
A FRIENDLY AMENDMENT

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Heather Gerken comes to praise Justice Kennedy’s opinion for the Supreme Court in *United States v. Windsor*.¹ I come to praise Gerken’s valiant effort to recast the *Windsor* opinion along more convincing lines.² Gerken does not propose a wholesale substitute for Justice Kennedy’s analysis. She suggests a shift in emphasis that lends Kennedy’s explanation for condemning DOMA a surprising jurisprudential significance. Where some of us have seen yet another lamentable paean to the sovereignty of the states, Gerken detects the faint hint of the “nationalist” school of federalism that she and others have nurtured in recent years.³ Gerken does not (yet) attach relevant significance to Justice Kennedy’s predicate holding that *Windsor* presented the question of DOMA’s validity in a justiciable posture. I want to contend that there, too, Kennedy may have recognized (implicitly and even more faintly) that the values we should associate with federal structure are not well served by sovereignty-based allocations of power.

I

The soul of the *Windsor* opinion was Justice Kennedy at his best. As he did in *Lawrence v. Texas*⁴ and *Romer v. Evans*,⁵ here, too, Kennedy knew gay bashing when he saw it. Quoting Justice Brennan, he declared that a federal statute cannot rest on “a bare congressional desire to harm a politically unpopular group.”⁶ Yet that is precisely what DOMA was. Proponents in

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¹ 133 S. Ct. 2675 (2013); Heather K. Gerken, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015).

² Cf. WHAT ROE V. WADE SHOULD HAVE SAID (J.M. Balkin ed., 2005) (presenting a variety of alternatives).

³ See Symposium, *Federalism as the New Nationalism*, 123 YALE L.J. 1888 (2014). Professor Gerken does not argue that Justice Kennedy actually intended to base the *Windsor* decision on the framework the nationalist school supplies, but expressed himself poorly. Nor does she predict that Kennedy and his colleagues will embrace nationalist federalism any time soon. Yet her “internalist account” of the opinion does offer additional support that is generally consistent with some of what Kennedy wrote, whatever he meant. Gerken, *supra* note 1, at 608-09.

⁴ 539 U.S. 558 (2003).

⁵ 517 U.S. 620 (1996).

⁶ Dep’t of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

Congress conceded it, and everybody watching knew it. The whole point of the statute, its very “essence” to use Justice Kennedy’s term, was to demean persons who find love in LGBT relationships. It is this aspect of the *Windsor* opinion on which some lower courts have now relied in part to confirm that the freedom to marry extends to same-sex partners.⁷ The flimsy rationales concocted for denying marriage to LGBT couples only prove what the real explanation has always been. People may fear, and they may hate. They may hold intolerant religious commitments. But they cannot constitutionally write their personal anxieties and attitudes into law. This is the lasting triumph of *Windsor*, a lonely piece of evidence that there may still be some hope for humankind, after all.

Trouble is, Justice Kennedy clouded this long-overdue message with an appeal to state “sovereign authority within our federal system.”⁸ Now quoting Chief Justice Rehnquist, he said that the “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’”⁹ And he described the marriages that DOMA denigrated as relationships on which the State of New York had chosen, in the exercise of its traditional authority, to confer “protection and dignity” going “further” than the Court’s prior decisions demanded.¹⁰ Gerken acknowledges that this was no casual observation.¹¹ With undeniable care and consistency, Justice Kennedy repeatedly linked the constitutional flaw in DOMA to an attempt to “injure the very class New York [sought] to protect.”¹² The challenge of the *Windsor* opinion is to account for the connection between the individual rights Justice Kennedy plainly vindicated and a particular state’s decision to recognize same-sex marriage.

It’s clear that Justice Kennedy did not mean to say that DOMA simply exceeded some structural limitation on congressional authority. He explicitly declined to decide whether the “intrusion on state power” regarding marriage violated “the Constitution” by “disrupt[ing] the federal balance.”¹³ That disclaimer brought relief to the quarters in which I move, where it had been feared that the justices would do the right thing for the wrong reason.¹⁴ Justice

⁷ *E.g.*, *Kitchen v. Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014). Of course, the validity of state bans on same-sex marriage was not before the Court in *Windsor*. *United States v. Windsor*, 133 S. Ct. at 2696 (2013) (limiting the holding to marriages “lawful” under state law).

⁸ *Windsor*, 133 S. Ct. at 2692.

⁹ *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

¹⁰ *Id.* at 2692.

¹¹ Gerken, *supra* note 1, at 609.

¹² *Windsor*, 133 S. Ct. at 2693.

¹³ *Id.* at 2692.

¹⁴ *Cf.* Steven G. Calabresi & Genna Sinel, *The Gay Marriage Cases and Federal Jurisdiction* (Northwestern Law & Econ Research, Working Paper No. 14-18), available at <http://ssrn.com/abstract=2505514> (contending that DOMA was unconstitutional “because

Kennedy has figured prominently in the Court's notorious decisions striking down enactments of the Congress on nebulous, text-free grounds traveling under the vague (and outdated) label of "dual sovereignty."¹⁵ In *Windsor*, we at least eluded that leaden missile. In point of fact, Kennedy described congressional legislative power expansively, without express objection from the dissenters.¹⁶

Justice Kennedy explained that "[t]he State's power in defining the marital relation is of central relevance in this case *quite apart from principles of federalism*."¹⁷ New York's use of "its historic and essential authority to define the marital relation" to include same-sex relationships "enhanced the recognition, dignity, and protection of the class in their own community."¹⁸ DOMA was unconstitutional because it used "this state-defined class" not for the purpose the state itself contemplated, but rather to "impose restrictions and disabilities."¹⁹ These passages were confusing in the least and, in one way, ominous. Professor Gerken identifies the issue precisely. Kennedy may have meant that it was only New York's approval of same-sex marriage that elevated the individual interests at stake sufficiently to make the Fifth Amendment case against DOMA.²⁰

This is where Gerken extends a helping hand. Justice Kennedy did not necessarily say, and he did not necessarily mean, that Congress went constitutionally wrong in DOMA by interfering with sovereign state policy-making power. True, the conventional account of federalism holds that state sovereignty ensures that national political minorities can sometimes find a safe haven at the state level.²¹ Yet the *Windsor* opinion can be read to perceive,

Congress did not have the enumerated power to adopt a federal marriage statute").

¹⁵ *Printz v. United States*, 521 U.S. 898, 918 (1997). In *Printz*, of course, the Court upset the recruitment of state executive officers to implement a federal statute while conceding that there was "no constitutional text" speaking to the issue. *Id.* at 905. In *Alden v. Maine*, 527 U.S. 706 (1999), Justice Kennedy delivered an opinion that four members of the Court later declared so bereft of justifying authority that it could not be taken as authoritative. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting in part and concurring in part) (joined by Souter, Ginsburg, & Breyer, JJ.).

¹⁶ *Windsor*, 133 S. Ct. at 2690 (stating that the Federal Government "has a wide choice of the mechanisms and means" by which to "exercise its own proper authority"); *id.* (explaining that "Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue").

¹⁷ *Id.* at 2692 (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Gerken, *supra* note 1, at 601 (acknowledging that Justice Kennedy wrote as though individual constitutional rights were "contingent on their recognition by the states").

²¹ Not long ago, Justice Thomas contended that sovereignty-based federalism "enhances self-government by creating a local decision-making system that is closer to the people, and hence more responsive to their wishes" and described the states as "organizers of resistance to the unwarranted exercise of federal powers." Clarence Thomas, Justice, U.S. Supreme

however dimly, a federalism of a quite different order. The nationalist school values federalism not because it grants dissenters an “exit option,” but rather because it guarantees them an opportunity to use local governmental units as “staging grounds” for promoting change in the nation as a whole.²² Kennedy might have, should have, understood that federalism and individual rights function together—the one providing the effective political structure in which the other can flourish.²³ By this account, DOMA was unconstitutional because it crushed the efforts of political outsiders to foster progressive change at the local level before it could gain traction on a wider scale.²⁴

I confess some doubts about nationalist federalism in general and the contribution it may make to understanding *Windsor* in particular. Many of us think the Court’s sovereignty decisions are wrong. For one thing, federalism (of any stripe) was never inevitable in this country. The early states were only the product of the way this part of the world was invaded.²⁵ For another, structural arrangements can be expected to change as a society develops, and it is pound foolish even to try to forestall evolutionary shifts, however significant.

The sovereignty-based federalism we have is very much the creation of the judges, and a poor fist they have made of it. Things could have been different, especially during Reconstruction. Consider how the system might look now if the *Slaughterhouse Cases*,²⁶ *Hans v. Louisiana*,²⁷ and *Murdock v. Memphis*²⁸ had gone the other way. The current Court’s insistence that sovereignty-based federalism fosters personal freedom is largely a scam. Structural arrangements sell better when they are packaged as bulwarks of liberty. Even if there were something to the argument, it would hardly make sense to preserve individual freedom by enforcing state sovereignty and hoping for the best. That is what

Court, Why Federalism Matters, Dwight D. Oppenheimer Lecture at Drake University Law School (Sept. 24, 1999), in 48 DRAKE L. REV. 231, 235, 237 (2000).

²² Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7, 10 (2010) [hereinafter Gerken, *Foreword*].

²³ Gerken, *supra* note 1, at 601.

²⁴ *Id.* at 600.

²⁵ By common account, the principal drafters in Philadelphia would have abolished the states, but caved to political reality. *E.g.*, John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 814 (1961), reprinted in THE FORMATION AND RATIFICATION OF THE CONSTITUTION 490 (Hall ed., 1987). *Cf.* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE (2008) (explaining that federalism is typically found in other nations where populations are so divided by religion or language that they can tolerate no central governmental authority).

²⁶ 83 U.S. (16 Wall.) 36 (1873) (giving the Privileges or Immunities Clause a notoriously grudging interpretation).

²⁷ 134 U.S. 1 (1890) (holding that the states enjoy sovereign immunity against private suits pressing federal claims).

²⁸ 87 U.S. (20 Wall.) 590 (1874) (holding that the Supreme Court has no appellate jurisdiction to review state court decisions on the meaning of state law).

the Court does, or says it does.

The nationalist project to adjust the conventional federalism picture faces a daunting linguistic hurdle. In legions of other cases, the Supreme Court plainly takes federalism to *mean* that states qua states enjoy some measure of autonomy that both insulates them from some federal overrides and guarantees their authority to fashion local policy.²⁹ It's hard enough to wean the legal system from imprecise terms. It is ever so much harder to redefine terms of art. Yet that is what Gerken proposes. She herself uses the federalism label, but her definition is entirely different, missing out the sovereignty piece and revealing her nationalist agenda. Thus her "stand in" for federalism is "the best way to protect minorities in a majority system."³⁰ If I have this right, Gerken does not insist that federalism must be shed of its tie to sovereignty. She just thinks we can ignore sovereignty and use federalism interchangeably with decentralization—in defiance of common nomenclature.³¹

One might see this as academic hubris. Yet the stakes being as high as they are, we should consider the possibility that Gerken and her cohorts might succeed, that they might seize control of this familiar term and transform its meaning. If Gerken can reformulate the federalism definition, she might free us of the burdens we bear for sovereignty. The rest of us regret that the sovereignty monster is upon us and yearn for another New Deal to be rid of it (again). But we should open our minds to an alternative. I am reminded of the

²⁹ *E.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (affirming "the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees"). Federalism is widely understood to describe systems with autonomous subunits as opposed to centralized governmental schemes that may accommodate decentralization. FEELEY & RUBIN, *supra* note 25, at 12, 20. Compare Alexander De Becker, *Local Government in Belgium: A 'Catch 22' Between Autonomy and Hierarchy* (describing Belgium as a "federal state"), in *LOCAL GOVERNMENT IN EUROPE* 26 (Panara & Varney eds., 2013), with Irene Couzigou, *Territorial Decentralisation in France: Towards Autonomy and Democracy* (describing France as a "unitary, decentralized State"), in *LOCAL GOVERNMENT IN EUROPE*, *supra*, at 73.

³⁰ Gerken, *Foreword*, *supra* note 22, at 13. While Gerken and her colleagues explore the way local political action can contribute to national policy, they do not insist on national uniformity as the ultimate end in view. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1900 (2014) [hereinafter Gerken, *Federalism*] (explaining that "local variation is perfectly consistent with a nationalist scheme"). In this, the nationalist school comports with extant Supreme Court thinking. See *Danforth*, 554 U.S. at 280 (stating that the states' ability to make their own laws "is not . . . limited by any general, undefined federal interest in uniformity").

³¹ According to Gerken, we have already abandoned the notion that federalism is crucially defined by reference to state sovereignty. See Gerken, *Foreword*, *supra* note 22, at 13 (contending that terms like "process federalism" and "cooperative federalism" would be unintelligible otherwise). So, for example, academics should study the way local minorities are able to make policy when there is no doubt that a sovereign override is available—as in the case of cities, boards, commissions, and even juries. *Id.* at 21-28.

day in Legal Process, when, at the end of another great class, Al Sacks stopped, rolled down his sleeves, looked into our satisfied faces, and announced that on the following day he was bringing Duncan Kennedy in to explain why everything Sacks had been saying was wrong.

Gerken contends not so much that the Court has erected the wrong federalism, and now insists on preserving the wrong federalism, but that the federalism the Court has built and maintained is beside the point. The law in the books is marginal to the law in action all around us.³² Our functional structural arrangements have matured, leaving judicial decisions enforcing state sovereignty as islands in the stream of events rushing past. It would be nice to be done with sovereignty, but we needn't worry much about it. We can and should simply refocus our attention. The task is to study, comprehend, analyze, and evaluate a growing body of arrangements in which state and local governmental units participate in the development of national policy.³³

Gerken concedes that the ideas that emerge from state and local politics do not always move the nation ahead: "the gears of rights and structure can move backwards, not just forwards."³⁴ For every local movement-become-law recognizing same-sex marriage, banning plastic grocery bags, or raising the minimum wage, there is another promoting carbon fuels, celebrating guns, or demonizing fugitives from poverty and injustice south of the Rio Grande. On this (crucial) point, Gerken is ambivalent. On occasion, she suggests that nationalist federalism can play favorites. We are not required to empower dissenters who are "disloyal to our fundamental ideals."³⁵ Yet she credits retrograde campaigns as catalysts for a rich national debate that will produce good results in its own time. When dissent is heard in a small enough space to succeed, the truth will out. Citizens "dissenting by deciding" will do their deciding well.³⁶

The rest of us would like to believe this, but find it hard sledding. So far from fostering enlightened social change, small venues can be pockets of parochialism. Lest we forget, it is the self-centered resistance of the states (and their congressional delegations) that so often disables progressive policy-making despite a national consensus.³⁷ But, of course, it is precisely the prevailing despair for American politics that we ought to resist by hearing

³² See Gerken, *Federalism*, *supra* note 30, at 1913.

³³ Much of the work done by the nationalist school is "more interpretive than normative." *Id.* at 1895. It is investigative and "descriptive." *Id.* at 1889. And so, I will add, it is genuine scholarship.

³⁴ Gerken, *supra* note 1, at 599-600.

³⁵ Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 958, 992 (2014) (contending that Justice Kennedy "insisted that states must have discretion to promote marriage equality" but did not say "they may have just as much discretion to deny it").

³⁶ *Id.* at 1980.

³⁷ Symposium, *America's Political Dysfunction: Constitutional Connections, Causes, and Cures*, 94 B.U. L. REV. 575 (2014).

Gerken out.

Nationalist federalism is an unlikely explanation for *Windsor* or, indeed, any judicial decision invalidating federal action. Gerken herself thinks the national government can trump policies adopted at the state and local levels.³⁸ She argues that national power should be stayed as a matter of constitutionally inspired prudence to give local democracy a chance to breathe. Thus *Windsor* prevented Congress from frustrating just such a local movement and in a case in which small-space sentiments lined up with individual rights. Here again, there is a dark side. The Court's decision in *Shelby County v. Holder*,³⁹ albeit grounded in sovereignty-based federalism, removed a national safeguard for free elections and enabled states to manufacture schemes that discourage voting.⁴⁰

When Justice Kennedy acknowledged the value of state-centered politics in *Windsor*, he probably had in mind the threadbare claim that state sovereignty protects individual liberty and local self-government from national usurpation. He declared that New York had exercised its "sovereign authority" to make judgments about marriage. But some of his verbiage is consistent with the alternative, nationalist model. Kennedy said, for example, that New York "was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'"⁴¹ And he said that the state marriage law 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."⁴²

Gerken fairly mines these passages for hope that Kennedy recognized what nationalist federalism embodies—namely, the insight that local engagement is valuable well beyond the trope that the states can be laboratories for testing ideas.⁴³ The *Windsor* opinion may not be the thin edge of the wedge for nationalist federalism. But since it resists any alternative explanation, we should not assume it is the same blunt sovereignty instrument we have sadly come to expect from this Court.⁴⁴

³⁸ Gerken, *Foreword*, *supra* note 22, at 10.

³⁹ 133 S. Ct. 2612 (2013)

⁴⁰ *Id.* (invalidating the "coverage formula" in § 4 of the Voting Rights Act). See Jaime Fuller, *How Has Voting Changed Since Shelby County v. Holder?*, WASH. POST THE FIX (July 7, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/>, archived at <http://perma.cc/5ELQ-4XG2> (reporting that many states have adopted restrictions in the wake of the Court's decision).

⁴¹ *United States v. Windsor*, 133 S. Ct. at 2692 (2013) (quoting *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011)). The line Kennedy quoted from his own opinion for the Court in *Bond* was actually tucked into a paragraph citing state sovereignty as a shield against national power.

⁴² *Id.* at 2692-93.

⁴³ See Gerken, *Federalism*, *supra* note 30, at 1901.

⁴⁴ Even as I say this and mean it, I must also say that it seems quaint to spend our academic time pondering the structure of government in this or any single nation. Even if

The more of this I read, the more I am convinced—to the point that the picture Gerken describes seems not only plausible, but right, and not only right, but irrefutable. We have been looking for federalism in all the wrong places. This is unsettling, of course, to academics who have spent our careers worrying through a marvelously complex and unruly system of law and institutions that no one can master. Now it turns out that we have been flummoxed by the easy stuff. The legal system we actually have is a lot more complicated, exponentially complicated. But if the world we are investigating is on the move, we had best get in step with it.

II

There is another arguably complementary point to be made about Justice Kennedy's opinion in *Windsor*. Before he reached the merits, Kennedy had first to explain how it was that the case was fit for adjudication. Recall that, soon after Edith Windsor initiated her suit in the district court, Attorney General Holder announced that the United States would not defend DOMA as a valid explanation for denying Windsor the usual tax exemption for surviving spouses. Justice Scalia insisted that what had been a justiciable dispute was at that point no longer a "controversy" for purposes of Article III.⁴⁵ Justice Kennedy countered that the "complication" created by the Government's position was a "prudential" matter the Court could defuse in the exercise of judgment.⁴⁶

Justiciability jurisprudence, too, is grounded in the sovereignty idea—specifically, a pervasive faith that governmental authority is distributed among the branches of the national government, each of which is confined within formally circumscribed bounds. The Court scarcely pauses to consider whether the separation of powers reflects a realistic view of the modern regulatory state. Or to ask whether it is normatively attractive. For the justices, separation is simply there to be enforced as a constitutional mandate. I wonder, then, if Justice Kennedy's softer-than-usual approach to justiciability in *Windsor* is worth a passing nod.

I would not contend that *Windsor* signals a programmatic tendency to classify justiciability doctrine as federal common law. The evidence suggests a

we were able to revise our thinking about federalism and sovereignty for the good of our own country, the gain would be modest. Civilization is collapsing worldwide because sovereign nations can't manage the cooperation necessary to prevent wars and pestilence, far less to stop or even slow the devastation of the natural environment. Then again, some of us somewhere may yet beat the odds and survive, necessarily in isolated enclaves. And there might just be a chance, brought on by necessity, to begin in small spaces to construct a better world for the future, if any there is. I very much doubt it. But Heather Gerken has put me in a hopeful mood.

⁴⁵ *Windsor*, 133 S. Ct. at 2697 (Scalia, J., dissenting).

⁴⁶ *Id.* at 2685 (majority opinion).

pending move in the other direction.⁴⁷ But if the prerequisites for access to the Article III judiciary were not packed in constitutional ice, the courts might be in a better position to monitor and accommodate the local social and political movements of which Heather Gerken speaks. Here again, it is important to say that Gerken's nationalist federalism mainly lives (and perhaps thrives) without benefit of judicial attention. Yet, in Gerken's view, at some point it's necessary to decide that a local initiative has blossomed into something of national moment. Would it be too much to suggest that in reaching the merits in *Windsor*, while at the same time deflecting the question in *Hollingsworth v. Perry*,⁴⁸ the Court was grappling with the "rule of recognition" problem regarding the freedom to marry?⁴⁹ Probably.

Still, if Justice Kennedy's treatment of the merits in *Windsor* reflects a vague appreciation of structural values apart from sovereignty, it may be that his handling of justiciability at least bears watching for similar symptoms. Perhaps there will come a day when we will escape the formalism that has impoverished Supreme Court decisions about access to the courts for decades.

⁴⁷ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (questioning judicially crafted "prudential" standing rules).

⁴⁸ 133 S. Ct. 2652 (2013) (holding that the proponents of the California prohibition on same-sex marriage lacked standing to seek review of a circuit court decision declaring the ban unconstitutional).

⁴⁹ See Gerken, *supra* note 1, at 604.