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Anthony Michael Kreis

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UNHINGING SAME-SEX MARRIAGE FROM THE CONSTITUTIONAL CANON: THE SEARCH FOR A PRINCIPLED DOCTRINAL FRAMEWORK

Anthony Michael Kreis^{*}

INTRODUCTION

When eighty-four-year-old Edie Windsor challenged the Defense of Marriage Act's constitutionality, she may not have predicted the case's historic importance. The Defense of Marriage Act (DOMA),¹ enacted in 1996, amended the federal Dictionary Act to define "marriage" and "spouse" to exclude same-sex marriages in over 1,000 statutes and regulations.² As a result, DOMA prohibited lawfully married same-sex couples from availing themselves of federal benefits provided by a wide swath of programs and policies covering Social Security, housing, taxation, copyright, and veterans' affairs.³

In *United States v. Windsor*, the United States Supreme Court held that the Defense of Marriage Act violated the equal protection guarantees incorporated in the Fifth Amendment.⁴ Writing for the Court, Justice Anthony Kennedy held upon "careful consideration"⁵ that DOMA had the "avowed purpose and practical effect" of imposing inequality on wedded same-sex couples.⁶ The statute's principal effect and principal purpose rendered the law

^{*} Emory University School of Law, Visiting Scholar-in-Residence; University of Georgia, Ph.D Candidate, School of Public and International Affairs; J.D., Washington & Lee University School of Law; B.A., University of North Carolina at Chapel Hill. The author wishes to thank Professors Mary Dudziak, Martha Fineman, Timothy Holbrook, Michael Perry, and Sonja West for their comments on earlier drafts of this Essay and the Emory University School of Law faculty for a robust faculty roundtable on the *Windsor* decision that greatly improved the formulation of this piece.

¹ Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)) ("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.").

² *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

³ *Id.* at 2694.

⁴ *Id.* at 2695.

⁵ *Id.* at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

⁶ *Id.* at 2693.

constitutionally deficient.⁷ Despite some debate that the Court might sidestep the equal protection arguments in favor of a pure federalism rationale or punt on standing grounds,⁸ Justice Kennedy couched *Windsor*'s holding in a hybrid of substantive due process, equal protection, and federalism.⁹

The Court's majority was careful, however, to reiterate that *Windsor* did not immediately undermine state same-sex marriage prohibitions.¹⁰ Perhaps seeing the limitations of that caveat and *Windsor* as ushering in new litigation attacking the constitutionality of state same-sex marriage bans, Justice Samuel Alito vigorously dissented. Writing for himself and joined in part by Justice Clarence Thomas, Justice Alito argued, "Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue."¹¹

Justice Alito went on to forcefully contend that the Court erred in its application of substantive due process to the liberty interest claimed by Edie Windsor.¹² Under the traditional formulation of the substantive due process doctrine, substantive due process analyses are two tiered. For those fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition,"¹³ "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"¹⁴ and "implicit in the concept of ordered liberty,"¹⁵

⁷ *Id.* at 2694.

⁸ See, e.g., Adam Winkler, *Might Justice Kennedy Spring a Surprise on DOMA?*, L.A. TIMES, (June 22, 2013), <http://articles.latimes.com/2013/jun/22/opinion/la-oe-winkler-doma-supreme-court-20130623> ("[S]peculation has recently turned to the possibility that Kennedy, instead of voting to strike DOMA, might decide the case on narrow procedural grounds that leave the basic constitutionality of DOMA unresolved."); Allison Trzop, *Evening Round-up: DOMA Argument*, SCOTUSBLOG (Mar. 27, 2013, 6:57 PM), <http://www.scotusblog.com/2013/03/evening-round-up-doma-argument/> ("Federalism also attracted attention, as Court watchers parsed Justice Kennedy's evident concern for marriage as a matter traditionally regulated by the states.").

⁹ See *Windsor*, 133 S. Ct. at 2695–96. Justice Scalia strenuously objected to the majority's analysis. "The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a 'bare . . . desire to harm' couples in same-sex marriages." *Id.* at 2707 (Scalia, J., dissenting) (alteration in original) (internal quotations marks omitted).

¹⁰ *Id.* at 2696 ("This opinion and its holding are confined to those lawful marriages.").

¹¹ *Id.* at 2714 (Alito, J., dissenting).

¹² *Id.* at 2714–15.

¹³ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁴ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

¹⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

the doctrine demands strict scrutiny.¹⁶ For all other liberty interest claims under substantive due process guarantees, the doctrine provides only rational basis review.¹⁷ The *Windsor* decision failed to clearly articulate a traditional standard of review but suggested the scrutiny was more exacting than traditional rational basis.¹⁸

Justice Alito's dissent is an indictment of the murky hybrid analysis, suggesting the Court improperly applied a more rigorous judicial review to DOMA without the broader historical inquiry demanded by the substantive due process doctrine. In his dissent, Justice Alito argues that same-sex marriage falls outside the boundaries of what constitutes a fundamental right. At the heart of Justice Alito's argument is a contention that the analysis of a purportedly fundamental right's history and tradition should be constructed at a granular level:

It is beyond dispute that *the right to same-sex marriage* is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.¹⁹

In a separate dissent, Justice Antonin Scalia also leveled a similar biting criticism of the majority's flirtation with substantive due process. Justice Scalia echoed Justice Alito's critique that the *Windsor* majority neglected the requisite historical analysis for substantive due process:

The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements [tying the Fifth Amendment and

¹⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 766 (1997) (Souter, J., concurring) ("In the face of [a fundamental] interest . . . a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted.").

¹⁷ *Id.* at 767 n.9 ("[A right must] be fundamental before anything more than rational basis justification is required . . . not every case will require the 'complex balancing' that heightened scrutiny entails.").

¹⁸ Justice Scalia correctly observed that the Court's standard of review does not neatly fit within traditional understandings of rational basis review or strict scrutiny. "As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases But the Court certainly does not *apply* anything that resembles that deferential framework." *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

¹⁹ *Id.* at 2715 (Alito, J., dissenting) (emphasis added) (citation omitted).

individual dignity] mean. *Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation’s history and tradition,”* a claim that would of course be quite absurd.²⁰

However, both dissents improperly frame the historical question by structuring the analysis from the narrowest possible level of abstraction.²¹ The question cannot be whether a constitutional challenge from same-sex couples asserting a right to marry creates a new fundamental right—a right to same-sex marriage. Rather, the question is *whether the government’s prohibition of same-sex couples’ access to the fundamental right of the freedom to marry can withstand heightened judicial scrutiny.*

In framing same-sex couples’ constitutional challenges for the freedom to marry as seeking a “very new right,”²² the dissenting justices imply that preexisting same-sex marriages and same-sex couple households, many of which raise children,²³ necessarily and inherently function differently than heterosexual marriages and heterosexual-headed households. With this presupposition and the emphasis on novelty, the two dissents improperly view states that have extended same-sex marriage rights as having created dual institutions of marriage, rather than simply allowing same-sex couples to share in the same rights, privileges, responsibilities, and status afforded by a singular institution of marriage. The latter, more inclusive posture is more proper for constitutional analysis and is consistent with the Court’s prior marriage-related decisions.

Time and again, the Supreme Court has reinforced the bedrock principle that marriage is a fundamental right.²⁴ However, when it has significantly

²⁰ *Id.* at 2706–07 (Scalia, J., dissenting) (emphasis added) (citation omitted) (quoting *Glucksberg*, 521 U.S. at 720–21).

²¹ Beyond the fundamental right to marry, fundamental rights protected by the Due Process Clause have also been stated broadly. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (voiding private, consensual anti-sodomy laws citing a right to choose relationships and “dignity”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (invalidating contraceptive prohibition for married couples under a “right of marital privacy”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (overturning statute proscribing private primary education as violating the parental liberty to raise children).

²² *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

²³ *See* Sabrina Tavernise, *Adoptions Rise by Same-Sex Couples, Despite Legal Barriers*, N.Y. TIMES, June 14, 2011, at A11 (noting an upward trend in same-sex couples adopting children).

²⁴ *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (articulating marriage as “one of the basic civil rights of man”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage . . . [is] the most important relation in life . . .”).

extended that right to expand the constitutional freedom to marry, the Court has not relied upon the type of analysis advocated by Justices Scalia and Alito. This Essay will highlight the improper formulation and application of the Due Process Clause in the dissenting opinions in *Windsor* through the lens of the Court's decisions on prisoners' marriage rights in Part I and interracial couples' marriage rights in Part II. The Essay concludes that the framework endorsed by Justices Scalia, Thomas, and Alito is an impermissible, stark departure from precedent that would introduce an element of subordination into the substantive due process doctrine.

I. THE NON-TRADITION OF PRISONER MARRIAGE RIGHTS

In *Turner v. Safley*, the Court rejected a longstanding, near nationally uniform, history of denying prisoners the right to marry.²⁵ In *Turner*, Missouri prisoners successfully challenged a regulation that prohibited inmates from marrying other inmates or civilians unless the prison superintendent determined that compelling reasons justified the marriage.²⁶ Notably, less than ten years prior to *Turner*, only two states—California and Pennsylvania—had formal written policies recognizing an inmate's decision to marry as a right.²⁷ And unlike California, which codified this right,²⁸ Pennsylvania's recognition was an administrative directive that provided a mechanism to substantially burden the right by empowering prison wardens to deny or delay marriage requests.²⁹ In 1977, only five states allowed inmates to marry without a prison official's approval.³⁰ Writing in 1985, Virginia Hardwick described the dominant practice among the states for regulating prisoners' requests to marry, which typically resembled the regulation challenged in *Turner*:

Under most state prison regulations, broad discretion to permit or deny prisoner marriage is vested in prison administrators. The procedure in Virginia presents a typical example. The Virginia regulations allow the director to examine "each case on its individual

²⁵ 482 U.S. 78, 95 (1987).

²⁶ *Id.* at 82 ("The challenged marriage regulation, which was promulgated while this litigation was pending, permits an inmate to marry only with the permission of the superintendent of the prison, and provides that such approval should be given only when there are compelling reasons to do so." (internal quotation marks omitted)).

²⁷ Jackson M. Bruce et al., Comment, *Prison Inmate Marriages: A Survey and a Proposal*, 12 U. RICH. L. REV. 443, 451 & n.60 (1978). Tennessee had an informal, unwritten policy that was said to recognize an inmate's decision to marry as a right. *Id.*

²⁸ *Id.* at 466.

²⁹ *Id.* at 452 n.75.

³⁰ *Id.* at 451.

merits taking into account the parties, their relationship prior to incarceration, their financial assets, the public interest, and all other pertinent considerations. The decision of the director [is] final³¹

In the years preceding *Turner*, courts regularly upheld the types of regulations that *Turner* held as an unconstitutional infringement of prisoners' fundamental freedom to marry.³² Indeed, it was not until the 1980s that courts gave a hard look at what had traditionally been judicially rubber-stamped carve outs to the fundamental right to marry for prisoners.³³ Yet, this history was not a part of the *Turner* Court's analysis. The Court did not ask whether the practice of inmate marital rites was embedded in the nation's fabric as evidenced by tradition and history. Rather, the Court properly framed the fundamental right simply as "the decision to marry."³⁴

Like *Windsor*, *Turner* did not employ a strict scrutiny analysis. The Court sidestepped applying strict scrutiny in holding the marriage regulation was not reasonably related to a legitimate penological objective.³⁵ But, the Supreme Court's opinion never articulated that inmates' right to marry required a separate inquiry as to whether the prisoners sought a fundamental right distinct from the fundamental freedom to marry already articulated in precedent. The Court correctly used the similarities and differences, or lack thereof, between civilians' marriages and those marriages to which an inmate was a party to *weigh the validity of the rationale proffered by the government* for restricting the fundamental freedom to marry, *not the nature of the right asserted*.

³¹ Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 277 (1985) (alterations in original) (footnote omitted).

³² See, e.g., *Wool v. Hogan*, 505 F. Supp. 928, 933 (D. Vt. 1981) (granting defendants' motion for summary judgment on prisoner's cause of action seeking the right to marry); *Holland v. Hutto*, 450 F. Supp. 194, 197 (W.D. Va. 1978), *aff'd in part, vacated in part*, 601 F.2d 580 (4th Cir. 1979); *In re Goalen*, 512 P.2d 1028, 1030-31 (Utah 1973) ("[T]he refusal of the warden to permit the marriage . . . does not violate petitioner's constitutional rights or those of [petitioner's] convicted friend."); *Dep't of Corr. v. Roseman*, 390 So. 2d 394, 395 (Fla. Dist. Ct. App. 1980) ("We hold that prison inmates have no fundamental right to marry"); *Koerner v. N.J. Dep't of Corr.*, 394 A.2d 1262, 1264 (N.J. Super. Ct. Law Div. 1978) (rejecting challenge to prison regulation allowing only prisoners in minimum custody and eligible for a furlough to marry).

³³ See, e.g., *Bradbury v. Wainwright*, 718 F.2d 1538, 1546 (11th Cir. 1983) (reversing and remanding summary judgment dismissing inmate's freedom to marry claim); *Lockert v. Faulkner*, 574 F. Supp. 606, 609 (N.D. Ind. 1983) (denying defendants' motion for summary judgment on prisoner's freedom to marry claim); *Salisbury v. List*, 501 F. Supp. 105, 110 (D. Nev. 1980) (rejecting plaintiffs' motion for summary judgment in inmate marriage suit because there was "substantial controversy" as to whether the plaintiffs' civil rights had been infringed by the defendants).

³⁴ *Turner v. Safley*, 482 U.S. 78, 95 (1987).

³⁵ *Id.* at 97-98.

Under the analysis proposed by Justices Scalia and Alito in *Windsor*, the *Turner* decision's substantive due process rationale—which Justice Scalia sanctioned as a member of the *Turner* majority—is unsupportable for want of a national tradition and history of embracing inmate marriage.

II. THE HOSTILE TRADITION OF ANTI-MISCEGENATION

Loving v. Virginia also highlights the problematic posture of Justices Scalia and Alito's framework. *Loving* held that state anti-miscegenation laws violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.³⁶ Yet, interracial marriage was long disfavored by society and prohibited by law since the nation's founding. During the early seventeenth century, for example, Virginia enforced unwritten miscegenation prohibitions by public whippings and church penance.³⁷ By 1691, Virginia enacted its first statutory ban of miscegenation marriages.³⁸ Virginia's early proscription against mixed race marriages was not alone. Indeed, Delaware, Massachusetts, North Carolina, and Virginia all enacted anti-miscegenation laws prior to 1725—a trend that continued well into the antebellum era.³⁹

Outlawing interracial marriages was commonplace well into the twentieth century.⁴⁰ Until the California Supreme Court did so in 1948,⁴¹ no court had held that anti-miscegenation statutes violated equal protection principles.⁴² Three years after that ruling and sixteen years before *Loving*, twenty-nine states prohibited interracial marriages including six states that banned interracial marriage by state constitutional amendment.⁴³ However, in the fifteen years prior to *Loving*, fourteen states repealed their statutory bans.⁴⁴

³⁶ 388 U.S. 1, 12 (1967).

³⁷ Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966).

³⁸ *Id.* at 1191–92.

³⁹ *Perez v. Lippold*, 198 P.2d 17, 38–39 (Cal. 1948).

⁴⁰ *See Loving*, 388 U.S. at 6 n.5.

⁴¹ *Perez*, 198 P.2d at 29.

⁴² *Id.* at 35 (Shenk, J., dissenting) (“[Interracial marriage bans] have never been declared unconstitutional by any court in the land although frequently they have been under attack.”); *see also* Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1224 (1966) (“[Interracial marriage prohibitions] have been upheld as constitutional by every appellate court which has considered the point, with the single exception of the Supreme Court of California, which split four-to-three on the question.” (footnote omitted)).

⁴³ *Perez*, 198 P.2d at 38 (Shenk, J., dissenting). These state-level constitutional bans on interracial marriages underscore the extent to which mixed race marriages were opposed in the South. So great was the hostility to interracial couples' marriage rights that states enshrined this rabid discrimination within their fundamental documents—many of which were not repealed until well after *Loving*. *See* ALA. CONST. art. IV,

While the pre-*Loving* liberalization of state laws is noteworthy, the shift cannot be attributed to the manifestation of a “rooted” national “conscience”⁴⁵ that interracial marriages were a fundamental right. In 1958, less than ten years before *Loving*, Gallup recorded that only four percent of Americans approved of interracial marriages.⁴⁶ A year after *Loving* in 1968, the percentage of Americans supporting interracial marriage rose significantly, but still constituted a small minority at twenty percent.⁴⁷

The idea of interracial marriage had a long presence in the American marketplace of ideas, but was emphatically and aggressively rejected throughout the nation’s history. Unlike the non-tradition of inmate marriage rights, which was widely blocked by administrative fiat, pervasive racism was entrenched in the heart of American law and society. There was not simply a lack of a national tradition and history accepting interracial marriage, but a strong tradition of its hostile rejection as manifested in the codification of interracial marriage prohibitions in state constitutions and statutes.

Had the *Loving* Court asked whether mixed race marriage was a fundamental right, deeply rooted in American history and tradition as Justice Alito’s reasoning would argue, the Court could not have employed the substantive due process rationale it did in *Loving*. Of course, the Supreme Court in *Loving* could have only applied strict scrutiny under the Equal Protection Clause, avoiding the fundamental rights question altogether and without affecting the ultimate outcome.⁴⁸ But, the fact remains that the formulation of the due process right to marry as articulated by the dissenting justices in *Windsor* would be unintelligible to the *Loving* Court.

CONCLUSION

The analysis developed in *Loving* and *Turner* cannot square with the posture advocated in either Justice Scalia or Justice Alito’s forceful dissenting opinion. Indeed, the dissenting justices’ posture of analysis for a same-sex

§ 102 (repealed 2000); FLA. CONST. of 1885, art. XVI, § 24; MISS. CONST. art. XIV, § 263 (repealed 1987); N.C. CONST. of 1868, art. XIV, § 8 (1875); S.C. CONST. art. 3, § 33 (repealed 1999); TENN. CONST. art. XI, § 14 (repealed 1978).

⁴⁴ *Loving*, 388 U.S. at 6 n.5.

⁴⁵ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁴⁶ Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), <http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx>.

⁴⁷ *Id.*

⁴⁸ *See Loving*, 388 U.S. at 12.

couple's freedom to marry claim under the Fourteenth Amendment's Due Process Clause is inconsistent with precedent. However, more than just an erroneous application of substantive due process, this suspect departure from the constitutional canon relegates same-sex couples to an inferior position within the process and structure of constitutional analysis.

In demanding same-sex couples argue that same-sex marriage is a fundamental right distinct from the preexisting recognized fundamental freedom to marry, the Court would demand something of same-sex couples not required in previous constitutional challenges to barriers blocking the fundamental marriage right. Thus, if their views prevailed, the *Windsor* dissenters would subordinate same-sex couples into an inferior, segregated tier within the two-tiered fundamental marriage right analysis. Rendering constitutional decisions with tools of interpretation that disparately burden a class of persons united by an immutable characteristic conflicts with the American civil rights tradition and must be zealously rejected.

Given *Loving* and its progeny's special place in the constitutional canon, courts cannot cavalierly apply a substantive due process analysis that deviates from the *Loving* formulation of the fundamental marriage right, as Justices Scalia, Thomas, and Alito would allow. The *Windsor* dissenters' theory is unmoored from the Court's own rich constitutional tradition and must be challenged head-on by future litigants and courts.