Tennessee Law Review

Volume 81
Issue 2 *Winter 2014*

Article 4

2014

COULD WINDSOR REVIVE FEDERALISM? THE STATES' RIGHT TO PROTECT CITIZENS FOLLOWING DOMA'S DEMISE

Mark A. Fulks

Ronald S. Range III

Follow this and additional works at: https://ir.law.utk.edu/tennesseelawreview

Part of the Courts Commons, and the Legal Profession Commons

Recommended Citation
Fulks, Mark A. and Range, Ronald S. III (2014) "COULD WINDSOR REVIVE FEDERALISM? THE STATES' RIGHT TO PROTECT CITIZENS FOLLOWING DOMA'S DEMISE," *Tennessee Law Review*: Vol. 81: Iss. 2, Article 4.
Available at: https://ir.law.utk.edu/tennesseelawreview/vol81/iss2/4

This Article is brought to you for free and open access by Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. It has been accepted for inclusion in Tennessee Law Review by an authorized editor of Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. For more information, please contact eliza.boles@utk.edu.

COULD *WINDSOR* REVIVE FEDERALISM? THE STATES' RIGHT TO PROTECT CITIZENS FOLLOWING DOMA'S DEMISE

MARK A. FULKS* & RONALD S. RANGE III**

The United States Supreme Court's decision in United States v. Windsor *was perhaps the most anticipated decision of the October 2012 Term. By invalidating the Defense of Marriage Act (DOMA), the Court settled one hotly debated issue. But the Court's rationale gives rise to a litany of questions. Under the rubric of the Fifth Amendment, the Court invalidated a federal statute that denied certain citizens the right to liberty, which was rooted in the state's definition of marriage, and the equal dignity the state sought to protect. In doing so, the Court announced a new test to determine where supreme definitional authority resides in the relationship between the state and federal governments. Although the parameters of the* Windsor *test are not entirely clear, the analysis includes (1) the scope of the federal enactment, (2) the existence of a class protected by state law, (3) an issue that is within the exclusive province of the states, (4) the uniform treatment and equal dignity of class members, (5) the societal impact of the class, and (6) the imposition of restrictions and disabilities on the class by the federal government. The restrictions and disabilities may include the imposition of inequality on a subset of the state-defined class, the imposition of burdens on families, and the divestiture of duties.*

Although the Court limited its holding to the lawful marriages that DOMA affected, there will undoubtedly be attempts to apply the Windsor *analysis to other contexts. It is generally understood that the states' core police powers have always included the authority to define*

---

* Mark A. Fulks is an attorney with the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., in Johnson City, Tennessee, and a doctoral candidate in the Department of Public Administration, College of Public Service and Urban Affairs, at Tennessee State University in Nashville, Tennessee. The opinions expressed in this article are those of the authors and do not necessarily represent the opinions of their employers and educators. The authors would like to thank the editors of the Tennessee Law Review for their invaluable work on this article. This article would not have been possible without the contributions of Lindsey Martin, Kyle Rate, and Kelley Strange.

** Candidate for Doctor of Jurisprudence, University of Tennessee College of Law, May 2014; Tennessee Law Review, Student Materials Editor. Ronald will start as an associate this fall in the Johnson City, Tennessee office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

criminal law, and it is in the criminal arena that Windsor *may be applied. For example, many states have adopted procedures through which criminal defendants may have their convictions expunged and thereby have their dignity and status restored. Many states have also adopted procedures through which convicted felons may have their rights of citizenship, such as the right to possess firearms, restored. Similarly, several states have chosen to permit the use of marijuana for qualified patients (and even for recreational use in two states). Yet, in each of these contexts, the federal government refuses to recognize the protection afforded to these citizens by the states and, in doing so, imposes considerable burdens and disadvantages on them.* Windsor *may afford these individuals grounds upon which to challenge the federal government's actions.*

I. INTRODUCTION 309
II. THE BIRTH AND DEATH OF FEDERALISM 310
   A. *The Birth of Federalism* 310
   B. *The Supremacy Clause and Federalism: Dueling Concepts* 311
   C. *Supreme Court Treatment: The Commerce Clause Cases Sounded the Death Knell for Federalism by Granting Broad Regulatory Power to the Federal Government* 312
   D. *Effects of Supreme Court Trends on Federalism* 314
   E. *Police Powers are the States' Alone* 315
III. *UNITED STATES V. WINDSOR* 316
   A. *Facts* 316
   B. *Defense of Marriage Act* 317
   C. *Tax Refund Suit in the Lower Court* 317
   D. *Attorney General's Notice* 318
   E. *Court of Appeals Treatment* 319
   F. *Certiorari to the Unites States Supreme Court* 319
   G. *Supreme Court Opinion* 319
IV. IMPLICATIONS OF *WINDSOR* 324
   A. *Immigration and Expungement of Criminal Records* 326
   B. *Gun Rights* 331
   C. *Marijuana* 334
V. CONCLUSION 338

I. INTRODUCTION

The Supreme Court recently held in *United States v. Windsor* that the Defense of Marriage Act (DOMA) is unconstitutional as a deprivation of the equal liberty of persons, which the Fifth Amendment protects.[1] The definition of marriage has historically been a creature of state law.[2] And Congress has previously enacted statutes to define marriage in order to further federal policy, but DOMA is much more expansive, affecting well over 1,000 federal statutes.[3] DOMA is also directed at injuring a certain class of individuals that several states, including New York, have seen fit to award dignity.[4]

Although the Court did not clearly articulate its reasons for holding DOMA unconstitutional, it considered (1) the scope of the federal enactment, (2) the existence of a class protected by state law, (3) an issue that is within the exclusive province of the States, (4) the uniform treatment and equal dignity of class members, (5) the societal impact of the class, and (6) the imposition of restrictions and disabilities on the class by the federal government (the *Windsor* test).[5]

Regardless of the propriety of the Court's issuance of an opinion in this case,[6] it undoubtedly will be used as fuel for the ever-more-difficult war for federalism. The factors the *Windsor* Court considered apply with equal force to state and federal conflicts in a multitude of criminal law settings, including federal deportation based upon "forgiven" state crimes,[7] lack of recognition of state restoration statutes with regard to firearm possession,[8] and harsh punishment for individuals abiding by their state's marijuana laws.[9] This article explores *Windsor*'s potential to reinvigorate the dying concept of federalism.

---

1. United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675, 2695–96 (2013).
2. *Id.* at 2691.
3. *Id.* at 2690.
4. *Id.* at 2692.
5. *See generally id.* at 2689–96.
6. Chief Justice Roberts, Justice Scalia, and Justice Thomas, as well as many less-connected observers, firmly believe that the Court had no right to hear the case in the first place due to lack of an Article III controversy. *Id.* at 2697–703 (Scalia, J., dissenting).
7. *See infra* Part IV.A.
8. *See infra* Part IV.B.
9. *See infra* Part IV.C.

II. THE BIRTH AND DEATH OF FEDERALISM

A. The Birth of Federalism

The principle of federalism was created in Article IV, Section 4 of the United States Constitution, although the principle had not yet adopted that name. This clause, known colloquially as the "Guarantee Clause,"[10] "guarantee[s] to every State in this Union a Republican Form of Government . . . ."[11] As one constitutional law scholar observed, it is impossible for states to have republican governments unless they have enough autonomy to create and maintain their own form of government in the first place.[12] The Guarantee Clause, therefore, requires some restraint on the federal government's authority to interfere with state affairs. Additionally, the Tenth Amendment makes clear what the Guarantee Clause leaves to inference: the framers intended a federalist form of government, where powers not explicitly given to the federal government belong to the states.[13] James Madison articulates the principle of federalism as so:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[14]

In other words, the founders designed the government so that state governments have more power over the day-to-day life of citizens than the federal government. They chose a dual sovereign form of government for many reasons, including the ease with which citizens of the United States could travel from an oppressive state to a better state and the fact that a smaller, more local government is more responsive to its citizenry.[15] If people do not like the laws or

---

10. *See, e.g.*, Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22–23 (1988).

11. U.S. CONST. art. IV, § 4.

12. Merritt, *supra* note 10, at 2.

13. *See* U.S. CONST. amend. X. The Supreme Court chose not to recognize this restriction until 1976 in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

14. THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

15. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing Michael W.

culture of a certain state, they are free to move to a state with more favorable laws or culture; this is a built-in feature of the Constitution.

B. *The Supremacy Clause and Federalism: Dueling Concepts*

The same Constitution that grants power to the states and specifically instructs the federal government to abstain from interference with state autonomy also provides the federal government with a powerful weapon in its fight against state authority: the Supremacy Clause.[16] According to the Supreme Court, "Congress may legislate in areas traditionally regulated by the States" because of the Supremacy Clause.[17] Moreover, the Court has recognized that states' rights are limited by the federal government only through the Supremacy Clause.[18]

The Supremacy Clause allows Congress to supersede state law either expressly or implicitly.[19] "States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance."[20] Also, intent to supersede is shown where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[21] Lastly, federal law preempts state law when state law directly conflicts with federal law, such that it constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[22]

Preemption under the Supremacy Clause is the primary vehicle through which the federal government may disparage a state-protected class. If a state's actions regarding a certain issue of law conflicts with federal policy, preemption offers the easiest method to essentially nullify that state law.[23] The power to nullify state laws

---

McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987)); Merritt, *supra* note 10, at 3–10.

16. *See* U.S. CONST. art. VI, cl. 2.
17. *Ashcroft*, 501 U.S. at 460.
18. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).
19. *See* Arizona v. United States, 567 U.S. __, 132 S. Ct. 2492, 2501 (2012).
20. *Id.* (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)).
21. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
22. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
23. *See generally* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015 (2010) (discussing the federal government's null preemption, which is the preemption of state law by inaction). Note, however, that Nash's article refers to preemption by *inaction* in its title, not nullification of state law by legislative action as discussed here.

through preemption, combined with the power granted by the Commerce Clause to enact broad legislation, results in the federal government's freedom to override state laws that protect state citizens, thereby disparaging the state-protected classes.[24]

C. Supreme Court Treatment: The Commerce Clause Cases Sounded the Death Knell for Federalism by Granting Broad Regulatory Power to the Federal Government

The Supreme Court has changed its position on the balance of power between state and federal governments. Initially, the Court recognized the importance of the dual sovereign form of government.[25] In the famous federalism case *Texas v. White*,[26] the Court declared the sovereignty of the states to be equally important to the rights of the federal government and interpreted the Constitution to provide for "an indestructible Union, composed of indestructible States."[27] This deference was short-lived.

Over the roughly 150-year span between *White* and today, the Court has slowly eroded federalism and state autonomy in a variety of contexts. For example, the Court has held that the federal government can regulate wholly intrastate businesses' labor relations,[28] that Congress can condition monetary grants on specific state action,[29] and that the federal government can regulate intrastate crop production for home use, even if those crops will never enter interstate commerce.[30]

The most significant blow to federalism came in 1942, when the Court held the Commerce Clause to be nearly unlimited in its prescription of power to the federal government in *Wickard v. Filburn*.[31] The *Wickard* ruling approved the federal government's regulation of matters previously under the states' exclusive control.[32] Through a series of quasi-logical assumptions, the Court in *Wickard* held that the federal government had the right to regulate the

---

24. *See* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1040–41 (2000) ("[B]road notions of state dignity are difficult to square with . . . the power of [the federal] sovereign . . . to strip states of their regulatory authority via federal preemption.").

25. *See, e.g.*, Texas v. White, 74 U.S. 700, 725 (1869).

26. 74 U.S. 700 (1869).

27. *Id.*

28. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

29. *See* South Dakota v. Dole, 483 U.S. 203, 205–06 (1987).

30. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

31. *See id.* at 124.

32. *Id.* at 121.

production of wheat by an individual on self-owned land for family consumption.[33] Specifically, the Court held that even though the amount of wheat Wickard grew was insignificant, and even though he never placed the wheat in interstate commerce, Congress had the right to regulate that wheat through the Commerce Clause because Wickard would have bought wheat in interstate commerce if he had not grown his own.[34] The Court found that "Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."[35]

Additionally, the Court held that it could aggregate all instances of home wheat production throughout the country to satisfy the "substantial effect" requirement without any evidentiary showing that others were actually growing their own wheat.[36] The Court approved of the penalty the federal government imposed on Wickard for growing his own wheat rather than paying high prices at a market, simultaneously endorsing restrictions on Wickard's freedom and the state's right to regulate production of crops.[37] The *Wickard* decision opened the floodgates for broad federal legislation by providing Congress an easy basis for constitutionality: the Commerce Clause authorizes any economic activity that could conceivably affect interstate commerce when aggregated with all similar activity nationwide.[38]

The Rehnquist Court attempted to rein in the potentially unlimited power of the Commerce Clause, primarily in *United States v. Lopez*[39] and *United States v. Morrison*.[40] The *Lopez* Court placed a restriction on overuse of the Commerce Clause by holding that non-economic activity cannot be aggregated to show the existence of a substantial effect on interstate commerce.[41] The *Morrison* Court affirmed *Lopez*, holding that the federal gender-motivated crime act at issue was unconstitutional because violence against women is a non-economic activity, Congress cannot regulate violent, non-

33. *Id.* at 131–33.
34. *Id.* at 127–29.
35. *Id.* at 128–29.
36. *Id.* at 127–28.
37. *Id.* at 124.
38. *See id.* at 127–31.
39. 514 U.S. 549 (1995).
40. 529 U.S. 598 (2000).
41. *Lopez*, 514 U.S. at 561.

economic activity based on its aggregate effect, and the state has the right to protect its citizens through general police powers.[42]

Sixty-three years after *Wickard*, the Court in *Gonzales v. Raich* held that seriously ill patients who were legally prescribed medical marijuana by medical doctors under California law were in violation of federal law.[43] This case is discussed in more detail below, but it essentially extended the holding of *Wickard* to an illegal crop, marijuana.

Two pro-federalism opinions round up the general federalism analysis: *National Federation of Independent Businesses v. Sebelius*[44] and *Windsor*. These are more popularly known as the "Obamacare" and "DOMA" cases, respectively. *Sebelius* held that the federal government lacked the power to enact the Affordable Care Act under the Commerce Clause because economic inactivity cannot be aggregated.[45] *Windsor* is later discussed more thoroughly, but in short, it held that the federal government cannot disparage a state-protected group (there, same-sex couples married legally under state law).[46] These cases at least purport to limit the power of the federal government over the states.

D. *Effects of Supreme Court Trends on Federalism*

Two constitutional law commentators have observed interesting and noteworthy trends regarding federalism. First, the Supreme Court hears fewer cases now than it did several years ago.[47] This increases state autonomy because the Court reviews fewer state appellate decisions.[48] Second, the expansion of the Commerce Clause (as discussed above in Part II.C) and the allowance of aggregation to show substantial effect encourage Congress to pass broader laws to avoid unconstitutionality.[49] The notion that a law would be unconstitutional but for its overbreadth and all-encompassing scope stands in direct opposition to the principles of federalism. Lastly, the change in interpretation of the Necessary and Proper Clause from a

---

42. *Morrison*, 529 U.S. at 617–18.

43. Gonzales v. Raich, 545 U.S. 1, 30–33 (2005).

44. 567 U.S. __, 132 S. Ct. 2566 (2012).

45. *Id.* at 2595–96.

46. United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675, 2695–96 (2013).

47. Glenn H. Reynolds & Brannon P. Denning, *What Hath* Raich *Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 921 (2005).

48. *Id.* at 920–21. Supreme Court review of fewer state decisions decreases state court concern for running afoul of a law and being reversed.

49. *Id.* at 922–23 (quoting Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1333 (2001)).

means to an end to an independent source of power has frustrated the entire notion of separation of powers.[50] As the commentators put it, "if courts are, as a practical matter, going to defer to Congress's own interpretation of the scope of its powers, then [the courts'] role is likely to be limited."[51]

E. Police Powers are the States' Alone

Although the Supreme Court has diminished states' rights in several areas of law, it more narrowly construes interference with state police powers. This proposition is supported by the text of the Guarantee Clause and the Tenth Amendment, as previously noted in section II.B, as well as Supreme Court precedent.[52] The Constitution expressly grants police power to the states and denies police power to the federal government.[53] In his concurrence in *Lopez*, Justice Thomas emphatically stated that "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."[54]

The federal government can only supersede state police powers if that is the "clear and manifest purpose of Congress."[55] Congressional intent to supersede state police powers can be shown by federal regulation so broad that it appears that Congress left no room for the states to legislate.[56] The Court held in *Rice v. Santa Fe Elevator Corp.*[57] that the state regulation at issue was not superseded by federal law because Congress did not clearly evidence its intent to supersede state law.[58] So, to summarize the foregoing federalism and Commerce Clause analysis before delving into the *Windsor* opinion: Congress has broad power to enact laws through the Commerce Clause (among other provisions); federal laws can only override state

---

50. *Id.* at 925.

51. *Id.*

52. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000); *see also* Brown v. Maryland, 25 U.S. 419, 443 (1827) (stating that police power "unquestionably remains, and ought to remain, with the States").

53. *Morrison*, 529 U.S. at 618.

54. United States v. Lopez, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring).

55. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Emp't Relations Bd., 315 U.S. 740, 749 (1942); Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 611 (1926)).

56. *See* Pa. R.R. Co. v. Pub. Serv. Comm'n, 250 U.S. 566, 569 (1919).

57. 331 U.S. 218 (1947).

58. *Rice*, 331 U.S. at 237.

police powers if that is the clear purpose of Congress; and any such act must be otherwise constitutional.

III. *UNITED STATES V. WINDSOR*

A. Facts

In response to changing social values and in recognition of the desire of same-sex couples to affirm their commitment to each other, the laws of New York were first changed to recognize same-sex marriages performed elsewhere and then to allow same-sex marriages.[59] As of June, 2013, twelve states and the District of Columbia had decided that "same-sex couples should have the right to marry and . . . status of equality with all other married persons."[60] Edith Windsor and Thea Spyer were a same-sex couple legally married under the laws on Ontario.[61] The State of New York recognized the Ontario marriage as valid.[62]

Spyer died in February 2009 and left her entire estate to Windsor.[63] No state permitted same-sex marriage at the time Windsor and Spyer wished to marry.[64] Windsor tried to claim the estate tax exemption as Spyer's surviving spouse.[65] DOMA, however, prevented her from claiming the exemption because it "exclude[d] a same-sex partner from the definition of 'spouse' as that term is used in federal statutes."[66] Windsor paid the taxes, but she challenged the constitutionality of § 3 of DOMA, which defines "marriage" for federal purposes.[67] The district court and the court of appeals both held that § 3 was unconstitutional and granted Windsor a refund.[68] The Supreme Court granted certiorari and affirmed the court of appeals.[69]

---

59. United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675, 2689 (2013).
60. *Id.*
61. *Id.* at 2682.
62. *Id.* at 2683 (citing Windsor v. United States, 699 F.3d 169, 177–78 (2d Cir. 2012)).
63. *Id.* at 2689.
64. *Id.*
65. *Id.* at 2682.
66. *Id.*
67. *Id.* at 2683.
68. *Id.* at 2682.
69. *Id.*

B. Defense of Marriage Act

Congress enacted DOMA in 1996 before any state had passed a law permitting same-sex marriage.[70] Section 3 of DOMA amended the Dictionary Act in Title 1, § 7 of the United States Code to define "marriage" and "spouse" for federal purposes.[71] It provides:

> 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.[72]

While § 3 does not itself prevent states from enacting same-sex marriage laws, it does affect over 1,000 federal laws in which marital or spousal status affect treatment.[73]

Because § 3 does not recognize same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax.[74] The marital exemption excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse."[75] Windsor sought a refund of the $363,053 in estate taxes that she could have avoided if the marital exemption had applied.[76] The IRS denied the refund because Windsor did not qualify as a "surviving spouse" under § 3.[77]

C. Tax Refund Suit in the Lower Court

Windsor filed suit in the United States District Court for the Southern District of New York, claiming that DOMA violated her equal protection rights under the Fifth Amendment.[78] The district court held § 3 unconstitutional and ordered the issuance of a refund to Windsor, with interest.[79]

---

70. *Id.* (citing Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)).
71. *Id.* at 2683.
72. *Id.* (quoting 1 U.S.C. § 7) (internal quotation marks omitted).
73. *Id.* at 2683 (citing DENYA K. SHAW, U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004)).
74. *Id.*
75. *Id.* (quoting 26 U.S.C. § 2056(a)).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2684.

D. Attorney General's Notice

While the suit was still ongoing, Eric Holder, the Attorney General of the United States, notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA.[80] Holder noted that President Obama had decided that sexual orientation classifications "should be subject to a heightened standard of scrutiny."[81] Usually the Department of Justice issues "530D letters" following a judgment against the government's position in the lower court, but not in this instance.[82] This particular letter was precipitated only by the Executive Branch's own conclusion of a legal issue that awaited resolution in the highest chamber of the judiciary.[83]

President Obama stated that his conclusion that § 3 was unconstitutional would not cause the executive branch to cease enforcement of DOMA and that the country had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases."[84] He reasoned that his pronouncement of unconstitutionality would not remove "the judiciary as the final arbiter of the constitutional claims raised" because enforcement would continue.[85]

The Bipartisan Legal Advisory Group of the House of Representatives (the House Advisory Group) chose to intervene in the matter to defend the constitutionality of DOMA.[86] The Department of Justice did not oppose the House Advisory Group's intervention.[87] Although the district court denied the House Advisory Group's motion to enter the suit as of right because the

---

80. *Id.* at 2683.

81. *Id.*

82. *Id.*

83. *Id.* It is unusual that President Obama volunteered his opinion on an important constitutional law issue while the case was still pending before the Supreme Court. Separation of powers principles probably counsel against gratuitous comments from the Executive Branch to the Judiciary while an act of the Legislative Branch is still under review.

84. *Id.*

85. *Id.* This logic is questionable. President Obama interjected his own opinion into the Judiciary by issuing a formal opinion that § 3 was unconstitutional, thereby putting the Supreme Court on notice of what result he would like to see. It is up for debate whether reluctantly enforcing the current law, while lobbying for the law to be struck down, is proper under separation of powers principles.

86. *Id.* at 2684.

87. *Id.*

United States was already represented by the Department of Justice, the court granted its intervention as an "interested party."[88]

E. Court of Appeals Treatment

The Court of Appeals for the Second Circuit affirmed the district court's judgment prior to the Supreme Court's grant of certiorari.[89] In doing so, the appellate court applied heightened scrutiny to sexual orientation classifications, adopting the logic that the Department of Justice and Windsor had offered.[90] Although the Second Circuit affirmed the case and ordered the government to refund Windsor's tax expenditure, the government did not comply.[91]

F. Certiorari to the Unites States Supreme Court

The Supreme Court granted certiorari on the question of the constitutionality of § 3 and requested argument on two additional questions: (1) whether the United States' agreement with Windsor prevented review and (2) whether the House Advisory Group had standing to appeal the case.[92] Neither party raised lack of jurisdiction as an issue.[93] The Court, however, appointed Professor Vicki Jackson as amicus curiae to argue the position that the Court lacked jurisdiction to hear the dispute, and she convinced at least three Justices of this position.[94] Because the majority found jurisdiction to be proper, this article ignores jurisdictional issues for the sake of brevity.

G. Supreme Court Opinion

Regulation of Marriage. After discussing jurisdiction, the Court went right into one of its main bases for holding § 3 unconstitutional, noting that "the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution."[95] It was this statement that provided the

---

88. *Id.*; *see* FED. R. CIV. P. 24(a)(2).
89. *Windsor*, 133 S. Ct. at 2684.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*; *see also id.* at 2698 (Roberts, C.J., dissenting) (finding that the Court lacked jurisdiction to hear the case because there was not a "controversy" as required by Article III of the Constitution).
95. *Id.* at 2689 (majority opinion).

groundwork for the Court's repeated rationale that DOMA is unconstitutional because it disparages a group of people that a state seeks to protect. The Court noted that marriage has traditionally been a creature of state law, subject to few federal regulations.[96] However, the Court conceded, "Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue."[97]

The Court provided two examples of federal legislation concerning rights related to marriage that *are* constitutional: (1) the prohibition of citizenship based on sham marriages for undocumented immigrants, even if the marriage is legal under state law,[98] and (2) Congress's decision that common law marriages should be accepted as equal justification for Social Security benefits of married couples, regardless of state law.[99]

Scope of the Act. The Court noted that while the two examples it provided "establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy," DOMA's much wider scope impacts over 1,000 federal laws and programs.[100] The Court then restated one of the key factors upon which this article relies, that "[DOMA's] operation is directed to a class of persons that the laws of New York, and of eleven other states, have sought to protect."[101]

State Power over Marriage. The Court stated that it must first determine the extent of state power and authority over marriage to determine the validity of DOMA's intervention.[102] "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons;"[103] "but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[104]

The Court recognized that states have always had authority to define and regulate marriage within their borders and, conversely, that the federal government has no authority regarding domestic relations.[105] "[T]he states, at the time of the adoption of the

---

96. *Id.* at 2690.
97. *Id.*
98. *Id.* (quoting 8 U.S.C. § 1186a(b)(1) (2006 & Supp. V)).
99. *Id.* (citing 42 U.S.C. § 1382c(d)(2)).
100. *Id.*
101. *Id.* (citations to the relevant state laws permitting same-sex marriage omitted).
102. *Id.* at 2691.
103. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)).
104. *Id.* (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
105. *Id.*

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."[106]

Deference to States on Domestic Relations. Because marriage is a field left to the states, the federal government has consistently deferred to state law regarding marriage.[107] To emphasize this point, the Court quoted from its holding in *De Sylva v. Ballentine*:[108] "'[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,' under the Copyright Act 'requires a reference to the law of the State which created those legal relationships' because 'there is no federal law of domestic relations.'"[109] Federal courts generally do not adjudicate issues of marital status due to this rule.[110] For example, federal courts do not hear domestic cases even if they arise in diversity because of "the virtually exclusive primacy . . . of the States in the regulation of domestic relations."[111] The Court then emphasized that the tradition of states regulating marriage dates back to the founding of the United States.[112]

Impact of DOMA. The Court found that DOMA interfered with the long-established right of states to vary incidents and benefits of marriage.[113] The Court noted that its decision was not grounded solely in federalism, but also in the fact that the state actively sought to confer rights upon a class (same-sex couples) and the federal government sought to injure that class.[114] It cited *Romer v. Evans*[115] for the proposition that the "unusual character" of certain discriminations indicates the need for "careful consideration to determine whether they are obnoxious" to the Constitution.[116] The Court found that the adoption of same-sex marriage laws in New

---

106. *Id.* (alteration in original) (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

107. *Id.*

108. 351 U.S. 570 (1956).

109. *Windsor*, 133 S. Ct. at 2691 (quoting *De Sylva*, 351 U.S. at 580).

110. *Id.* (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

111. *Id.* (citing *Anekbrandt*, 504 U.S. at 714 (Blackmun, J., concurring)).

112. *Id.*

113. *Id.* at 2692.

114. *See id.*

115. 517 U.S. 620 (1996).

116. *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928))).

York in response to changing public sentiment was exactly what the framers intended regarding state sovereignty.[117]

The Court also referenced its opinion in *Lawrence v. Texas*.[118] *Lawrence* extended protection to same-sex couples by holding that states cannot punish private same-sex intimate relations, which can form "but one element in a personal bond that is more enduring."[119] New York chose to go a step further and recognize the dignity of same-sex marriages.[120] Critically, New York's decision reflected "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[121]

Due Process and Equal Protection. The Court found that DOMA violated due process and equal protection principles by seeking to injure the class (same-sex couples) that New York sought to protect.[122] The Court relied on *Department of Agriculture v. Moreno*[123] for the proposition that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[124] The majority used strong language to condemn the legislative purpose of DOMA, stating that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[125]

Interference with Equal Dignity. The Court reemphasized its finding that the actual purpose of the federal definitional restriction of marriage to that of a man and a woman was to deny equal dignity to same-sex couples married under state law.[126] The Court demonstrated this by reviewing the title of DOMA, the legislative history (essentially that it was enacted to "protect" marriage from

---

117. *Id.* Same-sex couples can presumably choose to relocate to a state that recognizes equal marriage rights for them, such as New York. Conversely, opponents of same-sex marriage who do not wish to live in a place that allows equal rights for same-sex marriages could relocate to more conservative states.

118. 539 U.S. 558 (2003).

119. *Windsor*, 133 S. Ct. at 2692 (*Lawrence*, 539 U.S. at 567).

120. *Id.*

121. *Id.* at 2692–93.

122. *Id.* at 2693 (citing U.S. CONST. amend. V; Bolling v. Sharpe, 347 U.S. 497 (1954)).

123. 413 U.S. 528 (1973).

124. *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534).

125. *Id.*

126. *Id.*

gay couples), and evidence that DOMA was supposed to discourage states from recognizing same-sex marriage.[127] New York sought to provide equality for same-sex couples by allowing them to marry under state law; conversely, DOMA sought to create inequality (or to eliminate the equality New York provided) by "writ[ing] inequality into the entire United States Code."[128]

Impose Inequality. This differential federal treatment allowed little stability or predictability concerning the legal repercussions of same-sex marriage—couples married according to New York were unmarried according to the federal government.[129] Notably, the Court held that the "differentiation demean[ed] the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State . . . sought to dignify."[130] DOMA also "humiliate[d] tens of thousands of children now being raised by same-sex couples" by sending them the message that their parents' choices were immoral or otherwise not condoned by the federal government.[131]

Impose Burdens. DOMA also imposed financial burdens on same-sex couples married under state law. For example, DOMA rendered them ineligible for government healthcare benefits, social security benefits of marriage, special bankruptcy protection, and marital tax filing.[132] DOMA also imposed noneconomic burdens, such as denying same-sex spouses the right to be buried beside one another at veterans' cemeteries.[133]

Unequal Effects. DOMA also had unusual or otherwise less apparent effects, like denying protection to the same-sex spouses of federal officials. It is a federal crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer."[134] DOMA denied this protection to same-sex spouses by excluding them from the federal definition of a spouse.[135]

The Constitution as a Restraint on Power. "The power the Constitution grants it also restrains."[136] The Court reasoned that its discussion in the opinion sufficiently showed "that the principal

---

127. *Id.*
128. *Id.* at 2694.
129. *Id.*
130. *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).
131. *Id.*
132. *Id.* (citations omitted).
133. *Id.* (citation omitted).
134. *Id.* at 2694–95 (alteration in original) (quoting 18 U.S.C. § 115(a)(1)(A)).
135. *Id.* at 2695.
136. *Id.*

purpose and the necessary effect of [DOMA was] to demean those persons who [were] in a lawful same-sex marriage."[137] The Court concluded that the "principle purpose" and "necessary effect" of the law was to demean a class, namely individuals in lawful same-sex marriage."[138] Therefore, the Court held that § 3 of DOMA was unconstitutional as a deprivation of the liberty of persons protected by the Fifth Amendment.[139]

The Court went on to emphasize that DOMA told same-sex couples that their marriages were less worthy than heterosexual marriages.[140] It then included language implying a balancing test by stating that DOMA was invalid because "no legitimate purpose overc[ame] the purpose and effect to disparage and to injure those whom the State . . . sought to protect."[141] Lastly, the Court stated that its holding is confined to lawful same-sex marriages.[142]

IV. IMPLICATIONS OF *WINDSOR*

Upon the *Windsor* decision's release, commentators immediately began contemplating its potential implications on federalism more generally.[143] Eric Restuccia and Aaron Lindstrom described aspects of the decision as "friendly to state sovereignty" because of the emphasis it placed on the state's role in defining marriage, the community's perspective on the issue, and the federal government's interference with the state's exercise of its exclusive authority.[144] They noted that "[t]his decision in favor of state sovereignty overturns a decision by Congress, thus treating state decisions on

---

137. *Id.*

138. *Id.*

139. *See id.*

140. *Id.* at 2695–96.

141. *Id.* at 2696.

142. *Id.* In his dissent, Justice Scalia referred to the penultimate sentence as a "bald, unreasoned disclaimer," which he seemingly thought lacked much force. *Id.* at 2709 (Scalia, J., dissenting). To him, the Supreme Court clearly showed its feelings toward state prohibition of same-sex marriage in the opinion, regardless of the disclaimer, and he predicted that it would be only a matter of time until the Court recognized a right for same-sex couples to marry. *See id.*

143. *See, e.g.*, Mae Kuykendall, *Federalism and Same-Sex Marriage in* Windsor v. United States*: Defusing the Power of NO!*, ACSBLOG (July 9, 2012), http://www.acslaw.org/acsblog/federalism-and-same-sex-marriage-in-windsor-v-united-states-defusing-the-power-of-no/; Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013, 3:49 PM), http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/.

144. Restuccia & Lindstrom, *supra* note 143.

marriage as controlling."[145] They ultimately concluded that "leaving this issue to the democratic processes of the states preserves a foundational element of freedom: the right of the people to govern themselves. The power to define marriage is theirs alone."[146]

These comments echoed the arguments presented to the Court by a group of federalism scholars writing as amici curiae.[147] The Federalism Scholars provided a fully developed analysis of the federalism issue. They began with the importance of the federalism perspective, discussing the lack of federal authority to define marriage, and concluded with a discussion of the states' reserved powers.[148] In their discussion of federal authority, the Federalism Scholars argued that defining marriage was not within the enumerated powers granted to Congress by the Constitution, that the Constitution was designed to restrain the power of the federal government, and that DOMA was not necessary and proper to the exercise of any of the federal government's enumerated powers.[149] The Federalism Scholars concluded their brief with a discussion of states' rights in the context of police powers, noting that regulating domestic relations has traditionally been considered "a virtually exclusive province of the States."[150] In this regard, they argued that "DOMA shatter[ed] two centuries of federal practice" because it "create[ed], for the first time, a blanket federal marital status that exist[ed] independent of States' family-status determinations."[151] "The Constitution," they contended, "left that power to the States."[152] Finally, the Federalism Scholars argued that DOMA infringed upon the sovereignty of the states by invalidating marriages that the states deemed lawful.[153] On this point, the scholars argued that DOMA "forcibly create[d] a two-tiered marriage system in States that recognize[d] same-sex marriage," which had detrimental consequences for the states' administration of their domestic

145. *Id.*

146. *Id.*

147. *See* Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 2–5, United States v. Windsor, 570 U.S. __, 133 S. Ct. 1251 (2013) (No. 12-307); *see also* Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-DOMA-decision/ (discussing similarities and differences between the *Windsor* decision and the Federalism Scholars' position).

148. Brief of Federalism Scholars, *supra* note 147, at 5–11.

149. *Id.*

150. *Id.* at 26 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

151. *Id.* at 29.

152. *Id.* at 31.

153. *Id.* at 31–40.

relations regulations.[154] Likewise, they noted that DOMA "blur[red] vital lines of political accountability by forcing individuals to look to two sets of laws and officials for redress."[155]

Although the *Windsor* decision does not present a straightforward federalism analysis, it does include strong federalism undertones. Accordingly, it provides fertile ground for the roots of federalism to grow in other areas that have been traditionally left to the states. The states' police powers are not limited to domestic relations issues—they permeate citizen's daily lives. Moreover, state and federal laws often conflict. Going forward, *Windsor* may substantiate challenges that courts previously cast aside or completely overlooked.

A. *Immigration and Expungement*[156] *of Criminal Records*

One area in which *Windsor* appears to have immediate implications is the intersection of federal immigration law and state criminal law. Tennessee, like many other states, has adopted a statutory procedure for the expungement of a person's records relating to arrests, indictments, and convictions.[157] The purpose of these laws is to release rehabilitated individuals—citizens, resident aliens, and illegal aliens alike—from the stigma of criminal charges

---

154. *Id.* at 31.

155. *Id.* at 32.

156. One scholar has opined that "there is no such word as 'expungement' in the English language" and the correct term is "expunction." *See* Effect of Pub. Chapter No. 175 of the Acts of 2003 on the Expungement of Records in Multi-Count Criminal Indictments, Op. Tenn. Att'y. Gen., Opinion No. 06-003 (2006) (citing Letter from Donald F. Paine, Esq. to Hon. Paul G. Summers (Oct. 17, 2005)). Nevertheless, Tennessee's Attorney General concluded that the word "expungement" is acceptable, and possibly preferred, given that it is listed before "expunction" as the noun form of "expunge" in Black's Law Dictionary. *Id.* (citing BLACK'S LAW DICTIONARY 621 (8th ed. 2004)). Another scholar has used the term "expungement" in his published works. *See* David Louis Raybin, *Expungement of Arrest Records: Erasing the Past*, 44 TENN. B. J. 22, 27 (2008) (quoting BLACK'S LAW DICTIONARY 522 (5th ed. 1979)). Moreover, "expungement" is the favored term in Tennessee. The authors found 128 cases that use "expungement," twenty-eight cases that use "expunction," and seventeen cases that use both terms. For this article, the authors have decided to follow the majority rule.

157. In Tennessee, two statutes address expungement: Tennessee Code Annotated section 40–32–101 (sometimes described as the "general expungement" statute) and section 40–35–313(b) (the expungement provision of the judicial diversion statute). Macon v. Shelby Cnty. Gov't Civil Serv. Merit Bd., 309 S.W.3d 504, 509 (Tenn. Ct. App. 2009) (citing State v. Dishman, 915 S.W.2d 458, 464 (Tenn. Crim. App. 1995)).

that have been dismissed or resulted in an acquittal.[158] In effect, the remedy restores individuals to the same status in society as those who have never been so much as arrested. It erases the vestiges of criminality from the public record. Yet, in the context of immigration, the federal government often chooses to ignore the state's forgiveness and its definition of citizenship, including the accompanying rights,[159] as well as the state's definition of what constitutes a conviction under state law.[160] Instead, it disparages these individuals by denying them the rights of citizenship bestowed upon them by states and casting them out of the country.[161]

The case of Jose Rodriguez illustrates the application of *Windsor*'s anti-disparagement principle in the immigration–

---

158. State v. L.W., 350 S.W.3d 911, 916 (Tenn. 2011) (quoting State v. Adler, 92 S.W.3d 397, 403 (Tenn. 2002)). In *Adler*, the court further explained that the expungement statute was designed to prevent the permanent harm that could result if dismissals and acquittals remained a part of the public record. *Adler*, 92 S.W.3d at 403. The Court was so adamant about the necessity for this protection that it extended the expungement statute to erase charges filed for greater offenses even when the defendant is actually convicted of a lesser offense. *Id.*; *see also* State v. Doe, 588 S.W.2d 549, 552 (Tenn. 1979) ("It is common knowledge that the preferment of charges against a citizen can have a severe impact upon his reputation, regardless of whether or not a conviction results . . . ."). *But cf. Macon*, 309 S.W.3d at 510 (holding that a law enforcement agency may require applicants to disclose expunged convictions during the application process).

159. *See, e.g.*, People v. Martinez, 304 P.3d 529, 533 (Cal. 2013) (withdrawal of guilty plea, dismissal of charges, and expungement of conviction did not affect the federal immigration consequences of Martinez's conviction); People v. Kollie, 959 N.Y.S.2d 854 (N.Y. Cnty. Ct. 2013) (citing Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (2006)) (noting that a conviction vacated because of rehabilitation remains a "conviction" under the Immigration and Nationality Act and may result in removal).

160. The Immigration and Nationality Act defines the term "conviction" as:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48).

161. *See, e.g.*, Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) ("[W]hen a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.").

expungement context. In 2007, Rodriquez, a Mexican citizen and resident alien in the United States, received a misdemeanor citation for patronizing prostitution.[162] During plea negotiations, the prosecutor for the State of Tennessee offered Rodriguez the opportunity to rehabilitate himself and erase the criminal history resulting from the charge through a judicial diversion program.[163] For Rodriguez, judicial diversion and expungement provided the path to exoneration.[164] On September 20, 2007, Rodriguez entered into a plea agreement with the state, pleaded guilty, and began his diversion program.[165] He successfully completed judicial diversion, and as a result, on January 8, 2010, his criminal record was expunged.[166] However, according to the federal government, patronizing prostitution is a crime of "moral turpitude," which results in automatic deportation, regardless of any expungement order.[167] Accordingly, because of his plea, and despite the dismissal of the charges, the federal government instituted removal proceedings against Rodriguez.[168]

---

162. Rodriguez v. State, No. M2011–01485–CCA–R3–PC, 2013 WL 59449, at *1 (Tenn. Crim. App. Jan. 7, 2013).

163. *Id.*

164. *See* TENN. CODE ANN. § 40–35–313(b) (2010) ("Upon the dismissal of the person and discharge of the proceedings[,] . . . the person may apply to the court for and order to expunge . . . all recordation relating to the person's arrest, indictment or information, trial, finding of guilty and dismissal and discharge pursuant to this section. . . .").

165. *Rodriguez*, 2013 WL 59449, at *1.

166. *Id.*

167. *Id.* The term "crime of moral turpitude" is not defined anywhere in the Immigration and Naturalization Act. *See* Olivas-Motta v. Holder, 716 F.3d 1199, 1209 (9th Cir. 2013). There is a split of authority among the circuit courts concerning the test for determining whether a criminal offense is a crime of moral turpitude. As noted in *Olivas-Motta*, the Seventh and Eighth Circuits have held that the term "crime involving moral turpitude" is a "descriptive circumstance" that permits a review of both the elements of the offense of conviction and the facts underlying the conviction in order to classify the offense. *Id.* at 1208–09 (citing Bobadilla v. Holder, 679 F.3d 1052, 1055 (8th Cir. 2012); Ali v. Mukasey, 521 F.3d 737, 741 (7th Cir. 2008)). On the other side of the debate, the Third, Fourth, Ninth, and Eleventh Circuits have held that a "crime involving moral turpitude" is "a generic crime whose description is complete unto itself, such that 'involving moral turpitude' is an element of the crime." *Id.* at 1209. Promotion of prostitution has been held a crime of moral turpitude. *See* Cruz v. Att'y Gen., 452 F.3d 240, 243 (3rd Cir. 2006). Likewise, solicitation of prostitution has been held a "crime involving moral turpitude." *See* Rohit v. Holder, 670 F.3d 1085, 1090 (9th Cir. 2012).

168. *Rodriguez*, 2013 WL 59449, at *1.

At the time of his guilty plea, Rodriguez did not know that the federal government would not abide by the State of Tennessee's decision to relieve him of the stigma of his guilty plea and erase his criminal history.[169] Facing automatic deportation, Rodriguez returned to the state court that had afforded him an opportunity at rehabilitation (expungement of his record), seeking to invalidate his guilty plea.[170] Though the federal government would not recognize the state court's expungement of Rodriguez's criminal record, it would recognize a judgment from the state court that set aside his guilty plea. Accordingly, Rodriguez filed a post-conviction petition to collaterally attack his plea.[171] Both the trial court and the Tennessee Court of Criminal Appeals denied him relief.[172] His case was pending in the Tennessee Supreme Court at the time of writing.[173]

Judicial Diversion. "An individual who successfully completes a judicial diversion program under [Tennessee Code Annotated] § 40–35–313 has not been 'convicted' of any crime"[174] However, as the concurring opinion in *Padilla v. Kentucky*[175] recognized, a crime may still qualify as a conviction for immigration purposes even after judicial diversion.[176]

Expungement. Tennessee's legislature designed its expungement statute to prevent citizens' prior criminal charges from causing them unfair stigma.[177] An expungement effectively restores a person to the legal status that person occupied before criminal charges were brought.[178] Under the Tennessee statute:

---

169. *Id.*

170. *Id.* Rodriguez filed a petition for post-conviction relief, seeking to invalidate his guilty plea and expunged conviction, partly in reliance upon the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Rodriguez*, 2013 WL 59449, at *1. The post-conviction court dismissed his petition because the statute of limitation had run and the *Padilla* decision does not apply retroactively. *Id.* at *2; *see* Chaidez v. United States, 568 U.S. ___, 133 S. Ct. 1103, 1105 (2013) ("We conclude . . . *Padilla* does not have retroactive effect.").

171. *Rodriguez*, 2013 WL 59449, at *1.

172. *Id.*

173. *Id.*

174. *Id.* at *3 (quoting Wright v. Tenn. Peace Officer Standards & Training Comm'n, 277 S.W.3d 1, 8–9 (Tenn. Ct. App. 2008)).

175. 559 U.S. 356 (2010).

176. *Padilla*, 559 U.S. at 380 n.2 (Alito, J., concurring) (noting the intricacies of immigration law and concluding that complexities such as this should not require counsel to do more than advise that a plea may have adverse immigration consequences).

177. *Rodriguez*, 2013 WL 59449, at *3 (quoting State v. L.W. 350 S.W.3d 911, 916 (Tenn. 2011) (quoting State v. Adler, 92 S.W.3d 397, 403 (Tenn. 2002))).

178. *Id.*

> Once the record has been expunged, the discharge and dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose," except as provided in subsections (b) and (c), related to evidence at civil trials.[179]

Although expungement restores the individuals to the legal status they occupied prior to their arrest and conviction, law enforcement agencies sometimes obtain the records for their own purposes.[180] These records' primary use is to determine eligibility for diversion.[181] Arrest histories, investigative reports, intelligence information of law enforcement agencies, confidential files of district attorneys general, confidential records of the Department of Children's Services or Department of Human Services, and appellate court opinions do not get erased by expungement.[182] An expungement, therefore, leaves these indicia of arrest behind.[183]

If *Windsor* will have any implications beyond the context of gay marriage, the intersection of federal immigration law and the expungement of criminal convictions under state law provide a logical starting point. As previously discussed, the expungement statute in Tennessee creates and protects a certain class of citizens. This state law is designed to protect a class of rehabilitated individuals from the adverse effects of an arrest, charge, and conviction by removing the stigma of a criminal history. The authority to define the sentences, consequences, and disabilities of state crimes falls within the exclusive province of the states. The federal immigration laws impose a disability on only a subset of the class of individuals who have benefited from the expungement of criminal convictions. Moreover, it is difficult to imagine a greater disparity in the dignity among class members than by removing some from the country while allowing others to remain. This extreme sanction results in the imposition of extreme restrictions and disabilities on the class members. Individuals like Rodriguez face the destruction of their families through removal. When the removed individual is a spouse or parent, the burdens on the family are arguably equal to, if not greater than, those imposed on the beneficiaries of the *Windsor* decision.

---

179. *Id.* at *2 (quoting TENN. CODE ANN. § 40-35-313(a)(2)).

180. *See* TENN. CODE ANN. § 40-35-313(c) (2010).

181. *Rodriguez*, 2013 WL 59449, at *2 (citing TENN. CODE ANN. § 40-35-313(a)(2)).

182. *Id.* (citing TENN. CODE ANN. § 40-32-101(b)(1)–(2)).

183. *Id.*

B. Gun Rights

Felons cannot possess firearms under federal law.[184] A conflict arises any time a state forgives an individual—through pardon or expungement, for example—and the federal government refuses to recognize the erasure of the crime. In this context, an interesting perspective on federalism emerges. It shows that the federal courts can continue to override the states' policy preferences even after the executive and legislative branches expressly bolstered the states' position through the enactment of a federal statute recognizing the preeminence of state law.

Prior to the enactment of the Firearm Owners' Protection Act (FOPA) in 1986,[185] the federal government expressly refused to recognize state expungements of convictions for firearm possession purposes.[186] Congress took the states' side on the issue by enacting FOPA, which amended the relevant section of the firearm possession statute to provide:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.[187]

Through this language, Congress ordered the federal government to recognize state expungements, thereby allowing individuals whose state crimes had been expunged under state law to possess firearms, unless the state expungements expressly provided otherwise.

But after Congress expressly provided that state law governs firearm rights for individuals with expunged crimes, the federal courts injected their own interpretations and definitions into the firearm rights analysis.[188] *Caron v. United States*[189] provides an

---

184. 18 U.S.C. § 922(g) (2006); *see also* District of Colombia v. Heller, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . .").

185. Firearm Owners' Protection Act, Pub. L. No. 99–308, 100 Stat 449 (codified as amended in scattered sections of 18 U.S.C.).

186. *See* Dickerson v. New Banner Inst., 460 U.S. 103, 120–22 (1983), *superseded by statute*, 100 Stat. at 450.

187. 18 U.S.C. § 921(a)(20).

188. *See, e.g.*, Caron v. United States, 524 U.S. 308 (1998) (holding that the rights restoration under Massachusetts law that limited Caron to possession of handguns showed that he was too dangerous to have any guns under federal law).

189. 524 U.S. 308 (1998).

example of this. There, Massachusetts law had restored the petitioner's right to possess firearms inside his business and home.[190] Yet the *Caron* Court held that the petitioner could not possess *any* guns, even those Massachusetts allowed, because "the Federal Government has an interest in a single, national, protective policy, broader than required by state law" and adhering to the state's regulation of which guns Caron could possess "would undermine this protective purpose."[191] The Court further stated that the Massachusetts finding that Caron was too dangerous to possess handguns outside the home justified the federal finding that he was too dangerous to possess any gun at any place.[192] This result is exactly the opposite of that which Congress and the state intended.[193] Congress enacted FOPA, which in part told the federal government to defer to state expungements for firearms purposes, and Massachusetts allowed Caron to possess any firearm in his home and any firearm (except a handgun) away from his home. The federal courts, however, deemed Mr. Caron unworthy of the right to possess any gun.

Justice Thomas dissented, recognizing that the plain language of the statute foreclosed the majority's argument.[194] The statute provided that expunged or restored criminals were permitted to possess firearms unless the restoration expressly provided otherwise, and the restoration in this case did not expressly provide otherwise.[195] In fact, it provided that such individuals *could* possess firearms, with the exception of *handgun* possession outside their homes or businesses.[196] It is hard to fault Justice Thomas's position.

The Court of Appeals for the Sixth Circuit likewise ignored the plain language of the statute in *United States v. Cassidy*,[197] holding that Cassidy could not possess firearms, even though his certificate of restoration did not expressly provide for firearm restriction, because Ohio statutory law banned his possession of firearms.[198]

---

190. *Id.* at 311.

191. *Id.* at 316.

192. *Id.* at 317.

193. *See generally* Daniel Brenner, *The Firearm Owners' Protection Act and the Restoration of Felons' Right to Possess Firearms: Congressional Intent Versus Notice*, 2008 U. ILL. L. REV. 1045 (2008) (discussing the federal circuit split over whether felons who have had their records expunged are exempt from FOPA when a separate state law provides that felons may not possess firearms).

194. *Caron*, 524 U.S. at 318 (Thomas, J., dissenting).

195. *Id.* at 317.

196. *Id.*

197. 899 F.2d 543 (6th Cir. 1990).

198. *Cassidy*, 899 F.2d at 549.

Several other circuits have similarly held that state statutory law qualifies as an "express restriction" on gun possession.[199]

Similar federal interferences regarding the rights states grant to former felons abound. In one case in particular, an who individual served a prison sentence for a nonviolent crime was subsequently arrested for possession of a .22 caliber rifle for small-game hunting.[200] Take the case of an Indiana man who was convicted of robbery and served time in prison.[201] After his release, his parole officer advised him that he could possess a rifle for hunting purposes.[202] Sometime later, federal officials raided the man's home for evidence of further robberies and found only his .22 caliber hunting rifle; they used it to charge him with possession of the gun, a federal offense carrying a minimum fifteen-year sentence.[203] Ironically, the minimum sentence for possession of the hunting rifle is longer than his punishment for committing additional robberies would have been.[204] David Kopel and Glen Reynolds provide an interesting illustration of how far the law could be stretched: "If Colorado decides to allow a person who was convicted of income tax evasion thirty-five years ago to possess a .22 rifle for squirrel hunting, why should the federal government override that decision?"[205]

Sometimes even when Congress evidences its intent for state law to govern, the federal government attempts to override state authority. The *Windsor* test applies nicely to the class of individuals who were convicted of felonies, had their records expunged or rights otherwise restored, and either possess or wish to possess firearms. The first *Windsor* factor, the scope of the federal enactment, disfavors the finding of disparagement because the enactment is fairly specific and not overly broad. The second factor, the existence of a class protected by state law, is a given. Those harmed by the federal interpretation are all individuals for whom the state has

---

199. *See* Brenner, *supra* note 193, at 1064.

200. *See e.g.*, David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 81–82 n.94 (1997) (citing Dennis Cauchon, *Trapped by the Law*, USA TODAY, July 6, 1992, at 3A).

201. *Id.*

202. *Id.*

203. *Id.* Eubanks was acquitted through jury nullification; the jurors understood that possession of a .22 caliber rifle for varmint hunting should not be punished by over a decade in prison. *Id.*

204. *Id.* Apparently Eubanks would have been better off robbing liquor stores than hunting varmints, at least according to the federal government.

205. *Id.* at 81.

sought to restore dignity and protection. The third factor, interference with the state's right to police its own citizens, favors a finding of disparagement. The fourth factor, lack of uniform treatment of the individuals by the federal government, also favors a finding of disparagement. However, part of this lack of uniformity is due to varying state laws. The fifth factor, the societal impact of the class, could be argued either way. The class consists of former felons, but the state wants to restore these individuals, presumably increasing the state workforce. So the fifth factor appears to be a wash. The sixth and final *Windsor* factor, the imposition of restrictions and disabilities, easily favors finding disparagement. The federal government prevents former felons from hunting and defending themselves at their homes, although the states chose to grant them those rights. In sum, convicted felons who have had their rights restored have an argument under *Windsor* that the federal felon-in-possession statute, 18 U.S.C. § 922(g),[206] is unconstitutional.

C. Marijuana

The current conflict between federal and state governments regarding marijuana use is probably the most obvious present day example of the federal government's denial of state autonomy. The war on marijuana is a story of many conflicts: conflicts between state and federal government; conflicts between Congress, the DEA, and medical doctors; and conflicts between seriously ill patients and the federal government.[207] As of the time of writing, twenty state governments have declared marijuana a proper medicine for patients suffering from a variety of ailments, from nausea to debilitating cancers.[208] The federal government, through the

---

206. 18 U.S.C. § 922(g) (2006) (prohibiting firearm possession amongst certain categories of people).

207. *See generally* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that Article I, Section 8 of the Constitution allows Congress to prohibit the local cultivation and use of marijuana in compliance with California law). State and federal governments are at odds regarding whether medical marijuana patients are criminals. Congress has the audacity to tell medical doctors that marijuana has no medical use, *id.* at 27, but a substantial number of doctors contends otherwise, *see* Michelle Castillo, *Survey: 76 Percent of Doctors Approve of Medical Marijuana Use*, CBSNEWS (May 31, 2013, 3:29 PM), http://www.cbsnews.com/news/survey-76-percent-of-doctors-approve-of-medical-marijuana-use/. Patients may obtain marijuana, but the threat of federal prosecution is always looming.

208. *See Thirteen Legal Medical Marijuana States*, PROCON.ORG, http://medicalmarijuana.procon.org/viewresource.asp?resourceID=881 (last updated Sept. 16, 2013); *see also* Terence McCourt, *Highlights of the Mass. Medical Marijuana Act*, LAW360 (July 16, 2013, 12:32 PM), http://www.law360.com/articles/455299/print?sect

Controlled Substances Act (CSA),[209] prosecutes these individuals. Under state law, these individuals are patients seeking relief from pain. But under federal law, these same individuals are criminal users of illegal drugs, subject to raids by militarized DEA agents and prison sentences for mere possession.[210]

As noted earlier, states possess *all* general police powers; the federal government possesses none.[211] Regulation of crimes is inherently a province of the state in which the crimes are committed.[212] The federal government can only override or preempt state laws regarding criminal conduct if: (1) that is the clear and manifested purpose of Congress, (2) the law has independent authority (such as the Commerce Clause), (3) and the law is otherwise constitutional.[213]

Interestingly, the federal government cannot force states to make marijuana illegal because the Supreme Court's decision in *Printz v. United States*[214] prevents the federal government from compelling legislation, and the legalization of a drug is the lack of a law, accomplished through a state repealing all of its laws criminalizing the drug.[215] In other words, the federal government

---

ion=employment (summarizing Massachusetts's new medical marijuana law, which makes it the latest state to join the fray). Several other countries have also legalized medical marijuana. *See* Kathleen T. McCarthy, Comment, *Conversations About Medical Marijuana Between Physicians and Their Patients*, 25 J. LEGAL MED. 333, 348 (2004) (noting that Canada and the Netherlands allow medical patients to receive marijuana); Miriam Bulwar David-Hay, *Clinic Offers Puff of Relief for Chronically Ill*, JERUSALEM POST, (Jan. 6, 2008), http://www.jpost.com/servlet/Satellite?cid=1198517303901&pagename=JPost%2FJPArticle%2FShowFull (discussing Israel's medical marijuana laws); Corinne Heller, *Israel to Soothe Battle Trauma with Marijuana*, REUTERS, Oct. 3, 2004, *available at* http://www.aegis.org/DisplayContent/DisplayContent.aspx?sectionID=64942 (noting Israel's effort to treat post-traumatic stress disorder with marijuana).

209. 21 U.S.C. § 885 (2006).

210. *See, e.g.*, Eugene W. Fields, *Rifle-Toting DEA Agents Raid Marijuana Store*, ORANGE COUNTY REG. (July 30, 2008), http://www.ocregister.com/articles/adams-orange-agents-2109067-city-going.

211. *See* United States v. Morrison, 529 U.S. 598, 618 (2003).

212. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 474 (2004).

213. *See* Rice v. Santa Fe Elec. Corp., 331 U.S. 218, 230 (1947) (citing Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Emp't Relations Bd., 315 U.S. 740, 749 (1942); Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 611 (1926)).

214. 521 U.S. 898 (1997).

215. Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 721 (2009)

would have to coerce the state to enact a law prohibiting marijuana use to counter legalization, which it cannot do.[216] Although states are therefore in the clear, so long as they do not actually sell or possess marijuana, patients availing themselves of state medical marijuana laws are at risk for prosecution. The interrelation between state legality and federal illegality causes a strange dilemma: patients frequently lack a legal method to obtain the marijuana even if the drug is legal under state law.[217] This is because states cannot actually dispense marijuana.[218] Thanks to the Supreme Court's decision in *Gonzales v. Raich*,[219] the authority of the federal government to enact the CSA under the Commerce Clause is now a given.[220]

In *Raich*, respondent Monson grew her own marijuana on her own land, and the other respondent, Raich, had the marijuana grown for her because she was too ill to tend the garden herself.[221] An inoperable brain tumor and other serious medical conditions afflicted Raich, who said that marijuana "effectively ke[pt] her alive, by stimulating appetite and relieving pain, in a way that prescription drugs d[id] not."[222] At no point did the marijuana cross state lines.[223] DEA agents raided Monson's property, and "after a [three] hour standoff" with the seriously ill Monson, the federal agents seized her marijuana plants.[224] The Supreme Court found the CSA proper under the Commerce Clause, which enables Congress to regulate conduct "*among* the several states,"[225] even though the marijuana never crossed state lines and there was no indication that it ever would.[226]

The Court's series of assumptions, nearly identical to the assumptions at the base of *Wickard* (referred to in Part II.C), were

---

(citing Printz v. United States, 521 U.S. 898, 935 (1997)).

216. *Id.*

217. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the State's Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1431–32 (2009).

218. *Id.* at 1432. State distribution would clearly run afoul of federal law, thereby subjecting state officials to the risk of prosecution. *Id.*

219. 545 U.S. 1 (2005).

220. *Id.* at 32–33.

221. *Id.* at 7.

222. Jesse McKinley, *Dying Woman Loses Appeal on Marijuana as Medication*, N.Y. TIMES (Mar. 15, 2007), http://www.nytimes.com/2007/03/15/us/15marijuana.html?r=0.

223. *Raich*, 545 U.S. at 59.

224. *Id.* at 7.

225. U.S. CONST. art. 1, § 8 (emphasis added).

226. *Raich*, 545 U.S. at 33.

as follows: (1) marijuana grown by the patients on their own land *might* enter the interstate drug market in some unknown quantity and at some unknown point in time; and (2) the patients *might* buy marijuana through the interstate drug market, thereby harming Congress's intent to eliminate the illegal trade of marijuana.[227] There was no showing that any of the medical marijuana had ever actually entered the illegal drug trade, nor was there a showing that any medical-marijuana patients ever purchased marijuana through interstate commerce.[228]

The basis for the current criminal prohibition of marijuana through the CSA, ironically, is the notion that some crime in which the federal government really does have authority—i.e., where marijuana crosses state lines—*might* happen in the future. It is odd that the Court held that Congress has the authority to regulate *intra*state marijuana use under the (*inter*state) Commerce Clause, but not violence against women and myriad other causes.[229]

The CSA might be held unconstitutional under *Windsor* if challenged. The *Windsor* Court provided a series of factors which, taken together, can establish federal disparagement of a state class.[230]

The first of the *Windsor* test factors, the scope of the federal enactment, favors the finding of disparagement, as the CSA is exceedingly broad. The second factor, the existence of a class protected by state law, favors a finding of disparagement because states explicitly sought to protect the patients from prosecution.[231] The third factor, that the legislation covers an issue that is within the exclusive province of the states, favors a finding of disparagement because police powers have always been an exclusive province of the states. The fourth factor, the uniform treatment and equal dignity of class members, favors a finding of disparagement because the state expressly allows for marijuana use by ill patients and the federal government brands these patients as criminals—hardly a dignified status. The fifth factor, the societal impact of the class, favors a finding of disparagement as well. If the class

---

227. *See id.* at 30–33.

228. *See id.* at 30.

229. *Compare Raich*, 545 U.S. at 30–33 (finding that Congress may enforce the CSA under the Commerce Clause even though the patients never bought or sold the marijuana through interstate commerce), *with* United States v. Morrison, 529 U.S. 598, 617 (2000) (finding that Congress lacks the authority to regulate violence against women under the Commerce Clause because violence against women is non-economic and cannot be aggregated to show substantial effect).

230. *See* United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675, 2695–96 (2013).

231. Additionally, if minorities wanted to challenge the CSA, they are protected.

comprised of same-sex couples legally married under state law is sufficient, surely the class comprised of all medical marijuana patients is sufficient as well. Lastly, the sixth *Windsor* factor, the imposition of restrictions and disabilities by the federal government on the class, favors a finding of disparagement. Few impositions are as heinous as prison time and the myriad of other consequences that flow from criminal conviction. Additionally, because the Court found that Congress enacted DOMA specifically to harm same-sex couples, it may be easier to show that Congress enacted the CSA to harm a protected class.[232] In sum, it appears that the CSA—and other laws like it—may be constitutionally suspect as federal disparagements of state-protected classes.

V. CONCLUSION

This article analyzed three situations that, though broad, are just a few of hundreds of arenas in which *Windsor* may be used as a shield against state oppression. Any time the federal government disparages a class the state seeks to protect, the *Windsor* test set forth in this article becomes relevant. Although the Court limited its opinion to DOMA, there will undoubtedly be attempts to strike down federal interference with state rights under the same analysis. It will be interesting to see how these inevitable challenges play out.

---

232. We concede, however, that the CSA could not have been enacted specifically to disparage *medical* marijuana smokers because medical marijuana was not legal in any state at the time of enactment.