
COMMENTS

FEDERALISM, MARRIAGE, AND HEATHER GERKEN'S *MAD GENIUS*

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In her characteristically astute and engaging essay, Professor Heather Gerken offers a sensitive and sympathetic reading of Justice Anthony Kennedy's majority opinion in *United States v. Windsor*.¹ Her core claim is that *Windsor*—and the transformation of political and legal support for same-sex marriage in the United States—demonstrate how “federalism and rights work together to promote change” and, in particular, how federalism furthers the equality and liberty values of the Fourteenth Amendment.² This is a natural line of argument for Gerken to develop with respect to *Windsor*, as she has produced an incredible body of scholarship dedicated to what she calls the “nationalist school of federalism”—a theory of federalism that understands “state power [as] a means to achieving a well-functioning *national* democracy.”³ We are fortunate that she has turned her attention to same-sex marriage, federalism, and the “many mysteries” of *Windsor*.

I am delighted to offer this response to her essay. I begin by agreeing in significant part with Gerken's process-based account of how federalism has helped facilitate the recognition of same-sex marriage in many states, and how federalism provided jurisprudential resources for the *Windsor* Court as it struck down the most significant provision in the Defense of Marriage Act.⁴

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¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² Heather Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594 (2015).

³ Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014) [hereinafter Gerken, *New Nationalism*]. See also Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012) [hereinafter Gerken, *Our Federalism(s)*]; Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Foreword*]; Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

⁴ Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (codified at 1 U.S.C. § 7 (Supp. V 1999)) (defining “marriage” as between one “man” and

Federalism's role facilitating the legal recognition of same-sex marriage in the United States over the last decade is a well-observed and important phenomenon. Federalism has provided laboratories of experimentation for different resolutions of the debate over same-sex marriage; it has helped manage and defuse that debate by lowering the stakes of different reform initiatives; it has had a temporizing effect, pacing the rate of change; it has generated healthy legal pluralism within our national system; and it has provided individuals with opportunities for choice and exit.⁵ Gerken does not so much disagree with these arguments as she contends that they do not account for a key feature of *Windsor*'s "mad genius." She understands *Windsor* "not as an effort to accommodate political change, but as an effort to clear the channels of political change" at the federal level.⁶ As she explains, "by getting rid of [Section 3 of] DOMA,"⁷ *Windsor* forces the federal government "to engage with the question of marriage equality" in administering federal regulatory programs,⁸ thus allowing "the states [to] now tug the federal government along with them."⁹ It is through this "forced engagement"¹⁰ that "federalism and rights work together to promote change."¹¹ "[R]ights and structure," Gerken explains, "are like two interlocking gears, moving the grand constitutional project of integration forward."¹²

As with her larger corpus of federalism scholarship, Gerken's take on *Windsor*, federalism, and same-sex marriage is founded on a complex and textured understanding of federalism—one that eschews traditional narratives, whether nationalist or state-centered in their orientation.¹³ She insists that we pay attention to the many forms that federalism can and does take: administrative federalism, polyphonic federalism, cooperative federalism, uncooperative federalism, dynamic federalism, and horizontal federalism, to name a few. There is no "one true federalism"¹⁴ in Gerken's account: "Every

one "woman" for "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").

⁵ The literature on these points is vast. For a small sample, see William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality Under United States v. Windsor*, 2013 CATO SUP. CT. REV. 117; Neil Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2014).

⁶ Gerken, *supra* note 2, at 602.

⁷ *Id.*

⁸ *Id.* at 608.

⁹ *Id.* at 600.

¹⁰ *Id.* at 609.

¹¹ *Id.* at 594.

¹² *Id.* at 588.

¹³ See, e.g., Gerken, *New Nationalism*, *supra* note 3.

¹⁴ I borrow this phrase from Susan Bandes, *Erie and the History of the One True*

flavor of federalism can be found somewhere in our system.”¹⁵ Importantly, her work questions the descriptive accuracy and adequacy of sovereignty-based theories of federalism—theories premised on the notion that each state has “power to rule without interference over a policymaking domain of its own”¹⁶—while also observing the powerful hold of sovereignty on American federalism jurisprudence.

Given the durable, even stubborn orthodoxy that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,”¹⁷ one might be forgiven for wondering how Gerken’s multi-dimensional, sovereignty-skeptical approach to federalism could shed light on the subject of family law’s place in our federated polity. If there is a North Star in sovereignty-based theories of federalism, it is family law’s firm entrenchment at the state level, and the allied notion that otherwise-legitimate federal regulatory and adjudicative powers simply do not (or should not) reach family law and policy.¹⁸ It does not take long to conjure examples that demonstrate the absurdity of the strongest iterations of this conception of federalism and family law,¹⁹ but its power and resilience is difficult to deny. Indeed, by Gerken’s count, Justice Kennedy’s opinion in *Windsor* refers to the states’ special sovereignty over domestic relations no fewer than eleven times. “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities,’”²⁰ he opines. Therefore, “[c]onsistent with this allocation of authority, the Federal Government, through

Federalism, 110 YALE L.J. 829, 829 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000)).

¹⁵ Gerken, *Our Federalism(s)*, *supra* note 3, at 1550.

¹⁶ Gerken, *Foreword*, *supra* note 3, at 12. *See also* Gerken, *supra* note 2, at 611.

¹⁷ *In re Burrus*, 136 U.S. 586, 593-94 (1890) (cited in *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992)).

¹⁸ For discussions of this theory of federalism and family law, see generally Kristin Collins, *Federalism’s Fallacy: Early Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761 (2005); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

¹⁹ *See, e.g.*, NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 258-77 (2000); JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); Collins, *supra* note 18, *passim*; Resnik, *Categorical Federalism*, *supra* note 18, at 646-70. *See also* sources cited *infra* notes 35-47 & 56-59.

²⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

our history, has deferred to state-law policy decisions with respect to domestic relations.”²¹ This refrain also bridges the majority and the three dissenting opinions penned in *Windsor*, though the dissenters take the additional step of proffering federalism as a basis for upholding state heterosexual-only marriage laws.²² Gerken dismisses the sovereignty talk in the *Windsor* majority opinion as “mostly claptrap.”²³ But however one assesses the salience of state sovereignty to *Windsor*’s outcome or reasoning, the opinion reflects and reaffirms a durable but contested understanding of the place of the family in our federal system.

What role will sovereignty-based theories of federalism play in the debate over same-sex marriage as it unfolds in the coming months, years, and decades? Could the nation’s experience wrestling with, and over, same-sex marriage usher in a more nuanced federalism jurisprudence by demonstrating, in a high-profile debate, the overlapping and concurrent nature of federal-state allocations of power with respect to the family? Or will the sovereignty talk in *Windsor* emerge as a lasting legacy? The latter possibility is suggested by *DeBoer v. Snyder*,²⁴ the Sixth Circuit’s post-*Windsor* opinion upholding several states’ heterosexual-only marriage laws. According to the majority opinion in *DeBoer*, state sovereignty—not equality or dignity—is the central feature of *Windsor*’s rationale. “*Windsor* hinges on the Defense of Marriage Act’s unprecedented intrusion into the States’ authority over domestic relations,” explains Judge Jeffrey Sutton, and the same principle requires deference to state heterosexual-only marriage laws.²⁵

The *DeBoer* majority and the *Windsor* dissenters are not alone in concluding that state sovereignty over marriage and family law weighs strongly against, or even bars, recognition of a federal constitutional right to same-sex marriage. That argument, which has taken various doctrinal formulations, features prominently in briefs defending heterosexual-only marriage laws in pre- and post-*Windsor* litigation.²⁶ But among federal judges, the *DeBoer* majority and the *Windsor* dissenters have thus far been in the minority on this point. Prior to *DeBoer*, nearly every lower federal court had interpreted *Windsor*’s rights-based reasoning to require states to recognize same-sex marriage, dismissing or ignoring *Windsor*’s federalism talk as

²¹ *Id.*

²² *Id.* at 2696-97 (Roberts, C.J., dissenting); *id.* at 2710-11 (Scalia, J., dissenting); *id.* at 2720 (Alito, J., dissenting).

²³ Gerken, *supra* note 2, at 601.

²⁴ 772 F.3d 388 (6th Cir. 2014).

²⁵ *Id.* at 400.

²⁶ The state sovereignty argument has taken various forms and has been premised on various doctrinal sources, from the Tenth Amendment to Article III. *See, e.g.*, Brief for Sixteen Utah Counties as Amici Curiae Supporting Appellants, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178); Brief for Eagle Forum Educ. & Legal Def. Fund, Inc. as Amicus Curiae, *DeBoer*, 772 F.3d 388 (No. 14-571).

inapposite.²⁷ As this Comment was going to press, the Supreme Court agreed to review the Sixth Circuit's decision in *DeBoer*.²⁸

I have no crystal ball, nor will I offer an assessment of the role that sovereignty-based federalism theories have played in the marriage-equality debate thus far. Rather, I consider the descriptive shortcomings of state sovereignty as a serviceable concept when trying to understand the allocation of regulatory authority over family law and policy, past and present. In Gerken's work, jurisdictional lines are messy and overlapping, and the currents of power run in multiple directions (up, down, sideways), through coordinate branches (legislative, executive, judicial), and at all levels of government (from the White House to city halls). Family law has been no exception to these cross-currents of authority, a point I demonstrate in Part I with special attention to the development and administration of federal marriage-based entitlements. My account of the concurrency of federal and state authority in family law and policy may not surprise those federalism scholars who, like Gerken, have questioned sovereignty's vitality and have embraced pluralistic understandings of "our federalism."²⁹ But attention to the many ways that family law has been subject to overlapping federal-state regulatory structures provides an important corrective to juridical declarations of state autonomy in the field of family law.³⁰ It also sheds important light on a long history of contestation over the metes and bounds of federal and state authority to regulate the family. The marriage equality debates are part of that history, but as I demonstrate in Part II, the debates over DOMA's constitutionality were unusual in an important regard: Sovereignty-based theories of federalism have often operated to thwart, rather than facilitate, progressive change in family law and policy.

How might this history of regulatory integration and jurisdictional contestation provide perspective on the current debate over the constitutionality of state heterosexual-only marriage laws? In Part III, I take up this question with an analysis of the sovereignty-based theory of federalism developed in *DeBoer*. In Gerken's account of *Windsor* and federalism's role in

²⁷ See *infra* notes 86-87 (collecting cases). In *Robicheaux v. Caldwell*, a judge in the Eastern District of Louisiana upheld that state's same-sex marriage ban, also citing *Windsor*'s sovereignty language in support of his conclusion. 2 F. Supp. 3d 910, 917 (E.D. La. 2014).

²⁸ *DeBoer*, 772 F.3d 388, *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571). The Sixth Circuit's opinion in *DeBoer* addresses the constitutional claims raised in four cases consolidated for appeal: *DeBoer v. Snyder*, *Obergefell v. Hodges*, *Bourke v. Beshear*, and *Tanco v. Haslam*. The Supreme Court granted the petitions for writ of certiorari in all four of those cases.

²⁹ See Gerken, *Foreword*, *supra* note 3, at 10 ("My account . . . privileges messy overlap over clear jurisdictional lines, and depicts power as fluid, contingent, and contested.").

³⁰ See, e.g., Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 273 (2009); Hasday, *supra* note 18; Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 220 (2000); Resnik, *supra* note 18; sources cited *infra* note 66.

the growing acceptance of same-sex marriage, federalism's complex structures have helped facilitate healthy and robust debate over same-sex marriage and have allowed some states to "tug" the nation toward recognition of marriage equality. By contrast, the sovereignty-based theory of federalism offered in *DeBoer*—founded on an account of state autonomy that fails to capture the complexities of federal-state authority in the field of family law—would shield marriage law from the horizontal and vertical dialogic processes that federalism creates and supports. The historical perspective I offer in this Comment makes plain that such an outcome is not an inevitable product of fundamental federalism principles, and provides a cautionary reminder that—as Gerken observes—"the gears of rights and structure" do not always move forward.³¹

I

References to the special place of the family in our federated polity found in *Windsor* and *DeBoer* are standard fare in accounts of American federalism—so standard that they have assumed a transhistorical and essential quality.³² I begin by asking what we might learn if, rather than trying to mine the historical sources to determine the precise contours of federal power over family law today, we analyze past practices for the purpose of determining how the doctrinal and institutional structures of federalism have shaped family law in the United States, and vice versa. What would we learn if, like Gerken, we approached the subject with an eye for the overlapping and crisscrossing exercises of power that characterize so much of American law and governance? If we thought we might find as much concurrency as autonomy? If we understood that federalism generates cooperation and contestation?

In framing my analysis in this fashion, my point is not to quarrel with the fact that, as with most other areas of substantive law, state and local governments have had a lead role in the creation and enforcement of the laws that govern familial relations. Rather, I urge that sovereignty-based accounts of the place of family law in our federal system—accounts that have been developed in significant part in the course of legal contestation over calls for reform—are both misguided and misleading. There is much we do not know about the integration and overlap of local, state, and federal family laws and policies. But based on what we do know, a far more interesting story about federalism and family law can be told.

A brief account of the history of the federal government's role in defining marriage for federal-law purposes—the key issue in *Windsor*—illustrates this point nicely. The first observation to be made is that federal-state regulatory overlap in marriage law is not a modern development. At least a century before

³¹ Gerken, *supra* note 2, at 599-600. ("The arc of the universe may bend toward justice, but the gears of rights and structure can move backwards, not just forwards." (internal citations omitted)).

³² See Collins, *supra* note 18, at 1763.

the expansion of the federal regulatory state brought programs like Social Security widows' and dependent children's benefits in the 1930s,³³ federal administrators had to determine women's eligibility for federal widows' military pensions.³⁴ The military pension system may seem like a quaint relic of a bygone era, but that perception is mistaken. It was a durable feature of federal law from the 1790s into the early twentieth century,³⁵ and its creation and expansion helped spur the development of a significant federal administrative apparatus in the early nineteenth century.³⁶ In the second half of the nineteenth century, Congress extended the pension system to reach widows of the Civil War and other military encounters.³⁷ As Theda Skocpol has demonstrated in great detail, by the 1890s the Civil War pension system had become America's first social security system.³⁸ World War I gave bloody birth to a new generation of war widows, and Congress once again provided for military widows in the War Risk Insurance Act of 1917 ("WRIA").³⁹ By the time Congress enacted the Social Security Act of 1939—which extended federal marriage-based entitlements to the general population—federal administrators had been struggling with how to determine “what constitutes marriage” for over a century.⁴⁰

³³ See Social Security Act, ch. 531, § 402, 49 Stat. 620, 627-28 (1935) (aid to dependent children); Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360 (benefits for wives and widows of eligible working men).

³⁴ The following discussion draws on Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085 (2009) [hereinafter Collins, *Administering Marriage*], and Kristin A. Collins, “Petitions Without Number”: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements, 31 LAW & HIST. REV. 1 (2013) [hereinafter Collins, *Petitions*].

³⁵ For examples of early nineteenth-century federal widows’ military pension statutes, see Act of June 7, 1794, ch. 52, § 1, 1 Stat. 390, 390; Act of Mar. 14, 1798, ch. 15, 1 Stat. 540, 540; Act of Mar. 16, 1802, ch. 9, § 15, 2 Stat. 132, 135. These statutes are representative. In the early nineteenth century alone, Congress enacted at least seventy-six public law widows’ pension statutes. See Collins, *Petitions*, *supra* note 34, at 2.

³⁶ See Collins, *Petitions*, *supra* note 34, at 6-16; Collins, *Administering Marriage*, *supra* note 34, at 1122-30.

³⁷ See, e.g., Act of July 12, 1862, ch. 165, § 2, 7 Stat. 566, 567.

³⁸ See Act of June 27, 1890, ch. 634, § 3, 26 Stat. 182, 182-83; SKOCPOL, *supra* note 19, at 120-30; see also Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. AM. HIST. 456 (1996).

³⁹ See Act of Oct. 6, 1917, ch. 105, §§ 200-405, 40 Stat. 398, 402-10. For a rich discussion of provision made for wives and widows in the War Risk Insurance Act, see Walter Hickel, *War, Region, and Social Welfare: Federal Aid to Servicemen’s Dependents in the South, 1917-1921*, 87 J. AM. HIST. 1362 (1998).

⁴⁰ 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 557 (3d ed., Little, Brown 1857). See Collins, *Administering Marriage*, *supra* note 34, at 1156-67.

It turns out that defining marriage for the purpose of administering a significant system of marriage-based entitlements was no mean feat. In the early nineteenth century, for example, the question of when romantic cohabitation crossed the line into legal marriage was open to dispute, as marriage licenses were rare and common-law marriage was not unusual. In light of that fact, for purposes of administering widows' pensions, the federal Pension Office issued a regulation in 1836 that established how the clerks in that office were to assess the validity of an alleged marriage.⁴¹ Congress followed suit in 1846, enacting a *statute* that defined marriage for the resolution of widows' pension claims.⁴² Although I have never set out to identify the first federal statute governing how marriage would be established for a federal program, that pride of place may go to the 1846 law, which required that federal pension clerks recognize common-law marriages. As explained by Attorney General John Mason, under the 1846 Act, "proof of a marriage in fact cannot be required—that is, by witnesses present at the ceremony, or by official records: general reputation and cohabitation are sufficient, *prima facie*."⁴³

The problem of how to establish the legality of a marriage when administering widows' pensions became more difficult and contested as the widows' pension system grew during and after the Civil War. For example, in 1864, Congress enacted a special Civil War pension statute that allowed widows of "colored soldiers" to prove marriage by providing evidence that the couple cohabited for at least two years and recognized "each other as man and wife,"⁴⁴ if the couple had not been able to marry under state law. Slaves had been denied the right to legally marry throughout the South. Thus, by employing a generous definition of marriage for recently emancipated widows, Congress sought to extend the material benefit of the pension laws to a class of particularly needy and historically excluded women—a practice Congress

⁴¹ See *Rules of Evidence in Widows' and Orphans' Claims*, 9 July 1836, in PENSION LAWS NOW IN FORCE, Doc. No. 118, 25th Cong. 2d. Sess. 102 (1838). Well before the executive branch issued the 1836 regulation, pension administrators crafted their own standards for determining the legality of a marriage. See Collins, *Administering Marriage*, *supra* note 34, at 1134.

⁴² Act of May 7, 1846, ch. 13, § 2, 9 Stat. 5, 6.

⁴³ 40 Op. Att'y Gen. 496, 498-99 (1846).

⁴⁴ Act of July 4, 1864, ch. 247, § 14, 13 Stat. 387, 389. The 1864 Act applied this liberal standard only to couples who had been unable to marry under state law, but in 1866, Congress omitted that qualifier. See Act of June 6, 1866, ch. 106, § 14, 14 Stat. 56, 58. For discussions of Civil War pension statutes' special provisions for widows and children of "colored" soldiers, see ELIZABETH REGOSIN, *FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION* 79-114 (2002); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999).

continued in 1873, when it extended this liberal definition of marriage to widows of “Indian soldiers and sailors.”⁴⁵

When Congress enacted WRIA in 1917, it once again employed liberal definitions of marriage, bringing more women within the pension system. WRIA created three different types of marriage-based entitlements for the wives and widows of World War I soldiers: allotments, subsidized insurance, and compensation (i.e., pensions).⁴⁶ With respect to “allotments”—an allowance for wives whose husbands were away fighting the war—WRIA recognized common-law marriage as a basis for *all* women’s claims, regardless of the woman’s race and with no mention of state law.⁴⁷ For the wives and widows of “colored or Indian soldiers and sailors,” WRIA went even further by accepting evidence of common-law marriage as a basis for eligibility for insurance and compensation—the two types of benefits provided to women whose husbands died in battle—regardless of whether the marriage would satisfy state law.⁴⁸

In short, in the nineteenth and early twentieth centuries, the statutes that created federal marriage-based entitlements regularly used both state and federal standards to answer the question “what constitutes marriage?”⁴⁹ As a general matter federal administrators were expected to recognize marriages that were legal under state law, and in some instances only state-sanctioned marriages were recognized. But in a significant class of cases, federal administrators were also to recognize unions as marriages even when state officials would not.

This brief overview of the history of the federal widows’ pension system suggests a far more complex, overlapping, intertwined picture of federal and state authority with respect to marriage law than sovereignty-based theories of

⁴⁵ Act of Mar. 3, 1873, ch. 234, § 11, 17 Stat. 566, 570 (“[T]he widows of colored or Indian soldiers or sailors . . . shall be entitled to receive the pension . . . without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment.”).

⁴⁶ Act of Oct. 6, 1917, ch. 105, §§ 200-405, 40 Stat. 398, 402-10.

⁴⁷ See *id.* § 22(5), 40 Stat. 398, 400-01. Here, I use the term “common-law marriage” loosely, as WRIA appears to have required recognition of some relationships as marriages that would not have satisfied most contemporary definitions of common-law marriage.

⁴⁸ *Id.* WRIA accomplished this by reference to the 1873 Civil War pension statute. All widows claiming compensation (i.e., a pension) or insurance were required to prove their marriages in conformity with state marriage law, “except such [widows] as are mentioned in section forty-seven hundred and five of the Revised Statutes,” i.e., Act of Mar. 3, 1873, ch. 234, § 11, 17 Stat. 566, 570.

⁴⁹ When Congress enacted the Social Security Act of 1939, it largely abandoned the practice of providing a distinctive (and more generous) federal definition of marriage, relying almost entirely on state law to define “wife” and “widow.” See Social Security Act Amendments of 1939, ch. 666, § 209(i), (j), (m), 53 Stat. 1360, 1377-78.

federalism allow, in turn raising important questions about the development of marriage law in the United States. Did the integration of state and federal definitions of marriage in the vast bureaucracy that developed to process widows' military pension claims for over one hundred years shape marriage law in the United States? If so, how did the currents of causation run?

Generalizations should always be made with caution, and there is much we simply do not know, but the historical sources suggest that federal administrators may have played an underappreciated role in the development of marriage-based entitlements and the legal definition of marriage. As I have demonstrated elsewhere, a combination of ideological, fiscal, and institutional pressures led federal pension clerks to resist recognition of widows' pension claims unless the widow produced record evidence of a formal, solemnized marriage. This was the case in the early nineteenth century, when pension clerks resisted recognizing widows' pension claims based on common-law marriage, despite federal and state law that directed otherwise.⁵⁰ Similarly, there is evidence to suggest that without record evidence of a formal marriage, many African American Civil War widows struggled to have their relationships recognized as marriages by pension administrators.⁵¹ When World War I widows began filing claims, administrators in the Veterans' Bureau again resisted recognition of common-law marriage. Indeed, one administrator—a lawyer by the name of Otto Koegel—teamed up with eugenicists in their active, vocal, and racially tinged campaign against common-law marriage.⁵² Koegel identified the Veterans' Bureau as “the largest court of domestic relations in the world”⁵³ and provided a thorough critique of common-law marriage—one that continues to be cited.⁵⁴

Did federal administrators' resistance to common-law marriage play a role in its demise under state law across the United States? It seems a reasonable hypothesis that the increasing availability of federal marriage-based entitlements like military pensions, along with federal administrators' resistance to common-law marriage, helped push the states toward a more legalistic, government-controlled definition of marriage. Similarly, developments in state and local law—including increased use of vital records—may have enabled federal administrators to make a stronger case

⁵⁰ See Collins, *Administering Marriage*, *supra* note 34, at 1134.

⁵¹ *Id.* at 1160-62.

⁵² Otto E. Koegel, *Common Law Marriage and Its Development in the United States*, in SECOND INTERNATIONAL CONGRESS OF EUGENICS, 2 EUGENICS IN RACE AND STATE 252 (1921). In 1922, Koegel elaborated his analysis of common-law marriage into a free-standing treatise. See OTTO E. KOEGEL, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* (1922).

⁵³ Koegel, *supra* note 52, at 261.

⁵⁴ See, e.g., Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 746 (1996); Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 154 nn.31-38 (2009).

against recognition of common-law marriage. This historical record demonstrates that one need not deny the states' primary role in developing substantive law in virtually every field, including family law, to also acknowledge the important role that federal programs played in the development of family law, not simply (or primarily) as part of a top-down governance structure, but through integration of federal, state, and local law in a significant administrative system. However, our understanding of how such integration shaped family law remains underdeveloped in the shadow of debates over whether the family is "truly local."⁵⁵

The complexities of overlapping regimes of federal and state family law are not buried in the archives; they are hiding in plain sight in our modern regulatory regimes. Today, all sorts of federal regulatory statutes and programs concern "domestic relations," and, pursuant to federal spending powers, several federal laws require the states to adopt certain legal family-status definitions. As anyone who followed the legal challenges to DOMA knows, that list includes over one thousand federal laws that mention the word "spouse," including all manner of provisions in the tax code, the Social Security Act, statutes governing veterans' benefits, and immigration law.⁵⁶ In addition, a whole host of federal laws provide financial assistance to families in need, establish requirements on how states define and prove the parent-child relationship, and help determine how states will enforce parental responsibilities.⁵⁷ Some of these federal statutes are administered by federal officials, some by state officials.

How have the power-sharing arrangements that characterize these laws and programs shaped family law in the modern era? Thanks to Gerken's rich and energetic work on federalism, along with that of other scholars who have probed federalism's many mysteries, we have a more complex and sophisticated understanding of the varied and diffuse ways that federalism influences the development of American law. But sovereignty theories obscure the complexities of the regulatory regimes that create and administer modern American family law, a fact that may help explain why we lack a reliable overview of how federalism's many structures and doctrines shape family law today.

⁵⁵ Among histories of marriage, Nancy Cott's *Public Vows* is an important exception, as it examines how "public direction of marriage took place simultaneously on all three levels"—i.e., national, state, and local. COTT, *supra* note 19, at 24.

⁵⁶ Letter from Barry Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Representative Henry J. Hyde, Chairman, House Comm. on the Judiciary 8-9, 42-44 (Jan. 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>.

⁵⁷ See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 331, 110 Stat. 2105, 2227; Full Faith and Credit for Child Support Orders Act, Pub. L. 103-383, 108 Stat. 4063, 4064-65 (1994); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403; Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2354 (1975); Aid to Families with Dependent Children ("AFDC"), Pub. L. No. 74-271, §§ 401-404, 49 Stat. 627 (1935).

For example, without even considering the more exotic species of federalism that Gerken and others have explored—administrative federalism, horizontal federalism, and “federalism all the way down”—to my knowledge, we do not have a clear account of state officials’ responses to the classic top-down operation of federal laws that directly impact which familial relationships states must recognize. Take federal laws and judicial opinions that address the legal status and rights of nonmarital children. In the 1940s, 50s, and 60s, many states denied nonmarital children’s claims for federal assistance on the grounds that there was a “substitute father” in the house—even when the man in question had no legal familial obligation to the child.⁵⁸ Congress and federal regulators sought to end this practice, and protect nonmarital children, by outlawing the states’ “man in the house” rules.⁵⁹ Relatedly, in a string of constitutional opinions issued from the late 1960s through the early 1980s, the Supreme Court recognized “illegitimate” children’s constitutional right to equal protection.⁶⁰

How did state officials’ reactions to these federal regulatory, statutory, and constitutional efforts to recognize the rights of nonmarital children shape the development of family law in the several states? There is considerable evidence that some state officials responding to these regulations and rulings engaged in what Gerken and her co-author Jessica Bulman-Pozen have called “uncooperative federalism”: when state officials charged with implementing federal policies use their power to erode the foundations of those policies.⁶¹ If that is the case, might a clearer understanding of that resistance help explain why, according to some family law scholars, significant vestiges of the “old law” of illegitimacy remains with us, notwithstanding late twentieth-century efforts to disestablish that body of law?⁶² In short, we know that federal programs often mingle state and federal definitions of who counts as a family member, and some scholars have provided careful micro-studies of the role of family law in different federal regulatory regimes.⁶³ But in comparison with

⁵⁸ See WINFRED BELL, AID TO DEPENDENT CHILDREN 3-19 (1965).

⁵⁹ *King v. Smith*, 392 U.S. 309 (1968), provides a thorough account of the federal legislative and regulatory efforts to prevent the states from excluding nonmarital children from AFDC, and resistance by many state officials to those efforts. See also BELL, *supra* note 58, at 1-39, 76-110; Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

⁶⁰ See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). For a searching analysis of the illegitimacy cases, see Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 103 CALIF. L. REV. (forthcoming 2015).

⁶¹ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009).

⁶² See, e.g., Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387 (2012).

⁶³ See, e.g., Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L.

fields in which significant energy has been spent trying to determine how federal and state regulatory integration works (or does not work), and how it shapes substantive law, family law and federalism have benefited from far less detailed descriptive and prescriptive work.⁶⁴

My first point is a simple one: federalism theories that assume that family law falls within a timeless and nearly impermeable zone of state authority obscure the far messier, textured, interesting reality of the past and present regulation of family law and policy—a reality that Gerken’s account of federalism would have us acknowledge rather than repress. One reason sovereignty-based theories of federalism thrive is that judges want generalizable principles and neat and tidy jurisdictional lines to help them decide cases.⁶⁵ But there are costs. One of those costs is epistemic: as long as we are constrained by assumptions about state sovereignty in the field of family law, we will remain ill-equipped to understand how complicated power-sharing arrangements involving local, state, and federal officials have shaped family law—and how various efforts to regulate, subsidize, and tax the family have shaped the practice of federalism.

II

If sovereignty talk tends to naturalize a simplified account of the allocation of regulatory authority over the family, it also tends to obscure recurring debates over family law’s place in our federal structure. As Gerken and others have observed, federalism’s doctrines and structures are the product of, and are sites of contestation concerning, different models of decentralized power.⁶⁶ Efforts to draw jurisdictional lines around family law—itsself an evolving and protean category⁶⁷—have been no exception to this history of contestation. In turn, this history reveals that claims regarding the states’ special sovereignty

REV. 269 (2014); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 257 (1980).

⁶⁴ The point is a relative one, of course. In a forthcoming article, Courtney Joslin seeks to “provide a set of values or factors that should guide the assessment of when and how the federal government should participate in the realm of family status determinations.” Courtney Joslin, *Federalism and Family Status*, 90 IND. L.J. (forthcoming 2015). Others have engaged these questions. See, e.g., Estin, *supra* note 30; Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 542 (1998); Law, *supra* note 30. However, as Jill Hasday demonstrates in her recent book, federal family law—and, I would add, the questions generated by jurisdictional overlap in the field of family law—remain outside “the family law canon.” See HASDAY, *supra* note 19, at 17-66.

⁶⁵ Cf. Resnik, *supra* note 18, at 620.

⁶⁶ See, e.g., ALISON LACROIX, *IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2012); Gerken, *New Nationalism*, *supra* note 3, at 902-04; Bulman-Pozen & Gerken, *supra* note 61, at 1271-84.

⁶⁷ For an important discussion of the genealogy of family law as a field, see Janet Halley, *What Is Family Law? A Genealogy* (pts. 1 & 2), 23 YALE J.L. & HUMAN. 1 & 189 (2011).

over the family often have been developed in the course of opposing challenges to traditional status-based family law principles. That observation may meet resistance from some federalism scholars and jurists who embrace federalism and rightly celebrate its many virtues—and, most recently, the role it played in the undoing of Section 3 of DOMA. But one need not undervalue federalism to acknowledge that it has been enlisted frequently as a rejoinder to efforts to bring equality principles to bear on American family law. As long as the sovereignty-based theory of federalism and family law remains a naturalized feature of “our federalism,” however, that theory will sound as a positive assertion about the nature of American federalism rather than as a prescriptive claim that has developed in part to preserve particular socio-legal family arrangements—arrangements that benefited some while disempowering or excluding others. Simply put, while federalism was used (successfully) to help dislodge DOMA, claims to family law’s essentially localist nature have frequently worked to preserve rather than unsettle inegalitarian family law principles.

Thanks to the efforts of historians and legal scholars who have studied the development of localist theories of family law, there is no shortage of examples of this phenomenon, past and present. Early nineteenth-century articulations of the sovereignty-based theory of federalism and family law excavated by Jill Hasday serve as a useful starting point. In the 1820s, national legislators intent on defeating efforts to admit Missouri as a free state warned their anti-slavery colleagues that federal “intervention” in the regulation of slavery would inevitably lead to disruption of other areas of domestic relations law.⁶⁸ They portrayed a slippery slope on which federal efforts to dismantle the master-slave relationship—then considered a “domestic relation”—would lead to other radical changes to the state laws that structured the household around men’s authority and women’s limited autonomy, and would all but require the enfranchisement of women.⁶⁹

Those objections were insufficient to prevent Reconstruction reforms from reaching the domestic relation of master and slave, but—thanks to Reva Siegel’s searching analysis of anti-suffrage arguments developed in the late nineteenth and early twentieth centuries—we know that anxieties concerning federal intrusion into the family and women’s claims to political equality were durable and salient.⁷⁰ Although the restriction of women’s political participation hardly seems like a species of “family law” today, one would not have known that during the seventy-year-long fight over woman suffrage. “Among the powers which have hitherto been esteemed as most essential to the public welfare, is the power of the States to regulate, each for itself, their domestic institutions in their own way,” explained an 1882 minority report of

⁶⁸ See Hasday, *supra* note 18, at 1327-38.

⁶⁹ See *id.*

⁷⁰ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998-1003 (2002).

the Senate Select Committee on Woman Suffrage, “and among those institutions none have been preserved by the States with greater jealousy than their absolute control over marriage and the relation between the sexes.”⁷¹ As Siegel demonstrates, the federalism rejoinder to women’s claims to equal citizenship identified women’s disenfranchisement as constitutive of the marital relationship, and insisted that the states possessed special sovereignty over marriage.

This federalism argument was not a minor part of the suffrage debate; it was a routine and core feature of the anti-suffrage argument that, after women began voting, was also used to resist federal social policy initiatives supported by newly enfranchised reform-minded women. For example, opponents of Progressive-era efforts to create federal programs and infrastructure intended to alleviate grinding poverty among widowed and abandoned mothers and children marshaled similar federalism-based objections to the work of the federal Children’s Bureau and to the relatively short-lived Sheppard-Towner Act, a public health measure designed to provide federal aid to the states to improve their maternal and child health facilities.⁷² Although claims to state sovereignty over family law did not block the passage of the Social Security Acts of 1935 and 1939, with their various programs designed to help children, mothers, and widows, federalism-based arguments undoubtedly shaped the Acts’ race- and class-stratified treatment of women and families—a point that has been meticulously chronicled by historians.⁷³

In the late twentieth and early twenty-first centuries, despite considerable change in the federal structure—and the undeniable growth of federal regulatory regimes and programs that defined, subsidized, taxed, and obligated families and their members in various ways—the argument that the family is a special enclave of state sovereignty has continued to shape the contours of federal and state family law and policy. Objections to the ill-fated Equal Rights Amendment to the federal Constitution frequently sounded—and continue to

⁷¹ S. Rep. No. 47-686, pt. 2, at 2 (1882) (quoted in Siegel, *supra* note 70, at 1000).

⁷² Maternity and Infancy (Sheppard-Towner) Act, ch. 135, 42 Stat. 224 (1921). On the history of the federal Children’s Bureau and the Sheppard-Towner Act, see MOLLY LADD-TAYLOR, *MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930*, at 148-66 (1994); SKOCPOL, *supra* note 19, at 480-524. The federalism-based challenge to the Sheppard-Towner Act was rejected by the Supreme Court in *Massachusetts v. Mellon*, 262 U.S. 447, 479 (1923), but federalism concerns were part of the steady criticism of the Act and informed Congress’s refusal to renew the Act in the late 1920s. See SKOCPOL, *supra* note 19, at 513-14.

⁷³ See Social Security Act, ch. 531, § 402, 49 Stat. 620, 627-28 (1935) (aid to dependent children); Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360 (benefits for wives and widows). For discussions of how federalism shaped the various Social Security programs intended for women, see LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, ch. 9 (1994); SKOCPOL, *supra* note 19, at 534-36.

sound—in federalism.⁷⁴ Similarly, as Judith Resnik has demonstrated, proposals that the United States ratify the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)—a treaty that requires signatory countries to take steps to eliminate discrimination against women—have been met with the contention that such an obligation would “bring federal and even international regulation into areas which are constitutionally reserved to state, local or private discretion.”⁷⁵ Allied arguments have been made in opposition to ratification of the Convention on the Rights of the Child.⁷⁶ In the mid-1990s, sovereignty-based federalism theories featured prominently in efforts to defeat the passage of the Violence Against Women Act—an act that was intended to help secure women’s equality by targeting the problem of “gender motivated violence.”⁷⁷ Although VAWA was enacted, its opponents in Congress successfully limited its scope in various ways.⁷⁸ And in *Morrison v. United States*,⁷⁹ the Supreme Court further limited VAWA when it ruled that the Act’s civil rights remedy was unconstitutional, reasoning that the regulation of violence against women involved matters that were “truly local” and thus beyond the scope of Congress’s Commerce Clause powers.⁸⁰

This summary catalogue of ways in which sovereignty-based theories of federalism have been enlisted in efforts to defeat or limit federal initiatives that challenged status-based relationships created by traditional family law (or that were perceived to do so) is by no means exhaustive. Nor is it offered to support the contention that sovereignty-based theories of federalism always work against efforts to develop a more egalitarian or dignity-enhancing family law apparatus. Such theories have also served the ends of progressive change by preventing the ossification of illiberal norms in federal law, thus enabling the

⁷⁴ See, e.g., *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 179 (1978) (letter of Phyllis Schlafly) (arguing that the “ERA is the centerpiece of the women’s lib movement for more Federal control over our lives, lesbian privileges to teach in the schools and have child custody, government-funded abortions, and Federal child-care to replace mother-care”).

⁷⁵ *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 36, 85 (1990) (statement of Phyllis Schlafly). See Resnik, *supra* note 18, at 665-67.

⁷⁶ S. Res. 133, 104th Cong. (1995); Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 171-72 (2006).

⁷⁷ Violence Against Women Act of 1994 (“VAWA”), § 40302, 108 Stat. 1941, 1941.

⁷⁸ For a discussion of the legislators’ efforts to address criticism that early forms of VAWA would improperly involve the federal government in domestic relations matters, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1 (1996).

⁷⁹ 529 U.S. 598 (2000).

⁸⁰ *Id.* at 617-19. For extensive discussions of VAWA, see Resnik, *supra* note 18, at 626-29; Siegel, *supra* note 70, at 1025-31.

states to experiment with more progressive alternatives, and, as Gerken observes, to “tug” the federal government along. *Windsor* is just one example of this phenomenon.⁸¹ In addition, it is absolutely not the case that that federal laws that regulate family membership and the rights and responsibilities associated with it are, by virtue of their federal-ness, wise, progressive, or equality promoting.⁸²

Rather, the point is that a clear-eyed description of how federalism has shaped family law and policy—and how family law has shaped the practice of federalism—must account for the fact that sovereignty-based theories of federalism often served to shield traditional, status-based family law principles from pressure for change. At different junctures, such pressure for change has been generated at the national level by and on behalf of individuals and groups seeking recognition of their status *as* members of families (e.g., former slaves), claiming equality *within* legally recognized families (e.g., nonmarital children), and claiming equality in the public sphere *despite* their status as members of families (e.g., married women). Efforts to defeat such claims using sovereignty-based theories of federalism have not always prevailed, as the significant body of federal family laws and policies attests. But assertions that family is “truly local” not only naturalize a flat, anemic understanding of the place of the family in our federal system but also tend to obscure the ways that claims to state sovereignty have frequently inhibited progressive change in family law and related fields.

III

How might this account of concurrent, overlapping federal and state regulation of the family, and of federalism’s role in helping to preserve traditional family law principles, provide perspective on *Windsor* and the ongoing debate over federalism and same-sex marriage? A full answer would extend far beyond the scope of this Comment, so in closing I focus on how the history outlined above cautions us to be mindful of the ways that federalism

⁸¹ For example, in debates over the Federal Marriage Amendment, opponents used the state-sovereignty theory of federalism to defeat a constitutional amendment that would have ossified a heterosexual-only vision of marriage in the federal constitution. *See, e.g.*, Bruce Fein, *Marriage Amendment Miscue*, WASH. TIMES, May 23, 2006, at A19 (arguing that the Federal Marriage Amendment “precludes [state] legislative bodies from recognizing same-sex unions irrespective of majority sentiments”). In the early twentieth century, federalism principles appear to have played a role in preventing the enactment of proposed federal constitutional amendments that would have constitutionalized a ban on interracial marriage. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 630 (2004).

⁸² Family law scholars have offered powerful and thoughtful critiques of current federal adoption law, federal welfare policies, and federal child support laws. *See, e.g.*, Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL’Y 303, 320-21 (2006).

may be used not only to “clear the channels of political change”⁸³ and further “Fourteenth Amendment values,”⁸⁴ as Gerken observes of *Windsor*, but also to obstruct those channels of change and insulate family law from those values.⁸⁵ One sees this possibility in the Sixth Circuit’s majority opinion in *DeBoer v. Snyder*, which offers a reading of *Windsor*—and rests on a conception of federalism—that is different from Gerken’s in very important respects.

For a time, it appeared that the federalism logic of *Windsor* would die an uncelebrated death. As same-sex couples lined up to challenge state constitutional and statutory bars on same-sex marriage, court after court—federal and state, trial and appellate—adopted *Windsor*’s equality and liberty rationales.⁸⁶ Some courts simply ignored the federalism language and logic of *Windsor*, while others openly rejected it.⁸⁷ When, on October 6, 2014, the Supreme Court unceremoniously denied the petitions for certiorari in seven of those cases,⁸⁸ it seemed that the commentators who had dismissed the federalism talk in *Windsor* as largely irrelevant were right. But exactly one month later, when the Sixth Circuit issued its opinion in *DeBoer*,⁸⁹ the federalism rationale of *Windsor* took center stage.

Writing for a divided panel, Judge Jeffrey Sutton dismisses *Windsor*’s rights-based reasoning as immaterial to an assessment of the constitutionality of state marriage laws, observing that “federalism permeates” *Windsor* and that

⁸³ Gerken, *supra* note 2, at 600.

⁸⁴ *Id.* at 595.

⁸⁵ As Gerken notes, “the gears of rights and structure can move backwards, not just forwards.” *Id.* at 599-600.

⁸⁶ See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 375, 384 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1081 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1278 (N.D. Okla. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 550-52 (W.D. Ky. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 767-68 (M.D. Tenn. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768, 775 (E.D. Mich. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1045, 1048-49 (S.D. Ohio 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979-80, 983 (S.D. Ohio 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194, 1200 (D. Utah 2013); *Garden State Equality v. Dow*, 82 A.3d 336, 367 (N.J. Super. Ct. Law Div. 2013); *Griego v. Oliver*, 316 P.3d 865, 876, 887 (N.M. 2013).

⁸⁷ For opinions that largely ignore the federalism logic of *Windsor*, see *Obergefell*, 962 F. Supp. 2d 968; *Bishop*, 962 F. Supp. 2d 1252; *Bourke*, 996 F. Supp. 2d 542; *Gray v. Orr*, 4 F. Supp. 3d 984 (N.D. Ill. 2013). In *Bostic v. Schaefer* the Fourth Circuit explicitly discounts *Windsor*’s federalism language, reasoning that “*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights” 760 F.3d at 379.

⁸⁸ See, e.g., *Kitchen*, 755 F.3d 1193, *cert. denied*, 135 S. Ct. 265 (2014).

⁸⁹ *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

“[o]nly federalism” can explain “[w]hy . . . DOMA [was] anomalous.”⁹⁰ The *DeBoer* majority reasons that the constitutionality of state marriage requirements turns on an institutional question: “Who decides?”⁹¹ According to the *DeBoer* majority, this question has only two possible answers: either “the Supreme Court will constitutionalize a new definition of marriage” or “the people, gay and straight alike,” will “meet today’s challenge admirably and settle the issue in a productive way . . . through the customary political processes” at the state level.⁹²

After framing the issue in this manner, the *DeBoer* majority then reaffirms the proposition that the states (and, in particular, “state voters”) traditionally have had nearly exclusive power to define marriage. Much of the opinion’s discussion of federalism sounds in tones of process federalism and embraces the role that state-level deliberation has played in changing the “hearts and minds” of Americans on the subject of same-sex marriage. Federalism “permits laboratories of experimentation”⁹³ and allows federated democracies to pace change in a way that provides stability.⁹⁴ However, there is no mistaking the prominent and pivotal role of sovereignty-based theories of federalism in *DeBoer*. The majority opinion repeatedly cites to and affirms the states’ “time-respected authority to define the marital relation”⁹⁵ and “long-held authority to define marriage.”⁹⁶ “When the Framers ‘split the atom of sovereignty,’” the *DeBoer* majority explains, “they did so to *enhance* liberty, not to allow the National Government to *divest* liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power.”⁹⁷

A similar principle insulates each state’s marriage laws from the policy choices of other states. Addressing a challenge to Section 2 of DOMA—which provides that the individual states may refuse recognition of a same-sex marriage formalized in another state—the *DeBoer* majority opinion reasons that “[p]reservation of a State’s authority to recognize, or to opt not to recognize, an out-of-state marriage preserves a State’s sovereign interest in deciding for itself how to define the marital relationship.”⁹⁸ In the legal universe portrayed in *DeBoer*, then, the states are truly islands when it comes to marriage, and the only legitimate avenue for change available to proponents of same-sex marriage is the state ballot box.

⁹⁰ *Id.* at 414.

⁹¹ *Id.* at 396.

⁹² *Id.* at 421.

⁹³ *Id.* at 406.

⁹⁴ *Id.* at 406-07.

⁹⁵ *Id.* at 414.

⁹⁶ *Id.*

⁹⁷ *Id.* (citation omitted).

⁹⁸ *Id.* at 419; see Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C).

The *DeBoer* majority explains the significance of this theory of federalism for the plaintiffs' constitutional claims with great clarity: "Not one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."⁹⁹ Indeed, in the majority's view, "[t]he States' undoubted power over marriage provides an independent basis for reviewing the [state heterosexual-only marriage] laws . . . with deference rather than with skepticism."¹⁰⁰ Independent from what? Independent from, and in addition to, existing standards of deference that are part and parcel of modern constitutional equal protection analysis. The *DeBoer* majority thus appears to develop a synthetic account of federalism and the Fourteenth Amendment in which the states' sovereignty over family law extends into the domain of constitutional elaboration and enforcement, mandating judicial and congressional deference to the states with respect to family law—a deference that the majority likens to the federal government's plenary authority over the status and rights of noncitizens.¹⁰¹

What should one make of the *DeBoer* majority's reading of *Windsor* and its account of the allocation of authority between federal and state institutions with respect to family law and policy? There is much to be said about the *DeBoer* majority's reasoning, and surely much more will be said in briefs and commentary leading up to the Supreme Court's review. Here, I make just two observations. First, it is important to underscore the novelty of the *DeBoer* majority's synthetic reading of equal protection and the state-sovereignty theory of domestic relations law. The constitutionalization of family law is a well-observed phenomenon—lamented by some and celebrated by others.¹⁰² In *DeBoer*, however, state sovereignty creates a special zone of constitutional deference around state marriage law. Depending on the contours of that zone of deference, which the majority opinion does not delineate clearly, the

⁹⁹ *DeBoer*, 772 F.3d at 402-03.

¹⁰⁰ *Id.* at 415.

¹⁰¹ *Id.* at 415-17. The *DeBoer* majority thus advances a theory of "noncongruent equal protection"—when a federal court's "equal protection scrutiny" differs depending on whether a state or federal law is at issue. See Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 171 (2014). The *DeBoer* majority focuses primarily on the extremely limited role that, in its view, the federal courts may play in enforcing constitutional principles in the domain of family law, but it also uses the sovereignty logic of *Windsor* to question Congress's power, following federal judicial recognition of a right to same-sex marriage, to use its "Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead." *DeBoer*, 772 F.3d at 415.

¹⁰² See, e.g., MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 80-81, 282-84 (1989); Michael Grossberg, *How to Give the Present a Past? Family Law in the United States, 1950-2000*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 3, 4-5 (Sanford N. Katz et al. eds., 2000).

resulting constitutional framework would mark a change by significantly limiting the role that federal due process and equal protection principles play in family law.¹⁰³ But the majority presents its theory of constitutional deference as an essential and inevitable outgrowth of the states' "historic and . . . nearly exclusive power" over family law, thus obscuring a significant departure from present constitutional practice. There is nothing unusual about this form of argument.¹⁰⁴ The intellectual and discursive conventions of legal practice frequently push judges and lawyers to account for constitutional developments in ways that call on historical sources as authority while enlisting those sources to support changes in legal standards. The founders, in this convention, often function as a source not of precedent, but of "timeless elements out of a past that [are] assumed to be 'correct' or 'providential' . . . or 'clear,'" infusing a judicial opinion with the aura of inevitability and certitude.¹⁰⁵

However, as the history of federal and state allocations of power over family law and contestation over such power demonstrate, the family's place in our federated polity is neither inevitable nor certain. It is contingent and changing. "State voters," usually acting through their legislators, have played a primary role in the regulation of the family. But officials operating at every level of government—federal judges, state judges, government lawyers of all sorts, municipal officials, low-level administrative officials in federal and state agencies, and legislators in Washington—have also shaped the legal definition and meaning of marriage over time. That process has sometimes been

¹⁰³ Few if any modern constitutional interpreters would suggest that such a theory would alter the outcome of *Loving v. Virginia*, 388 U.S. 1 (1967). The *DeBoer* majority distinguishes *Loving* as a case involving something other than the "definition" of marriage: *Loving* concerned an "eligibility requirement for marriage; it did not create a new definition of marriage." *DeBoer*, 772 F.3d at 411. Even assuming that distinction to be tenable, no explanation is given for why an "eligibility requirement" of the sort at issue in *Loving* or other cases involving the right to marry is any less central to the states' "undoubted power over marriage." See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978). The Supreme Court has also regularly subjected laws that govern the rights and responsibilities of marriage to federal equal protection and due process standards. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 462-63 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980); *Orr v. Orr*, 440 U.S. 268, 283 (1979). Similarly, starting in the late 1960s, the Court subjected state laws governing the rights and status of nonmarital children and their parents to constitutional review. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Gomez v. Perez*, 409 U.S. 535 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

¹⁰⁴ See JACK M. BALKIN, *LIVING ORIGINALISM* 11 (2011) ("Most successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles.").

¹⁰⁵ Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 215 (1990).

evolutionary, sometimes revolutionary; sometimes cooperative, sometimes contested; sometimes peaceful, sometimes violent. Some of the most significant changes—Reconstruction-era efforts to recognize the marriages of emancipated slaves, woman suffrage, New Deal social welfare programs, and the end of state anti-miscegenation laws—brought federal power to bear on family relationships in very direct ways. The static and simplified account of the federal-state allocation of power with respect to family law that is affirmed and reinforced by the *DeBoer* majority obscures these complex institutional processes and changes, and instead portrays a particular sovereignty-based conception of federalism and family law as transhistorical—the one true federalism to which we must adhere.

My second observation is that, just as the *DeBoer* majority's synthetic reading of the Fourteenth Amendment and federalism is predicated on a limited understanding of the past, its begrudging assessment of same-sex marriage plaintiffs' turn to federal courts is premised on a misguided account of modern institutional processes and practices.¹⁰⁶ The opinion at once acknowledges the plaintiffs' right to turn to federal court and questions that course:

If the plaintiffs are convinced that litigation is the best way to resolve today's debate and to change heads and hearts in the process, who are we to say? . . . [H]owever . . . we cannot deny thinking the plaintiffs deserve better—earned victories through initiatives and legislation and the greater acceptance that comes with them.¹⁰⁷

Observing that proponents of same-sex marriage have achieved “nearly as many successes as defeats” through the “customary political processes”—and reasoning that “the federal courts have no long-lasting capacity to change what people think and believe about new social questions”¹⁰⁸—the *DeBoer* majority concludes that the plaintiffs' claims do not belong in federal court at all.¹⁰⁹

¹⁰⁶ Judge Martha Craig Daughtrey's dissenting opinion in *DeBoer* makes a similar observation. See *DeBoer*, 772 F.3d at 435 (Daughtrey, J., dissenting) (“[A]s it turns out, legalization of same-sex marriage in the ‘nineteen states and the District of Columbia’ mentioned by the majority was not uniformly the result of popular vote or legislative enactment.”).

¹⁰⁷ *Id.* at 417 (majority opinion).

¹⁰⁸ *Id.*

¹⁰⁹ The *DeBoer* majority does not cite Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?*, though it appears to rely on Rosenberg's well-known argument that “courts can almost never be effective producers of significant social reform”—an argument Rosenberg has extended to the same-sex marriage debate. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 422 (2d ed. 2008). The majority does cite Michael Klarman's important contribution to the debate over the role that courts can play in social change. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012). However, while Klarman observes that litigation has retarded the cause of gay marriage in some ways, he also notes the numerous ways that litigation has

Instead, the legal definition of marriage belongs where “it has been since the founding: in the hands of state voters.”¹¹⁰

The *DeBoer* majority’s assertion that gay and lesbian “interest groups” have been “succeeding more and failing less” through “democratic initiatives”¹¹¹ and, in part for that reason, that their claims have no place in federal court or Congress, elides the role that various institutions—state and federal, administrative, legislative, and judicial—have played in “chang[ing] what people think and believe” about same-sex marriage. A more accurate account would acknowledge the role of courts—state *and* federal—in the same-sex marriage debate, recognizing them as integral to the processes of legal and social change, not orthogonal to those processes. Long before *Windsor*, federal courts helped raise the federal constitutional floor of gay and lesbian rights, most notably in *Romer v. Evans*¹¹² and *Lawrence v. Texas*¹¹³—two opinions that the *DeBoer* majority finds irrelevant to the plaintiffs’ claims.¹¹⁴ In turn, state courts—conspicuously absent from the *DeBoer* majority’s account of legitimate institutional forums for the marriage-equality debate¹¹⁵—have relied in part on federal constitutional jurisprudence in resolving state constitutional challenges to heterosexual-only marriage laws.¹¹⁶ And, as Bill Eskridge has

“advanced the cause of gay marriage.” *Id.* at 208-19.

¹¹⁰ *DeBoer*, 772 F.3d at 403.

¹¹¹ *Id.* at 415.

¹¹² 517 U.S. 620 (1996).

¹¹³ 539 U.S. 558 (2003).

¹¹⁴ *See DeBoer*, 772 F.3d at 401-02, 408-09, 414-19, 431-32.

¹¹⁵ The *DeBoer* majority references the role of state courts in the “victories” of the same-sex marriage movement, but it also questions the legitimacy of state courts’ rulings in favor of same-sex marriage, characterizing those courts as having “seiz[ed] control” of the definition of marriage. *See id.* at 408-09.

¹¹⁶ An exemplary passage from *Goodridge v. Department of Public Health* illustrates this point:

The history of constitutional law “is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *United States v. Virginia*, 518 U.S. 515, 557 (1996). This statement is as true in the area of civil marriage as in any other area of civil rights. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987); *Loving v. Virginia*, 388 U.S. 1 (1967).

798 N.E.2d 941, 966 (2003). Of course, state courts grappling with state constitutional challenges to heterosexual-only marriage laws also draw on and develop their own state’s constitutional jurisprudence in the course of deciding those cases, as the *Goodridge* court made clear: “The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.” *Id.* at 959 (citations omitted). My point is not to measure the influence of state and federal constitutional precedent in the marriage-equality cases, but to suggest that state courts’ use of federal constitutional case law and norms should be accounted for as one considers the various federal, state, and local legal norms and institutions that have played a role in the same-sex marriage debate.

demonstrated in great detail, constitutional litigation (state and federal) has served as an agenda-setting device for proponents of same-sex marriage, has enabled them to reverse the inertia they faced in legislatures, and has allowed gay and lesbian couples to falsify anti-gay stereotypes¹¹⁷—both *outside of court* in their everyday lives and *in court* through careful examination of expert testimony offered for and against same-sex marriage.¹¹⁸

Other federal officials have also played a role in the “victories” of the same-sex marriage movement. The most visible example of the federal executive branch’s support for recognition of same-sex marriage is Attorney General Eric Holder’s well-publicized letter to Congress in 2011 announcing the Department of Justice’s decision to cease defending DOMA, but lower-profile decisions contributed to the movement’s successes as well.¹¹⁹ In short, one need not deny the importance of state-level deliberative institutions in the process of social and legal change, or claim an outsized significance for federal institutions, to recognize that the *DeBoer* majority’s account fails to capture the institutional complexities that have characterized the same-sex marriage debate to date.

There is nothing unusual about the way the same-sex marriage debate has unfolded in multiple institutional settings—local, state, and federal. Gerken’s federalism scholarship invites us to peel back the layers of our governance structures, and to pay attention to how the states “tug” at the federal government, and to consider how federalism promotes dialogue among and between actors in different levels of government. Once we do this, we see that the federal, state, and local overlap in the field of family law has long been part of the practice of American federalism.

As I have demonstrated, the *DeBoer* majority offers a very different interpretation of *Windsor*, a very different vision of federalism, and a very different understanding of the process of legal change. It insists that the only legitimate venue for changing marriage law is the state ballot box and that when it comes to domestic relations, states are policy-making islands. The

¹¹⁷ William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 309-22 (2013). See also Thomas Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151 (2009).

¹¹⁸ See, e.g., *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

¹¹⁹ See Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to the Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, *archived at* <http://perma.cc/6Z25-HPJP>. By digging deeper into the sources, one can find important evidence of the ways that federal lawyers and administrators limited DOMA’s reach long before the executive branch officially repudiated the law. See, e.g., Steven A. Engel, Mem. Op. for Acting Gen. Counsel Soc. Sec. Admin. (Oct. 16, 2007) (finding that DOMA did not bar the award of Social Security benefits to the non-biological child of one member of a Vermont civil union).

importance of the same-sex marriage movement's victories in state legislatures cannot be questioned. Many proponents of same-sex marriage have observed that lasting change and acceptance of same-sex marriage is impossible without tangible success in the political branches or through direct democracy, much of which happens at the state and local levels.¹²⁰ But acknowledging the importance of political processes and local grassroots initiatives is very different from insisting that "state voters" are the only source of legitimate and permissible change to marriage law,¹²¹ and dismissing plaintiffs from federal court in part for that reason. The former recognizes and values the central role of state political institutions in bringing about social and legal change; the latter views those institutions as virtually uncheckable organs of sovereign power.

It is clear, however, that the marriage equality movements' electoral victories have not been, and will never be, the pristine exercises of state electoral power that the *DeBoer* majority imagines. Indeed, once the *DeBoer* majority's assertions concerning state voters' nearly exclusive authority over the family are placed in context, historical and modern, we see that those arguments are less about what "our federalism" *is* and more about how federalism and constitutional principles of equality and liberty *ought* to operate in the field of family law. The debate over what the place of the family in our federal constitutional democracy *should* be is an important one—and one that Americans have been having for centuries. Given the prominent role of historical reasoning in constitutional contestation and decision making, that debate is also understandably one in which claims regarding past allocation of regulatory power have featured prominently.

Disagreement concerning the history of the allocation of regulatory authority over the family will surely continue in the coming months, as the Supreme Court grapples with the constitutional status of state heterosexual-only marriage laws. As government officials, lawyers, and judges consider how history informs their assessment of the constitutionality of these marriage laws, they should be equipped with a candid acknowledgment of the limits of our knowledge of the past and an appreciation of the many forms American federalism has taken. They should acknowledge the complex integration of federal, state, and local family laws, and the overlapping regulatory regimes that administer those laws. Finally, they should be mindful of the myriad ways that sovereignty-based federalism theories have been, and can be, used to entrench inegalitarian family law policies.

¹²⁰ This has been the view of many within the same-sex marriage movement. See KLARMAN, *supra* note 109, at 215-17.

¹²¹ *Windsor* certainly does not suggest this to be the case. Instead, it notes that states' power to regulate domestic relations is "[s]ubject to certain constitutional guarantees." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).