marriage, or even the right to enter a marriage at all; it is the strong interest an individual has in being free from federal deprivation of the valid marital rights and privileges her state has already conferred upon her.

Given that no states and no other countries had legalized same-sex marriage prior to DOMA’s enactment, it would have been difficult to hold that same-sex marriage qualified for due process protection based on the Court’s past measures of what constituted a fundamental right, even under the robust understanding of substantive due process developed throughout the twentieth century.<sup>136</sup> Resting the Court’s outcome on substantive due process grounds would have entailed an uphill battle to refute Justice Alito’s assertion that it is “beyond dispute”<sup>137</sup> that a right to same-sex marriage was not “deeply rooted in [the] Nation’s history and tradition”<sup>138</sup> nor “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.”<sup>139</sup>

Articulating a broader conception of the liberty interest at stake posed a more difficult task than the Court seemed willing to confront in *Windsor*. Any argument that there is a right to marry generally would effectively require the constitutionalization of a definition of marriage, cementing a particular theory when our heterogeneous, pluralistic society holds many competing theories on the controversial question. Employing more expansive definitions of the liberty interest, even when expressed in less contentious and more apolitical terms—for example, a “right to religious and moral freedom”<sup>140</sup> or a “right to

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<sup>134</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>135</sup> *Id.* at 2695.

<sup>136</sup> See *supra* notes 33–63 and accompanying text.

<sup>137</sup> *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

<sup>138</sup> *Id.* at 2714 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))) (internal quotation marks omitted).

<sup>139</sup> *Id.* (quoting *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937))) (internal quotation marks omitted).

<sup>140</sup> Michael J. Perry, *Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States*, David C. Baum Memorial Lecture in Civil Rights and Civil Liberties 3 (Nov. 6, 2013), available at <http://ssrn.com/abstract=2352516> (explain-

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recognition,”<sup>141</sup> rather than a narrower “right to marry”—would still require the Court to favor one broadly construed substantive interest over another. Furthermore, it is not clear that a state’s absolute refusal to civilly recognize *all* marriages would be unjust, which emphasizes the comparative quality of these claims.<sup>142</sup>

### C. *Windsor Is Not Exclusively Based on Equal Protection Principles*

The Court expressly grounded its *Windsor* decision in equal protection principles, holding that DOMA “singles out a class of persons” and “imposes a disability on the class” by interfering “with the equal dignity of same-sex marriages.”<sup>143</sup> However, at least three reasons suggest that traditional equal protection arguments by themselves do not contain enough force to achieve the Court’s outcome. First is the Court’s lengthy discussion of the “State’s power in defining the marital relation,” which the Court asserted is “of central relevance” in the case.<sup>144</sup> Some scholars have argued that the majority simply underscored that the Act’s departure from the historical and traditional power of the federal government signaled the discrimination of an “unusual character” about which the Court was really concerned.<sup>145</sup> Even so, the Court’s use of structural federalism principles to yield evidence of discrimination of “unusual char-

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ing the “right to religious and moral freedom” as one of the “constitutional rights that bear[s] most directly on the question of the constitutionality of excluding same-sex couples from civil marriage”).

<sup>141</sup> Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 Va. L. Rev. Online 29, 33 (2013) (arguing that *Windsor* is based on a “right to recognition” that is “novel in the American constitutional tradition”).

<sup>142</sup> In fact, prominent scholars who have long advocated for lesbian and gay rights warn that recognition of a right to same-sex marriage may exacerbate unequal treatment of unmarried people. See, e.g., Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 Hofstra L. Rev. 201, 203 (2003) (“By constantly hammering at the injustice of excluding same-sex couples from the benefits and obligations of marriage, [the same-sex marriage] movement, perhaps inadvertently, solidifies the differential treatment of the married and the unmarried.”).

<sup>143</sup> *Windsor*, 133 S. Ct. at 2693, 2695–96.

<sup>144</sup> *Id.* at 2692.

<sup>145</sup> *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)) (internal quotation marks omitted). For an example of this view, see Professor Deborah Hellman’s thoughtful assertion that “we know that DOMA stamps [gay and lesbian] couples as inferior” in part “because the federal government has gone out of its way to intervene in an area normally left to states.” Deborah Hellman, *Scalia Is Right: Justice Kennedy’s Opinion in Windsor Doesn’t Rest on Federalism*, Balkinization (June 27, 2013, 5:29 PM), <http://balkin.blogspot.com/2013/06/normal-0-false-false-false-en-us-x-none.html>.

acter” was itself unusual (and seemingly unprecedented) in the Court’s equal protection jurisprudence.<sup>146</sup>

Second, the *Windsor* Court may not have been prepared to rely solely on traditional equal protection grounds because it had never recognized sexual orientation as an inherently suspect classification. In each of the opportunities the Court had to do so in the prior two decades, the Court notably elected to overturn discriminatory laws on grounds not requiring heightened scrutiny.<sup>147</sup> In *Romer v. Evans*, Justice Kennedy’s majority opinion explicitly purported to rely on rational-basis review, “the most deferential of standards,”<sup>148</sup> to strike down a Colorado law passed by referendum that prohibited any state or local government action designed to protect “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>149</sup> In *Lawrence v. Texas*, Justice Kennedy’s majority opinion expressly declined to rest its reasoning on the Equal Protection Clause, disagreeing with Justice O’Connor’s concurrence on this point.<sup>150</sup> In doing so, the Court avoided applying heightened scrutiny, even though “[t]he ‘liberty’ of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.”<sup>151</sup>

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<sup>146</sup> The Court’s prior investigation of “discrimination of an unusual character” typically involved inquiries into strained justifications given by states for certain discriminatory state legislation. See, e.g., *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)) (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” (internal quotation marks omitted)). The majority offers no cases in which the Court has previously elevated its standard of review of federal legislation because the federal government’s breach of states’ traditional powers served as evidence of discrimination of unusual character.

<sup>147</sup> Similarly, “The vast majority of [federal] courts of appeals have reached the same conclusion.” *Bostic v. Schaefer*, No. 14-1167, slip. op. at 94–96 (4th Cir. July 28, 2014) (Niemeyer, J., dissenting) (discussing several cases that “concluded that rational-basis review applies to classifications based on sexual orientation”). At the very least, this illustrates that *Windsor* deviates from a traditional equal protection analysis.

<sup>148</sup> 517 U.S. at 631–32 (holding that the legislation violated the Equal Protection Clause).

<sup>149</sup> *Id.* at 624 (quoting Colo. Const. art. II, § 30b) (internal quotation marks omitted).

<sup>150</sup> 539 U.S. 558, 574–79 (2003) (using the Due Process Clause, rather than the Equal Protection Clause, to strike down a law banning non-coital sex); *id.* at 579 (O’Connor, J., concurring) (“Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.”).

<sup>151</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004). Professor Tribe argues that “the ‘baby step’ of holding the Texas ban on same-sex sodomy unconstitutional on purportedly narrower

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Certainly, gays and lesbians have faced a shameful history of prejudice, stigma, and social marginalization.<sup>152</sup> But the Court has never been willing to adopt Justice Brennan's view, written in a dissent from a denial of certiorari in the mid-1980s, that laws targeting homosexual conduct should receive heightened scrutiny.<sup>153</sup> The political facts surrounding *Windsor* and *Hollingsworth v. Perry*, another decision concerning same-sex marriage that the Court handed down on the same day,<sup>154</sup> cast further doubt on the modern Court's ability to consider same-sex couples a "discrete and insular minority" under the equal protection rationale derived from footnote four of *Carolene Products*,<sup>155</sup> at least as that rationale is traditionally understood.<sup>156</sup> In *Windsor*, the Court stressed the "community's considered perspective" in "conferr[ing] upon [couples in valid same-sex marriages] a dignity and status of immense import" in the several states that had recognized same-sex marriages at the time.<sup>157</sup> (The number of states recognizing same-sex marriage has since increased dramatically, with over half of the country's population reportedly supporting the legalization of same-sex marriage.<sup>158</sup>) While just shy of fifty percent of voters rejected the 2008 ballot initiative providing that only marriages between a man and a woman would be recognized in California, which was at issue in *Hollingsworth*, most proponents of same-sex marriage "have little doubt that . . . voters

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equal protection grounds, though logically available to the *Lawrence* Court, would have been woefully inadequate." *Id.* at 1908–09 (footnote omitted).

<sup>152</sup> See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) ("[H]omosexuals have historically been the object of pernicious and sustained hostility.").

<sup>153</sup> *Id.* (arguing that the Court should carefully scrutinize laws targeting homosexual conduct "[b]ecause of the . . . severe opprobrium often manifested against homosexuals" and the "particular[] powerless[ness]" of the members of this group "to pursue their rights openly in the political arena").

<sup>154</sup> 133 S. Ct. 2652 (2013).

<sup>155</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (considering whether "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

<sup>156</sup> Section III.C posits a new conception of the process-based theory rooted in *Carolene Products* footnote four that integrates federalism principles.

<sup>157</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>158</sup> Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, Gallup (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx>.

would legalize gay marriage if the measure made it on the ballot again.”<sup>159</sup>

Third, it is difficult to exclusively ground the *Windsor* opinion on the Court’s assertion that DOMA was “motivated by an improper animus”<sup>160</sup> effected to achieve a “principal purpose”<sup>161</sup> to “disparage and to injure.”<sup>162</sup> While some of the law’s political proponents were undoubtedly uncomfortable with, and even hostile to, the notion of same-sex marriage, it is hard to attribute invidious intent to “the 342 Representatives and 85 Senators who voted for [DOMA], and the President who signed it” less than two decades ago.<sup>163</sup> Several of these political figures have publicly championed gay rights and have been lauded for their support of the gay and lesbian community.<sup>164</sup>

Scholars advocating for same-sex marriage have cautioned that “adjudging same-sex sexual conduct to be immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings.”<sup>165</sup> Indeed, the *Windsor* majority explained early in its

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<sup>159</sup> Jennifer Medina, *Anticipation Turns to Acceptance as California Awaits Marriage Ruling*, N.Y. Times (June 23, 2013), <http://www.nytimes.com/2013/06/24/us/anticipation-turns-to-acceptance-as-california-awaits-marriage-ruling.html>.

<sup>160</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>161</sup> *Id.* at 2694.

<sup>162</sup> *Id.* at 2696 (Roberts, C.J., dissenting).

<sup>163</sup> *Id.*

<sup>164</sup> Former President Bill Clinton insisted just a few years ago, prior to the Court’s consideration of *Windsor*, that “[i]t’s a slight rewriting of history . . . to imply that somehow [DOMA] was anti-gay,” citing various ways in which his administration advanced gay rights as evidence that the Act was not motivated by malice towards the gay community. Aliyah Frumin, *Timeline: Bill Clinton’s Evolution on Gay Rights*, NBC News (Mar. 8, 2013, 6:20 PM), <http://www.nbcnews.com/id/51104832/> (internal quotation marks omitted). While some commentators have stressed that Clinton did not agree with DOMA and only signed the law for political expediency, Clinton issued a statement when the law was passed, stressing that he had “long opposed governmental recognition of same-sex marriages, and this legislation is consistent with that position.” *Id.* (internal quotation marks omitted).

Even several Republican politicians, whose party most ardently backed the passage of DOMA, have since expressed support for same-sex marriage. See, e.g., Rob Portman, *Op-Ed., Gay Couples Also Deserve Chance to Get Married*, Columbus Dispatch (Mar. 15, 2013, 12:33 PM), <http://www.dispatch.com/content/stories/editorials/2013/03/15/gay-couples-also-deserve-chance-to-get-married.html> (explaining that his former support of DOMA “was rooted in my faith tradition that marriage is a sacred bond between a man and a woman,” rather than in any desire to harm others, and noting that “[w]ell intentioned people can disagree on the question”). Certainly, current support for a position does not prove an absence of prior animus, but it does provide a better understanding of the motivation underlying the prior position.

<sup>165</sup> Perry, *supra* note 140, at 13.



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opinion that when DOMA was enacted, the understanding of marriage between a man and a woman was “no doubt . . . thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”<sup>166</sup> The Court’s description of this traditional view as being “more cherished when challenged”<sup>167</sup> suggests the possibility that, at least for many officials, support of the Act was based on the value they placed on one perspective on the institution of marriage, rather than on their animus towards people who held another perspective.<sup>168</sup>

Even as the majority in *Windsor* pointed to pieces of DOMA’s legislative history and to the title of the Act itself to support the Court’s “principal purpose” assertion, the majority seemed to hedge its “bare . . . desire to harm”<sup>169</sup> argument. The Court has long held that an intent based on improper animus is sufficient to invalidate a law even under rational-basis scrutiny.<sup>170</sup> But the *Windsor* majority did not rely on rational-basis review to strike down DOMA, even as it asserted that a bare desire to harm formed the principal purpose of the law. While tying its decision to rational-basis cases,<sup>171</sup> the majority did not actually mention tiers of scrutiny at all, despite the dissenting opinion’s charge that “the Court certainly does not *apply* anything that resembles that deferential framework.”<sup>172</sup> The Court’s apparent hesitation to stake its opinion on its bare animus claim suggests that traditional equal protection argu-

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<sup>166</sup> *Windsor*, 133 S. Ct. at 2689.

<sup>167</sup> *Id.*

<sup>168</sup> Obviously, these stances are not mutually exclusive: Just because someone holds valid reasons for preferring one policy does not mean that she could not also harbor animosity towards others who hold an opposing view. But the Court’s statement does cast doubt on its later assertion that animus motivated the law and that injury to others was the law’s principal purpose.

<sup>169</sup> *Windsor*, 133 S. Ct. at 2693 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)) (internal quotation marks omitted).

<sup>170</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (explicitly noting that only the “most deferential of standards” of judicial review was needed to hold the law unconstitutional because of the animus that motivated it); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 446–50 (1985) (explicitly rejecting the application of “more exacting” scrutiny, but nonetheless invalidating under rational-basis review a law the Court found to “rest on an irrational prejudice against the mentally retarded”); *Moreno*, 413 U.S. at 534–35 (holding that a law defining “household” as a group of related people violated the Constitution’s guarantee of equality even at “the very least” level of judicial review because the law was motivated by “a bare congressional desire to harm a politically unpopular group,” hippies).

<sup>171</sup> For example, the majority cited all the cases discussed supra note 170: *Romer*, 517 U.S. 620; *Cleburne*, 473 U.S. 432; and *Moreno*, 413 U.S. 528.

<sup>172</sup> *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

ments, like federalism and due process arguments, do not serve as the sole rationale for the Court's holding.

### III. A NEW APPLICATION OF THE FUNDAMENTAL INTEREST-EQUAL PROTECTION DOCTRINE IN *BOND* AND *WINDSOR*

#### A. *Early Commentary on Windsor's Conflation of Constitutional Principles*

While it is clear that *Windsor* is not exclusively grounded in federalism, due process, or equal protection arguments, the framework underpinning the Court's conflation of these constitutional principles is less obvious. Court observers immediately flooded blogs and journals with various competing theories for Justice Kennedy's rationale.<sup>173</sup> Some early commentators focused on the political motivations but gave up trying to decipher the jurisprudential explanation, arguing instead that the opinion is confusing and unclear,<sup>174</sup> perhaps "politically favorable" but not "legally sound."<sup>175</sup> Some asserted that the references to the various constitutional principles were just nods to the Justices' individual preferences, necessary to ensure majority support for the desired outcome.<sup>176</sup> Some insisted that the opinion actually does rest on a single one of these constitutional arguments,<sup>177</sup> and the Court's discussion of the other constitutional themes is just "some blather" to be ignored.<sup>178</sup> And some sug-

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<sup>173</sup> Given the early submission deadline, this Note's discussion of academic commentaries on *Windsor* focuses primarily on sources published shortly after the Court handed down the opinion, such as blog entries and essays featured in journals' online companions. See *supra* note 118.

<sup>174</sup> See, e.g., Jeffrey Rosen & Michael McConnell, Debating the Court's Gay Marriage Decisions, *New Republic* (June 26, 2013), <http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate> ("[T]he DOMA decision is a logical mish-mash, portending more litigation and more instability.").

<sup>175</sup> See, e.g., Tara Helfman, A Ruling Without Reason, *Commentary Mag.* (June 26, 2013, 4:15 PM), <http://www.commentarymagazine.com/2013/06/26/a-ruling-without-reason/> (describing *Windsor* as an "opinion brimming with constitutional catch phrases but containing no coherent rationale").

<sup>176</sup> See, e.g., Levinson, *supra* note 117 (describing the opinion as "a camel (i.e., a horse designed by a committee)"); Eric Posner, There Was No Clear Constitutional Reason to Strike Down DOMA, But the Court Did It Anyway, *Slate* (June 26, 2013, 12:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/kennedy\\_s\\_doma\\_opinion\\_and\\_supreme\\_court\\_there\\_was\\_no\\_strong\\_constitutional.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/kennedy_s_doma_opinion_and_supreme_court_there_was_no_strong_constitutional.html) ("Same-sex marriage is advancing while affirmative action is receding because that's what the relevant majorities of the justices care about.").

<sup>177</sup> See, e.g., Rao, *supra* note 141, at 38 ("Windsor identifies only a right to recognition.").

<sup>178</sup> See Levinson, *supra* note 117.

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gested that Kennedy's opinion may simply reflect a kitchen-sink approach, where the basic amalgamation of the law's independent implications pushes it across some line of unconstitutionality.<sup>179</sup> Lower courts have similarly struggled to understand the competing rationales undergirding the Supreme Court's decision and how these rationales bear on constitutional challenges to states' marriage laws.<sup>180</sup>

The most compelling commentaries on *Windsor* have advanced arguments that the constitutional principles inform each other in some way; however, the scholars holding these views disagree over which direction the influence is running and which principle is primary. Professor Deborah Hellman, for example, explains that the Court introduced structural arguments as a tool to bring in more evidence of an equal protection violation.<sup>181</sup> She views the unusual nature of the national government's intrusion into an area traditionally reserved to the states as suggesting that DOMA "stamps" same-sex couples as inferior.<sup>182</sup> From this perspective, while the federalism arguments strengthen the Court's outcome, they only do so to the extent that they manifest the message the law expresses; the basic framework of the Court's equal protection jurisprudence remains unaltered.

Conversely, Professor Ernest Young argues that the Court built on its due process jurisprudence to articulate a fundamental "entitlement to federal recognition of state law rights created in the democratic exercise of the states' reserved powers."<sup>183</sup> From this perspective, the equal protection principles implicated in the opinion seem incidental to the central argument that the federal government must recognize state laws in certain areas traditionally left to the states unless the federal government has a good reason not to do so. Each of these two perspectives holds merit, but neither fully accounts for the majority's expansive discussion of all three constitutional concepts.

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<sup>179</sup> See, e.g., Posner, *supra* note 176 (asserting that ascertaining the *Windsor* majority's judicial approach is a "fool's errand," but nevertheless positing that the federalism concerns, due process assertions, and equal protection arguments, which singularly do not provide enough force to overcome rational-basis review, and which do not inform each other, may together have totaled enough of a constitutional violation to invalidate the law).

<sup>180</sup> See *supra* note 118.

<sup>181</sup> Hellman, *supra* note 145.

<sup>182</sup> *Id.*

<sup>183</sup> Ernest A. Young, *United States v. Windsor* and the Role of State Law in Defining Rights Claims, 99 Va. L. Rev. Online 39, 47 (2013); see also Young & Blondel, *supra* note 124, at 144 ("[R]espect for federalism played a crucial role in dissuading the Court from deferring to Congress.").

This Part builds on and combines these two perspectives to propose an alternative rationale that depends equally on federalism, substantive due process, and equal protection principles: *Windsor* reflects a new, more conservative approach to the old, liberal fundamental interest-equal protection doctrine. Under this novel take on a familiar but often forgotten framework, an individual's fundamental interest in the recognition of her state's rights under a federalist system converges with equal protection concerns to yield heightened judicial review of a discriminatory law. Introducing limiting principles based on federalism into Professor Karlan's "stereoscopic synergy" analysis,<sup>184</sup> and explaining this relationship through Professor Ely's representation-reinforcing theory of judicial review,<sup>185</sup> this proposed framework reconciles sets of constitutional themes often perceived to be in tension.

*B. Bond Upholds a Fundamental Interest in the Recognition of State Rights*

Justice Kennedy's central assertion that DOMA is invalid because it places a "stigma upon all who enter into same-sex marriages *made lawful by the unquestioned authority of the States*"<sup>186</sup> is more fully understood when read alongside Kennedy's opinion in *Bond v. United States*,<sup>187</sup> a case considered by the Court both before and after *Windsor*.<sup>188</sup> In a majority opinion unaccompanied by any dissents, *Bond* translates states' rights under the federalism balance guaranteed in the Tenth Amendment into language of an individual's fundamental interest under the Fifth Amendment. This technical legal reasoning is buried in dramatic facts mirroring the components of a Hollywood script: marital infidelity, revenge, and federal agents determined to apprehend violators

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<sup>184</sup> See supra note 4 and accompanying text.

<sup>185</sup> See supra note 5 and infra note 232 and accompanying text.

<sup>186</sup> *Windsor*, 133 S. Ct. at 2693 (emphasis added).

<sup>187</sup> 131 S. Ct. at 2355.

<sup>188</sup> The Court initially considered only the issue of standing, remanding the case back to the U.S. Court of Appeals for the Third Circuit in 2011 after determining that the petitioner did have standing to challenge whether the Constitution's structural limits on federal authority impose any constraints on the scope of Congress's authority to enact legislation to implement a valid treaty. *Id.* at 2360. Just three years later, the Court decided the merits of the case. *Bond v. United States*, 134 S. Ct. 2077 (2014). This Note concerns the Court's decision on the issue of standing, which is referenced as *Bond*. The second opinion is characterized as *Bond II*.

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of a statute passed to implement an international treaty to curb chemical warfare.<sup>189</sup>

For giving a friend a minor burn, Carol Anne Bond was charged with and convicted of an offense under a federal statute passed to comply with the Chemical Weapons Convention.<sup>190</sup> Bond's conviction carried a sentence three times the maximum allowed in her home state, the Commonwealth of Pennsylvania, which had declined to even prosecute the case.<sup>191</sup> Bond challenged the validity of the statute on the grounds that Congress had contravened the basic federalism principles rooted in the Tenth Amendment.<sup>192</sup> "The public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," she argued, "ha[d] been displaced by that of the National Government."<sup>193</sup> The U.S. Court of Appeals for the Third Circuit initially held that, because a state was not a party to the proceeding, the petitioner did not have standing to challenge the statute as an infringement on the powers reserved to the states.<sup>194</sup> In its first consideration of the case, the Supreme Court reversed that standing determination.

The merits of *Bond* present criminal law and international law questions that, like the standing issues in *Windsor*, exceed the scope of this Note. But the implications of Justice Kennedy's standing rationale in *Bond* for his analysis of the merits in *Windsor* are significant. Holding that a citizen could have standing to bring a case on the grounds that Congress unconstitutionally intruded on the traditional sovereignty of States, the *Bond* Court resoundingly declared that "[f]ederalism secures the freedom of the individual" and this "individual liberty secured by

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<sup>189</sup> Carol Anne Bond, the petitioner in the case, discovered that her husband had impregnated her close friend. Bond responded by harassing her friend and placing "caustic substances" on objects the friend encountered daily. Her friend incurred a minor burn on her thumb, and Bond was indicted. *Bond*, 131 S. Ct. at 2360.

<sup>190</sup> 18 U.S.C. § 229 (2012). The statute forbids knowing possession or use of any chemical that "can cause death, temporary incapacitation or permanent harm to humans or animals" where not intended for a "peaceful purpose." *Id.* §§ 229(a), 229F(1), (7), (8). The statute was enacted as part of the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681, 2681-856 (codified as amended in scattered sections of 18 and 22 U.S.C.). Section 229 implements provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

<sup>191</sup> *Bond*, 131 S. Ct. at 2366.

<sup>192</sup> *Id.* at 2360-61.

<sup>193</sup> *Id.* at 2366.

<sup>194</sup> *United States v. Bond*, 581 F.3d 128, 141-42 (3d Cir. 2009).

federalism is not simply derivative of the rights of the States.”<sup>195</sup> The Court pointed both to arguments in political theory and to analogies from Court precedent to explain this assertion.

*Bond*’s political theory discussion drew on the legal and policy claims offered in the cases that paved the way for the federalism revival of the Rehnquist Court. The Court first wove together two strands of federalism arguments, articulating that the principles of state sovereignty and limited national powers are mutually reinforcing.<sup>196</sup> Rejecting the government’s contention that the two arguments should be considered separately, the Court cited to prior opinions to explain that “[i]mpermissible interference with state sovereignty” falls outside the enumerated powers of the national government,<sup>197</sup> and that federal action exceeding the national government’s enumerated powers “undermines the sovereign interests of the states.”<sup>198</sup> These structural boundaries matter to the respective government institutions for their own integrity, but also to the individuals who participate in and are affected by those institutions. The Court explained, “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>199</sup>

This liberty interest originates in part from negative rights: Federalism frees an individual from the arbitrariness that can result from excessive powers and the threat of tyranny that can emerge when one government holds complete jurisdiction over all areas of public life.<sup>200</sup> The liberty interest also stems from the positive right that federalism offers to individuals to participate more directly in local political processes, lessening reliance on the more diffuse political processes that control a remote central institution.<sup>201</sup> In this way, the state-national balance guards individuals’ meaningful representation, ensures more responsive policy making, and maintains firmer political accountability.<sup>202</sup>

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<sup>195</sup> 131 S. Ct. at 2364.

<sup>196</sup> *Id.* at 2366.

<sup>197</sup> *Id.* (citing *New York v. United States*, 505 U.S. 144, 155–59 (1992)).

<sup>198</sup> *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

<sup>199</sup> *Id.* at 2364 (quoting *New York*, 505 U.S. at 181) (internal quotation marks omitted).

<sup>200</sup> *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* A strong federalism system serves the great heterogeneity and mobility that characterize modern society by allowing states to innovate and experiment to compete for and respond to a diverse and transient citizenry. *Id.*

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The *Bond* majority expressed analogies to separation-of-powers and checks-and-balances cases to demonstrate that the Court had previously protected individual interests tied to structural principles. In *INS v. Chadha*, the Court allowed an individual to challenge the one-house veto, a procedure that bypassed the constitutional requirement that any legislative action be passed by both chambers of Congress and presented to the President.<sup>203</sup> While the Court recognized that Article I, Section 7 of the Constitution provided the executive a check over Congress's exercise of legislative power,<sup>204</sup> by allowing an individual to bring the case, the Court implicitly recognized that the checks-and-balances constraint also serves the individual's liberty interest. Justice Kennedy (then-Judge Kennedy) authored the Ninth Circuit opinion that the Supreme Court affirmed in *Chadha*,<sup>205</sup> and he later applied these same concerns to separation-of-powers issues in *Clinton v. City of New York*.<sup>206</sup>

In *Clinton*, the Court concluded that the group of appellees, which included individuals, had standing to challenge the presidential line-item veto, and the Court held that the veto violated the Constitution's Presentment Clause.<sup>207</sup> Justice Kennedy concurred to specifically argue that the statute that permitted the line-item veto threatened the liberty of individual citizens.<sup>208</sup> Foreshadowing the parallel argument he would make in *Bond* and *Windsor* regarding transgression of federalism principles, Kennedy declared, "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."<sup>209</sup>

The Court in *Bond* used these arguments from the prominent structure-as-limiting-principle cases of the last few decades to describe why the individual's interest in federalism is fundamental.<sup>210</sup> But the Court did more than just explain the importance of this interest; the Court's language also tied this interest to the Court's substantive due process jurisprudence by mirroring that case law's most recognizable phrases. *Bond*'s statement that federalism empowers individuals to "seek a voice

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<sup>203</sup> 462 U.S. 919, 925 n.2, 945–46 (1983).

<sup>204</sup> *Id.* at 947.

<sup>205</sup> *Chadha v. INS*, 634 F.2d 408, 411 (9th Cir. 1980).

<sup>206</sup> 524 U.S. 417 (1998).

<sup>207</sup> *Id.* at 421, 425–27.

<sup>208</sup> *Id.* at 449 (Kennedy, J., concurring).

<sup>209</sup> *Id.* at 450.

<sup>210</sup> In addition to the cases already discussed in this Part, the Court's arguments in *Bond* and *Windsor* reflect many of the cases referenced in Part I's discussion of the resurgence of federalism. See *supra* notes 87–105 and accompanying text.

in shaping the destiny of their own times,”<sup>211</sup> which *Windsor* quotes,<sup>212</sup> evokes immediate connections to *Planned Parenthood of Southeastern Pennsylvania v. Casey*’s salient claim that liberty entails “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>213</sup> Similarly, *Windsor*’s deliberate use of the word “dignity” with respect to individuals (ten times in the fairly short opinion),<sup>214</sup> and *Bond*’s connection of this individual dignity to the dignity federalism affords the states,<sup>215</sup> demands that the audience direct its attention to the conspicuous use of the term in *Cruzan v. Director, Missouri Department of Health*,<sup>216</sup> *Casey*,<sup>217</sup> *Washington v. Glucksberg*,<sup>218</sup> and *Lawrence v. Texas*.<sup>219</sup> And the Court’s determination in *Windsor* to tie “[t]he significance of state responsibilities for the definition and regulation of marriage”<sup>220</sup> to “history and tradition”<sup>221</sup> and “the Nation’s beginning”<sup>222</sup> undeniably implicates substantive due process cases’ frequent discussions of what is “deeply rooted in the nation’s history and tradition.”<sup>223</sup>

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<sup>211</sup> *Bond*, 131 S. Ct. at 2364.

<sup>212</sup> *Windsor*, 133 S. Ct. at 2692 (quoting *Bond*, 131 S. Ct. at 2364).

<sup>213</sup> *Casey*, 505 U.S. 833, 851 (1992).

<sup>214</sup> See, e.g., *Windsor*, 133 S. Ct. at 2692 (“[T]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”).

<sup>215</sup> *Bond*, 131 S. Ct. at 2364 (“The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.”).

<sup>216</sup> *Cruzan*, 497 U.S. 261, 302 (1990) (Brennan, J., dissenting) (“Nancy Cruzan is entitled to choose to die with dignity.”).

<sup>217</sup> *Casey*, 505 U.S. at 851 (“These matters, involving the most intimate and 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.”).

<sup>218</sup> *Glucksberg*, 521 U.S. 702, 726 (1997) (“Like the decision of whether or not to have an abortion, the decision how and when to die is . . . a choice central to personal dignity and autonomy.” (citation omitted) (internal quotation marks omitted)).

<sup>219</sup> *Lawrence*, 539 U.S. 558, 567 (2003) (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”). While these seminal due process cases involving personal decisions likely strike the average reader and popular culture as the Court’s most conspicuous uses of the term “dignity,” scholars who follow the Supreme Court more closely have noted that the Court has developed several conceptions of “dignity.” See, e.g., Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 188 (2011). Professor Henry illustrates that both liberal and conservative Justices frequently refer to dignity in their opinions. *Id.* at 172.

<sup>220</sup> *Windsor*, 133 S. Ct. at 2691.

<sup>221</sup> *Id.* at 2689.

<sup>222</sup> *Id.* at 2691.

<sup>223</sup> See *supra* notes 39–44 and accompanying text.



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The Court was not prepared to assert that an individual has an independent constitutional *right* to the liberty interest she derives from her state's ability to regulate within the powers reserved to it by federalism principles. But the Court's discussion of the inherent and historical importance of this interest to the individual, and the Court's effort to link it to other interests the Court had previously elevated to the status of rights, show that the Court believed this interest to be fundamental. When Kennedy wrote in *Windsor* that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism,"<sup>224</sup> a statement that confused the dissent and some commentators, Kennedy may have meant, as he articulated in *Bond*, that recognition of the sovereignty of states provides more than just a source of integrity for the proper boundaries of government. It grants a fundamental liberty interest to the individual.

*C. The Fundamental Interest in the Recognition of State Rights  
Generates Stereoscopic Synergy with Equal Protection Principles*

Recognition of this fundamental liberty interest generates particular "stereoscopic synergy" with equal protection considerations because of the mutually reinforcing qualities woven throughout federalism, due process, and equal protection<sup>225</sup>—and the specific threat to these qualities imposed by a law that undermines both an individual's interest in federalism and equal protection. "[T]he liberties that derive from the diffusion of sovereign power"<sup>226</sup> afford members of suspect or quasi-suspect classifications, whose interests may be under- or inaccurately represented on a national level, the opportunity to meaningfully consolidate their political power at local levels. This phenomenon was intentionally crafted through the structural limits imposed by the Constitution, and it enables Justice Brennan's laboratory model, resulting in different states' adoption of different regulations in response to local voters' concerns.<sup>227</sup> Federalism ensures a particular relationship between representatives and constituents built on what James Madison termed a

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<sup>224</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>225</sup> See *supra* text accompanying notes 19–24, 75–79.

<sup>226</sup> See *supra* note 199.

<sup>227</sup> See *supra* note 22.

“communion of interests.”<sup>228</sup> The communion of interests rests on “an expectation both that representatives will sympathize with their constituents by sharing common interests and will accordingly share in any burdens they impose by law onto others.”<sup>229</sup>

Thus, when the federal government fairly recognizes laws validly passed by the states, federalism ensures that the concerns of members of suspect and quasi-suspect classifications are represented at the national level. Indeed, the relatively rapid advancement of the legalization of same-sex marriage across several states may be attributed to this very phenomenon: The issue gained national prominence after one state, Hawaii, began to experiment with the prospect of legalizing same-sex marriage.<sup>230</sup> Conversely, should the federal government discriminately refuse to recognize validly enacted state regulations based on the quasi-suspect classifications of the groups burdened or benefited by the regulations, the federal government would undermine the specific liberties federalism is intended to yield and protect.

Effectuated properly alongside other constitutional safeguards, federalism amplifies minorities’ interests by creating across a patchwork of localities a mechanism of shifting majorities and minorities.<sup>231</sup> Professor

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<sup>228</sup> The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961). Of course, this communion of interests does not mean that laws will not advantage some groups and disadvantage others. But it does mean that all constituents’ interests are considered.

<sup>229</sup> Brown, *supra* note 6, at 1497.

<sup>230</sup> This consideration was prompted by a Hawaiian court ruling that laws barring same-sex couples from marrying were constitutionally suspect. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). Although the local judiciary was the body to initially act on the matter, and the state legislature did not follow suit until many years later, the state court’s opinion doubtlessly represented local constituents’ interests and vocalized these interests to the national conversation. See Erik Eckholm, *Gay Marriage Battle Nears End in Hawaii, the First Front Line*, N.Y. Times (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/us/gay-marriage-battle-nears-end-in-hawaii-the-first-front-line.html> (explaining that “the contemporary battle over same-sex marriage was born [in Hawaii] two decades ago,” and served as “the first judicial expression of an idea that soon caught fire across the country and . . . launched the global movement for the right to marry” (internal quotation marks omitted)).

<sup>231</sup> This “spatial” understanding of shifting majorities/minorities complements other scholars’ discussions of shifting majorities/minorities in a more “temporal” sense. See *infra* note 232 (discussing John Hart Ely’s understanding of shifting majorities/minorities). This characterization of federalism also complements the understanding of the virtues of the “national political process” promoted by legal scholars, like Herbert Wechsler, who have argued that the political structure of the country “retard[s] or restrain[s] intrusions” by the national government on states’ interests. See Wechsler, *supra* note 25, at 558. However, as alluded to in note 25, *supra*, and as further discussed in the remainder of this Note, flaws in the national political process motivate a modest judicial role. So, the framework proposed in this Note is based on three assumptions: The structure of the national political process helps to protect

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John Hart Ely recognized how shifting majorities/minorities strengthen the representation of minorities' interests—but he developed his well-known representation-reinforcing theory of the judiciary because he also acknowledged that this phenomenon is often defective at the national level.<sup>232</sup> Ely finds this mechanism for protecting minorities to be inadequate because prejudice—either real animosity or a blindness that prevents the ruling parties from perceiving “overlapping interests” with the groups burdened by the laws enacted—regularly injects flaws into the political process that preclude adequate representation of minorities' interests.<sup>233</sup> This process-based equal protection theory helps to explain the concern triggered by federal laws that unfairly undermine individuals' interests in the rights properly enacted by their states: The decision makers most likely to be blinded to the liberty interests “that derive from the diffusion of [national] sovereign power”<sup>234</sup> are those decision makers who legislate on behalf of the national sovereign.

Federal laws that discriminately refuse to recognize validly enacted state regulations based on the classifications of the affected groups indicate a prejudice that renders flawed a political process grounded in federalism that is meant to protect the interests of those affected groups. Such prejudice may not be explained by animus directed toward the affected minority; rather, it may be explained, as seems to be the case with respect to DOMA, by blindness to the overlapping interests found in and

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local interests (not just states' interests but the interests of individuals within those states too); this national political process is often, or at least sometimes, defective; and the judiciary is capable of recognizing and correcting these flaws in order to protect the interests the political process is meant to promote (that is, to help ensure fairer representation of local interests at a national level).

<sup>232</sup> Ely, *supra* note 5, at 80–81 (positing a structural argument that constantly shifting majority and minority alignments over time are meant to narrow the distance between the interests of the ruling majorities and the ruled minorities, and therefore ensure more accurate representation of minorities' interests at any given time, but asserting that this feature of democratic governance is inadequate in practice and thus necessitates the representation-reinforcing role of the judiciary). Ely's model largely grows out of the process-based theory undergirding Justice Stone's “discrete and insular minority” concerns in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Ely, *supra* note 5, at 75–77 (“*Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”).

<sup>233</sup> Ely, *supra* note 5, at 153.

<sup>234</sup> See *supra* notes 199 and 226 and accompanying text.

affected by the principle of state regulation within spheres traditionally reserved to the states under a federalist system. Courts are appropriate to apply heightened scrutiny to these laws because such blindness “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>235</sup> This judicial interference is value-free in that it intends to simply strengthen a representative democratic process—which, when functioning correctly, fairly considers the interests of all individuals, including minorities, to set the polity’s substantive values—rather than meaning to supplant that political process with the courts’ imposition of its own values. As such, this model yields the “neutral principles” Professor Wechsler famously argued ought to characterize the Court’s then-emerging equal protection jurisprudence.<sup>236</sup> The rationale, drawing on features of liberal and conservative theories, transcends a particular case and a specific outcome.

#### D. This Stereoscopic Synergy Drives Windsor

Alongside other fundamental interests the Court has established—state voting, court access, interstate travel, and perhaps education<sup>237</sup>—*Bond* identifies an individual’s fundamental interest in the national government’s recognition of rights extended by her state as a legitimate exercise of the powers reserved to the state under the Constitution. The question then becomes whether the state regulation at issue (and the federal regulation that conflicts with it) is indeed one that falls within the state’s traditional sovereignty. The Court avoided this question in *Bond II*, deciding the merits of the case by narrowly holding that the statute at issue did not reach Bond’s conviction for simple assault under the unique facts of the case.<sup>238</sup> In *Windsor*, though, the Court resolutely decided: Defining marriage is “without doubt a proper exercise of [a state’s] sovereign authority within our federal system.”<sup>239</sup> Therefore, *Bond* and *Windsor*, read together, posit that an individual has a funda-

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<sup>235</sup> *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

<sup>236</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959) (“A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”).

<sup>237</sup> See *supra* text accompanying notes 66–71, 80–83.

<sup>238</sup> 134 S. Ct. 2077, 2093–94 (2014). By settling the case on statutory construction grounds, the Court dodged the bigger question of whether the treaty expanded the enumerated power of the federal government to pass the related criminal statute.

<sup>239</sup> *Windsor*, 133 S. Ct. at 2692.

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mental interest in the national government's recognition of a valid marriage law passed according to that state's sovereign authority.

The Court was careful to not declare a fundamental interest in same-sex marriage itself, or in any kind of marriage. Rather, an individual derives her claim that the national government should recognize the validity of her marriage from her state's prior determination to grant that validity. This is evident in the Court's insistence on coupling the term marriage with qualifiers like "state-sanctioned,"<sup>240</sup> "valid,"<sup>241</sup> and "made lawful by the unquestioned authority of the States."<sup>242</sup> And this is shown in the Court's insistence on describing Windsor's marriage with phrases like "a status the State finds to be dignified and proper,"<sup>243</sup> "the State acted to give . . . a lawful status,"<sup>244</sup> and "a relationship deemed by the State worthy."<sup>245</sup> Kennedy's penultimate sentence emphasizes this point: "This opinion and its holding are confined to those lawful marriages"<sup>246</sup>—that is, marriages made lawful by the separate states.

As with other fundamental interests that are not elevated to the level of constitutionally guaranteed rights, states are not constitutionally required to extend the right to marry to anyone. However, once a state does extend that right, because it "confer[s] upon [the recipients] a dignity and status of immense import,"<sup>247</sup> the national government cannot invidiously discriminate in its recognition of that state law right. It is on this point that equal protection principles converge with the fundamental interest that *Windsor* upholds. In DOMA, the national government discriminately recognized state marriage rights, created by the states through the democratic exercise of their reserved powers, based on the sexual orientation of the class of people asserting those rights. Like the classifications involved in the early fundamental interest-equal protection cases—wealth classifications with respect to court access, residency-based classifications with respect to state voting, and illegal alienage with respect to public education—the Court has never recognized sexual orientation as a suspect class. Therefore, the Court would have typically applied rational-basis review to a law that discriminates on the basis of

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<sup>240</sup> Id. at 2694.

<sup>241</sup> Id.

<sup>242</sup> Id. at 2693.

<sup>243</sup> Id. at 2696.

<sup>244</sup> Id. at 2692.

<sup>245</sup> Id.

<sup>246</sup> Id. at 2696.

<sup>247</sup> Id. at 2692.

sexual orientation, deferring to legitimate government interests served by the law as long as the law's means of furthering those interests were rationally related. For the reasons discussed in Part II, the Court was not willing to plainly hold that Section 3 of DOMA would not withstand such review.<sup>248</sup>

Under the fundamental interest-equal protection doctrine, however, when the government discriminately grants to some classes and withholds from other classes, even quasi-suspect classes, an interest that the Court has determined is fundamental, the law, at the very least, must advance *important* government ends by *substantially related* means. This heightened scrutiny is justified in the federalism-as-fundamental-interest context by its representation-reinforcing effect: Because the federalist structure, when properly accompanied by other constitutional guarantees, yields liberty interests that encourage more accurate representation of minorities' interests in the democratic process, the Court is correct to be vigilant of prejudice that may render this important mechanism of minority protection defective. Under this model, the prejudice indicated by DOMA's "[d]iscrimination[] of an unusual character"<sup>249</sup> is best understood as the federal government's blindness to the liberty interests derived from and protected by the states' right to regulate within their sovereign sphere. *Windsor's* use of the federalism-based fundamental interest-equal protection analysis to determine that Section 3 of DOMA did not pass heightened review represents the value-free, representation-reinforcing judicial intervention that Ely calls for to correct such blindness in the political process.

The Court may have shared in this blindness but for the stereoscopic synergy generated by the confluence of principles rooted in federalism, due process, and equal protection. Implication of federalism concerns, or denial of a liberty interest that is important but not enshrined as a right, or disparate treatment of a quasi-suspect class would, independently, rarely be sufficient to render a law constitutionally invalid. But perceived together, these values push the judiciary to strengthen the democratic process. Indeed, "the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved,"<sup>250</sup> particularly when the funda-

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<sup>248</sup> See *supra* Part II.

<sup>249</sup> *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)) (internal quotation marks omitted).

<sup>250</sup> *Id.* at 2695.

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mental interest protected by the Fifth Amendment is the “individual liberty secured by federalism.”<sup>251</sup>

#### IV. APPLYING THE FEDERALISM-BASED FUNDAMENTAL INTEREST-EQUAL PROTECTION DOCTRINE TO OTHER CONTEXTS

Part I of this Note explored how federalism, on one side, and due process and equal protection, on the other, have assumed separate public associations that are perceived to be in conflict with each other. Accusations of judicial activism that were thrust at the use of substantive due process and equal protection principles throughout much of the twentieth century, often by opponents holding strong federalism views, have made space for the same criticism now targeting the use of federalism as a limiting principle, frequently made by opponents advancing the Fifth and Fourteenth Amendment notions. Part II examined how *Windsor* challenges this understanding of these constitutional concepts as competing silos since none of the principles singularly suffices to reach the Court’s outcome. Part III explained how Justice Kennedy reconciles these principles through a modern, federalism-based salvaging of the fundamental interest-equal protection doctrine that emerges in *Bond* and *Windsor*.

This Note offers a theoretical underpinning of this approach that draws on liberal and conservative scholarship. Under this new twist on an old analysis, heightened judicial scrutiny applies to any law by the national government that discriminately interferes with rights granted by a state in the democratic exercise of its reserved powers based on the classification of the burdened group. This model rests on a value-free mechanism for the courts to correct defects in the representative democratic political process, rather than on the judiciary’s imposition of its own substantive judgments. Under such neutral principles, courts can apply this analysis without implicating the activist charges that popular culture directs towards federalism, due process, and equal protection principles. In this final Part, the proposed framework’s disruption of the strictly conservative and liberal labels placed on these constitutional concepts is further demonstrated by applying the stereoscopic synergy analysis to advance two political causes championed on opposite ends of the political spectrum: medical marijuana use and gun ownership.

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<sup>251</sup> *Bond*, 131 S. Ct. at 2364.

*A. Stereoscopic Synergy Applied to Medical Marijuana Use*

In *Gonzales v. Raich*, the Court permitted Congress to criminalize the production and use of home-grown cannabis against a challenge that the Controlled Substances Act exceeded the federal government's enumerated powers.<sup>252</sup> The Court reached this decision under a rational-basis review of the law.<sup>253</sup> The new fundamental interest-equal protection doctrine developed in this Note raises at least the possibility that the Court could reach a different outcome on this question.

California has been joined by other states in extending a right to use marijuana for medicinal purposes, and this exercise arguably falls within the powers reserved to the states to govern local health and welfare. As such, the national government's refusal to recognize this right implicates the fundamental interest that the Court recognized in *Bond* and *Windsor*. For many medicinal marijuana users, their dependence on the legalization of the substance affects their ability both to direct "the destiny of their own times"<sup>254</sup> and to "define [their] own concept of existence"<sup>255</sup> in the same way as for patients who rely on other legal drugs for their healthcare. The national government's refusal to recognize the validly enacted state rights of patients who depend on medicinal marijuana, while at the same time recognizing the state rights of patients who rely on other medical drugs, some of which arguably pose greater risks to the individuals and to society, descriptively represents discriminatory treatment of the former class. But a traditional equal protection or due process analysis would likely ascribe the lowest level of judicial review to claims brought by the medicinal marijuana users.

Under the approach proposed in this Note, because of the fundamental interest that is threatened—the liberty interest an individual derives from her state's exercise of its reserved powers to grant state rights recognized by the federal government—the Court would approach the congressional statute with heightened scrutiny. This consideration is war-

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<sup>252</sup> 545 U.S. 1, 6–9, 19 (2005) (determining that a prohibition on the growth of marijuana for medicinal use, even if the activity were considered intrastate and arguably non-economic, was a rational way for the national government to achieve a legitimate end of preventing access to marijuana for other purposes).

<sup>253</sup> *Id.* at 26–27 ("We have no difficulty concluding that Congress acted rationally in determining that . . . the subdivided class of activities . . . was an essential part of the larger regulatory scheme.").

<sup>254</sup> *Windsor*, 133 S. Ct. at 2692 (quoting *Bond*, 131 S. Ct. at 2364) (internal quotation marks omitted).

<sup>255</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).



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ranted because the federal government's discriminatory recognition of the state's proper regulations may indicate defects in the national political process that prevent fair representation of the interests of minorities particularly burdened by such discrimination. Under this review, the *rational* means by which the Controlled Substances Act serves *legitimate* ends—that is, completely banning the intrastate growth of marijuana for medicinal purposes to restrict access to marijuana for non-medicinal purposes—may not be enough to qualify as means that *substantially* further *important* government interests.<sup>256</sup>

### *B. Stereoscopic Synergy Applied to Private Gun Ownership*

This new analytical framework fusing federalism, due process, and equal protection is not limited to the advancement of liberal causes. In the wake of recent gun violence and corresponding calls for gun control from politicians in Washington, D.C., gun rights advocates have searched for effective arguments to defend private gun ownership. The fundamental interest-equal protection doctrine developed in *Windsor* may be attractive ammunition to add to their constitutional cartridge.<sup>257</sup>

It is difficult to argue that regulation of gun production and distribution does not fall within the federal government's enumerated powers under the Commerce Clause given the related economic market that crosses state lines (and given Court precedent). There may be some aspects of intrastate activities related to gun ownership, however, that the Court is willing to place within the powers traditionally and constitu-

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<sup>256</sup> For example, the strict regulations states have imposed on medicinal marijuana use and the small fraction that this legal market would constitute relative to the national marijuana market cast some doubt on whether the Court's reasoning in *Raich* could similarly withstand a heightened scrutiny analysis.

<sup>257</sup> Of course, the hypothetical cases discussed in this Part are simply meant to illustrate the proposed analytical framework and how that framework interacts with issues on obviously opposite ends of the political spectrum. One can imagine the analysis applied to other contexts in which the classifications are more defined and dignity concerns are stronger. For example, this approach could be used to strike down a federal law that discriminates in its treatment of state regulations regarding education, such as a federal statutory definition of "education" that refuses to recognize parochial and religiously motivated homeschool environments that are otherwise recognized by a state. Though education and religious affiliation, by themselves, may not draw heightened scrutiny on their own (at least under the Due Process and Equal Protection Clauses, setting aside the First Amendment issues), when combined with the implicated federalism concerns, this hypothetical represents another instance where the proposed fundamental interest-equal protection framework could motivate stricter scrutiny.

tionally reserved to the states in the face of interference by the national government, especially given the conservative majority's narrow view of the Commerce Clause<sup>258</sup> and strong stance on the historical right of private gun ownership.<sup>259</sup> Should the Court determine that regulation of some of these activities falls "within the authority and realm of the separate States," as *Windsor* described the right to define and regulate marriage,<sup>260</sup> a state's enactment of laws easing intrastate gun ownership would grant the corresponding liberty interest to individuals seeking to take advantage of that state right.<sup>261</sup>

The classification at issue in this hypothetical case is less defined than the class implicated in *Windsor*, and perhaps even less discrete than the class involved in the medical marijuana context.<sup>262</sup> Nevertheless, many individuals adamantly claim gun ownership as a "way of life" central to a collective identity.<sup>263</sup> For these individuals, a federal law that tramples

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<sup>258</sup> As discussed in Part I, the majority or plurality decisions in *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), *United States v. Morrison*, 529 U.S. 598, 617–18 (2000), and *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012), push back on the Court's previous decisions that had granted leeway to the use of the Commerce Clause to justify congressional action.

<sup>259</sup> In *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008), a 5-4 majority held that the Second Amendment protects an individual's right to possess a firearm for traditionally lawful purposes, such as self-defense within a home, with respect to the federal government. In *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010), the Court held that this right is incorporated through the Due Process Clause of the Fourteenth Amendment and therefore applies to the states.

<sup>260</sup> *Windsor*, 133 S. Ct. at 2690.

<sup>261</sup> *Heller* and *McDonald* noted that the Second Amendment right to possess a firearm in certain circumstances, such as in one's home for the purpose of self-defense, is not unlimited. *Heller*, 554 U.S. at 626–28 (noting, for example, that nineteenth-century courts found prohibitions on carrying concealed weapons to be lawful). Several states grant gun rights that exceed Second Amendment protection. Vermont, for example, does not require a permit to carry a concealed weapon. See State Gun Laws: Vermont, Nat'l Rifle Ass'n Inst. for Legislative Action (May 1, 2014), <http://www.nrila.org/gun-laws/state-laws/vermont.aspx>. These more expansive rights are what would be at issue in the hypothetical case discussed in this Part.

<sup>262</sup> Even so, the Court has not always required a very high bar for a group to demonstrate that it merits equal protection consideration as a discrete class, even if just under rational-basis review. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (defining hippies as a discrete group).

<sup>263</sup> See, e.g., Rick Jervis, Texas, A Place Where Gun Rights Are at Home, USA Today (Feb. 18, 2013), <http://www.usatoday.com/story/news/nation/2013/02/17/guns-are-a-way-of-life-in-texas/1926763> (quoting gun owner describing owning guns as "a part of our way of life"). Many commentators' descriptions of gun ownership as a cultural phenomenon resemble descriptions of other social groups to which the Equal Protection Clause has been applied. See, e.g., David French, Gun Rights, Gun Control, and Irreconcilable Cultural Differences, National Review Online (Dec. 21, 2012, 1:20 PM), <http://www.nationalreview.com/>

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on their state's ability to grant certain rights related to gun ownership—for example, invalidating a state right to own some types of guns for hunting purposes but recognizing state rights related to other arguably dangerous hobbies—may “impose a disadvantage . . . and so a stigma upon”<sup>264</sup> this class.

Courts would be unlikely to afford gun owners anything more than rational-basis review of their equal protection claims under a traditional equal protection approach. Pursuant to this new fundamental interest-equal protection doctrine, however, because the federal action discussed above would threaten the liberty interest the individuals would have derived from their state's enactment of laws within the state's reserved powers, courts would subject the discriminatory treatment to heightened scrutiny.<sup>265</sup> This judicial review would be buttressed by a concern about the federal representatives' blindness toward the “overlapping interests” they share with the gun owners who are harmed by the national government's discriminatory recognition of validly enacted state regulations.<sup>266</sup>

*C. Criticism of the New Fundamental Interest-Equal Protection Doctrine: Just Another Example of Judicial Activism?*

While this conservative take on a liberal doctrine disrupts the popular perception of federalism and substantive due process-equal protection as necessarily separate and conflicting concepts, the proposed analytical framework cannot escape criticism. From a practical standpoint, it is obvious that this federalist-fundamental interest-equal protection argument has a fairly limited scope; even the two hypotheticals suggested above

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corner/336316/gun-rights-gun-control-and-irreconcilable-cultural-differences-david-french (“[T]he gun-control argument is more about cultural values than it is about charts, graphs, and numbers. And those values are shaped less by public policy . . . than by peers, parents, and personal experience.”).

<sup>264</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>265</sup> Of course, heightened scrutiny does not mean automatic invalidation. One can think of several reasons for Congress's determination that certain gun ownership restrictions constitute substantial (or even narrowly tailored and least restrictive) means to further important (or even compelling) government interests.

<sup>266</sup> For example, many gun owners felt they were the collective object of a negative stereotype expressed in now-infamous comments then-Senator and presidential candidate Barack Obama made regarding working-class and rural voters who “cling to guns.” Ed Pilkington, *Obama Angers Midwest Voters with Guns and Religion Remark*, *Guardian* (Apr. 13, 2008), <http://www.theguardian.com/world/2008/apr/14/barackobama.uselections2008>. Obama's remarks were contemporaneously described as “demeaning” and illustrative of the fact that the candidate was “out of touch” with this class of voters. *Id.*

stretch the doctrine to reach the intended results. Although the Roberts Court has continued the federalism revival of the Rehnquist era, the truly pervasive reach of the modern national economy and the related expansive application of the Commerce Clause and the Necessary and Proper Clause mean the range of activities the Court is willing to place in “the authority and realm of the separate States”<sup>267</sup> is quite narrow. Even if this range is a bit broader under the Roberts Court, the Court has previously expressed the difficulty it faces in practically determining what fits within the scope of “traditional governmental functions,”<sup>268</sup> a task upon which this new framework is premised.

At the same time, one may argue that the discriminatory treatment discussed in the hypotheticals does not carry the same dignity implications as those posed by DOMA. While there may be alternative medical options to marijuana use or alternative hobbies and defense mechanisms to hunting and gun ownership, there is no comparable alternative to state recognition of one’s marriage because of the dignity and status that recognition imports. From this view, same-sex marriage is a unique issue, and the stereoscopic approach the Court applied to it in *Windsor* does not transfer well to other legal questions.

In addition to these practical concerns regarding the proposed framework’s application to other contexts, both liberals and conservatives are likely to criticize the argument that the Court actually applied this distinctive approach in *Windsor*. From the liberal critique, marriage itself—rather than the state’s right to regulate it—is the fundamental interest implicated in *Windsor*, and any law’s unequal recognition of that interest represents invidious discrimination. Equal protection really does the heavy lifting in the Court’s opinion; any discussion of federalism is just

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<sup>267</sup> *Windsor*, 133 S. Ct. at 2690.

<sup>268</sup> In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), the Court overruled the “traditional governmental function” test it had established just nine years earlier in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). *National League of Cities* had only been made possible by Justice Blackmun’s concurrence, a position he starkly departed from less than ten years later when he declared in *Garcia* that “the attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is . . . unworkable.” 469 U.S. at 531. While *Garcia* is still good law, the Rehnquist and Roberts majorities have significantly chipped away at *Garcia*’s skepticism of federalism principles, suggesting that the current Court may not be as averse to using an inquiry similar to the “traditional governmental function” test. See Graglia, *supra* note 33, at 763 (“*Garcia*, however, turned out not to be the final word on the Court’s role in protecting federalism.”); see also *supra* text accompanying notes 87–105 (discussing the surprising resurgence of federalism-limiting principles over the past two decades).

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window-dressing that will be easily thrown away when the Court considers a challenge to a state's definition of marriage.<sup>269</sup> From the conservative critique, this proposed approach represents the same judicial abuses of the first iteration of the fundamental interest-equal protection cases. Chief Justice Burger's criticism still stands that the Court is trying to aggregate a quasi-suspect class and a quasi-right, and any perceived synergy that results is just the imagination of the Justice writing the opinion (or of a humble law student commenting on it).

These arguments hint at the strongest criticism of this new approach, likely to come from the legal realists who would contest that there is actually nothing new about the approach at all: The only thing the *Windsor* decision reveals is the composition of the current Court and the preference of a majority of its members. This critique carries particular force in light of the other landmark decisions the Court handed down alongside *Windsor* in the final week of its last Term, using equal protection principles to signal growing skepticism of affirmative action<sup>270</sup> and using federalism arguments (and discussion of the equal sovereignty of the states) to strike down federal preclearance requirements on certain states' ability to implement changes to their voting laws and practices.<sup>271</sup> To many observers, these cases illustrate that the Justices simply pick and choose which aspects of which constitutional principles are necessary to reach the relevant majority's desired outcome. Any attempt to construct a technical analytical framework based on the Court's opinion is a nice academic exercise, but is just coincidental if it happens to be a descriptive account of what the Court actually did in this case or will do in future cases.

From this perspective, the only prescriptive force a doctrine holds is its potential to advance the policy preferences of a majority of the Justices. To that end, these critics will argue that no judicial theory is truly value-free: Courts necessarily engage in such substantive value judgments all the time, and the process-based framework advanced in this Note poses no exception.<sup>272</sup> While this criticism undoubtedly holds some

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<sup>269</sup> Justice Scalia anticipates this response to the majority's opinion. He demonstrates how future litigants could construct their arguments by crossing out and replacing just a few words in what he describes as "deliberately transposable" passages of the majority's opinion. *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

<sup>270</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013).

<sup>271</sup> See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>272</sup> See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1077 (1980) ("The crux of any determination that a law unjustly

merit, this Note's analysis is premised on the notion, shared with prominent scholars like Ely<sup>273</sup> but certainly not universally endorsed,<sup>274</sup> that structural and procedural values enforced by the judiciary more closely approximate the neutral principles that best steer the Court's constitutional jurisprudence.<sup>275</sup> Nevertheless, given the applicability of this new fundamental interest-equal protection framework to advance causes on both ends of the political spectrum, the doctrine may simply become a convenient tool for the liberal and conservative blocks on the Court to persuade swing votes toward their intended outcomes.<sup>276</sup> If these critics are proved correct, *Windsor* will stand less for the principled reconciliation of federalism, substantive due process, and equal protection, and more for the vitality of the judicial activism that initially placed these constitutional concepts in conflict with each other.

#### CONCLUSION

Federalism, due process, and equal protection have assumed popular political associations that are often in conflict with each other. Although there is little theoretical reason for these principles to be in necessary tension, the Court's activist use of these terms over the twentieth century has seemingly placed them at odds with each other. *Windsor*, read alongside *Bond*, proposes a new framework in which these constitutional concepts inform and embolden each other, adding a conservative twist to the liberal fundamental interest-equal protection doctrine. The two recent decisions reflect the Court's realization of the fundamental interest an individual holds in the rights granted by her state through the democratic exercise of the state's reserved powers. A particular stereoscopic

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discriminates against a group . . . [n]ecessarily . . . must look beyond process to identify and proclaim fundamental substantive rights.”).

<sup>273</sup> Ely, *supra* note 5, at 87 (“[C]ontrary to the standard characterization of the Constitution as ‘an enduring but evolving statement of general values,’ is that in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned . . . with procedural fairness . . . [and] process writ large . . . .” (citation omitted)).

<sup>274</sup> See, e.g., Tribe, *supra* note 272, at 1064 (“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”).

<sup>275</sup> See Wechsler, *supra* note 236, at 19.

<sup>276</sup> Cf. Louis Michael Seidman, *Depoliticizing Federalism*, 35 *Harv. J.L. & Pub. Pol’y* 121, 123 (2012) (expressing the “obvious fact” that “[a]ll sides regularly use the rhetoric of federalism to advance contestable political positions”).

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synergy emerges when acknowledgement of this fundamental interest fuses with equal protection considerations, yielding a value-free, representation-reinforcing judicial role to correct defects in the political process's protection of minorities' interests. Under this analysis, the Court may apply heightened scrutiny to any law by which the national government discriminates in its recognition of validly enacted state rights based on the class of the burdened individuals.

This proposed framework could be used to advance both liberal and conservative causes, dismantling the popular culture's perception of federalism and substantive due process-equal protection as strictly separate and opposing concepts. However, because of this political malleability, the Court's use of this new doctrine is likely to be subject to—and, over time, may actually be guilty of—the same charges of judicial activism that positioned these constitutional principles in tension with each other in the first place.