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THE TROUBLE WITH DIGNITY AND RIGHTS OF RECOGNITION

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In *United States v. Windsor*, the Supreme Court held that Section 3 of the Defense of Marriage Act violated the Fifth Amendment. This Essay examines the unusual right to recognition that forms the basis of the Court's decision and explains how such dignity rights have a problematic relationship to individual rights and to the structural protections of federalism. A right to recognition, standing alone, has never been part of our constitutional jurisprudence. To the extent that dignitary themes arose in previous cases, they were incidental to the finding of individual rights. I argue that there is good reason why recognition has not been afforded constitutional protection. Claims for recognition are only derivative of individual rights and cannot apply universally. Moreover, the dignity of recognition, because not an individual right, creates an unresolved tension with existing state laws that prohibit same-sex marriage—a tension between the dignity of recognition and the dignity of state sovereignty.

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THE end of the Supreme Court term has brought a flurry of concern for “dignity,” including recognition of the dignity of same-

sex marriages¹ and the equal dignity of states with respect to the Voting Rights Act.² Although dignity has a nice ring to it, the Court uses “dignity” to refer to a variety of different concepts,³ concepts that cannot easily coexist as the cases this Term demonstrate. This Essay examines the unusual right to recognition in *United States v. Windsor* and explains how such dignity rights have a problematic relationship to individual rights and to the structural protections of federalism.

I. A RIGHT TO RECOGNITION OF SAME-SEX MARRIAGE

In *Windsor*, the Supreme Court in a 5-4 decision invalidated Section 3 of the Defense of Marriage Act (DOMA).⁴ Dignitary themes of inclusion and recognition are at the heart of Justice Anthony Kennedy’s opinion for the Court. Commentators, however, have failed to appreciate the extent to which the Court’s use of dignity identifies a novel constitutional right to recognition unconnected to any substantive right.

In *Windsor*, the Court insists that the federal government must provide recognition to married same-sex couples. Justice Kennedy repeatedly refers to “dignity,” noting, for example, that States with same-sex marriage “enhanced the recognition, dignity, and protection of the class.”⁵ By contrast, the Court finds that the “essence” of DOMA was interference “with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power.”⁶ DOMA failed to recognize and to provide the appropriate status for these same-sex marriages, causing “injury and indignity.”⁷ By invalidating part of DOMA, the Court gave constitutional recognition to existing same-sex marriages.

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¹ See *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013).

² See *Shelby County v. Holder*, No. 12-96 (U.S. June 25, 2013).

³ See Neomi Rao, Three Concepts of Dignity in Constitutional Law, 86 *Notre Dame L. Rev.* 183, 186–87 (2011) (identifying three concepts of dignity used by constitutional courts and demonstrating how the concepts are fundamentally different in ways that matter for constitutional law).

⁴ *Windsor*, slip op. at 25–26.

⁵ *Id.* at 18.

⁶ *Id.* at 21.

⁷ *Id.* at 19.

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The approach in *Windsor*, however, differs from other civil rights cases by separating dignity from rights—it recognizes the dignity of same-sex marriage, but not a right to same-sex marriage. Nor does the Court find that DOMA exceeds the scope of federal power. Instead, the Court says that the Fifth Amendment “withdraws from Government the power to degrade or demean in the way this law does”⁸ The constitutional right in *Windsor* is not about a right to particular sexual behavior, as in *Lawrence v. Texas*,⁹ or about protecting the fundamental right to marry, as in *Loving v. Virginia*.¹⁰ Instead, *Windsor* protects only the dignity of having your personal relationships recognized by the federal government.

The particular constitutional guarantee in *Windsor* is hard to identify amidst the various rationales. Indeed, the muddled nature of the majority opinion—resting at times on the federal balance, equal protection, or due process—results in part from the fact that there is no comfortable place for a right of recognition. Nonetheless, a right of recognition is ultimately what is at stake in the Court’s opinion. The Court finds no legitimate purpose, only animus and degradation, in the enactment of DOMA.¹¹ The Court holds that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”¹² Yet what liberty is this? The Court explains that it is the liberty of not being demeaned or degraded, an entitlement “to recognition and protection to enhance their own liberty.”¹³ The disability that DOMA imposes is “*refusing to acknowledge a status* the State finds to be dignified and proper.”¹⁴ Similarly, the violation of the Fifth Amendment comes from “treating those persons as living in marriages less respected than others”¹⁵ All of this amounts to a dignitary harm, the harm of not being respected, acknowledged, and recognized.

⁸ *Id.* at 25.

⁹ 539 U.S. 558, 567 (2003) (invalidating Texas’ sodomy prohibition as a violation of the liberty protected by the Due Process Clause of the Fourteenth Amendment).

¹⁰ 388 U.S. 1, 2 (1967) (holding that Virginia’s anti-miscegenation laws violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

¹¹ *Windsor*, slip op. at 21–23.

¹² *Id.* at 25.

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* at 26.

Windsor does not uphold a substantive right or freedom, only a right to have your marriage validated by the federal government.

Perhaps, as Justice Antonin Scalia predicts in his dissenting opinion, the Court will identify a right to same-sex marriage in a future case,¹⁶ but that makes an independent right to the dignity of recognition—an independent right not to be “demeaned”—no less strange in our constitutional tradition.

II. RECOGNITION AS INCIDENTAL TO INDIVIDUAL RIGHTS

A right to recognition, standing alone, has never been part of our constitutional jurisprudence. To the extent that dignitary themes arise, they have been largely incidental to the finding of individual rights. Unlike *Windsor*, most equality decisions focus on universal rights and freedoms. Some landmark civil rights cases referenced “dignity” and related themes in the course of defending particular individual liberties and specific rights against the government. For example, in *Brown v. Board of Education*,¹⁷ the Court held that segregated schools violated the equal protection of the laws guaranteed by the Fourteenth Amendment. In the course of this momentous decision, the Court spoke of the feeling of inferiority that results from racial segregation.¹⁸ The discrimination was the constitutional harm and the dignitary offense one of the many social ills of discrimination. Similarly, in *Loving v. Virginia*,¹⁹ the Court struck down laws prohibiting inter-racial marriages because they violated equal protection as well as due process.²⁰ *Loving* focused on the harm to individual liberty and freedom for “all the State’s citizens” because the “Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”²¹ The Court rejected “White Supremacy” as a rationale for such laws, referring only obliquely to dignitary concerns.²²

¹⁶ *Id.* at 22–24 (Scalia, J., dissenting).

¹⁷ 347 U.S. 483, 495 (1954).

¹⁸ *Id.* at 494 (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

¹⁹ 388 U.S. 1, 2 (1967).

²⁰ *Id.* at 12.

²¹ *Id.* (emphasis added).

²² *Id.* at 11.

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More recently, in *Lawrence v. Texas*,²³ the Court invalidated Texas' sodomy prohibition and upheld an individual right to private sexual freedom. Writing for the Court, Justice Kennedy linked the dignity harm to the deprivation of liberty: "The State cannot demean [the existence of homosexuals] or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."²⁴ Liberty in *Lawrence* was about being able to engage in chosen sexual conduct without government interference—a negative liberty and an individual right, whatever one thinks of the constitutional reasoning. In these and other individual liberty cases, the Court sometimes referred in passing to the dignitary harm of invidious distinctions, but the offense to dignity was a consequence of inequality, not the inequality itself.

In *Windsor*, however, the dignitary harm *is* the harm—the harm of not being properly recognized and of lacking the proper federal status. Although this type of right to recognition is novel in the American constitutional tradition, it has robust roots in the jurisprudence of the European Court of Human Rights, which frequently upholds claims for recognition and benefits. Dignity as recognition reflects a strongly communitarian understanding of the individual. In this view, a person's dignity depends only in part on rights and must include recognition and validation by the community and state.²⁵

In the European Court as well as in the jurisprudence of some European constitutional courts, dignity is primarily linked to claims for recognition—rights often associated with protection for personality.²⁶ These are very different types of claims than those usually cognizable in American constitutional law. Recognition by our communities and even our political institutions may be an important

²³ 539 U.S. 558, 567 (2003).

²⁴ *Id.* at 578.

²⁵ The philosophical and legal treatment of dignity as recognition is discussed in detail in Rao, *supra* note 3, at 243–67.

²⁶ These rights are not only about personal freedom, but importantly about having the exercise of those freedoms properly acknowledged in both law and society. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (protecting the right to respect for private life); *I v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. Rep. 967, 967–68 (2003) (holding that transsexuals must have legal recognition of their chosen gender, because the law should properly respect and recognize a person's private life).

human need, but it has not previously been treated as a constitutional right.

III. THE DIFFICULTY WITH RIGHTS OF RECOGNITION

There are good reasons why such dignitary harms are not usually afforded constitutional protection. In part such claims are only derivative of individual rights. A failure to be recognized on its own is a somewhat flimsy claim. With respect to *Windsor*, the right to recognition matters only in the context of widespread federal regulation—the thousands of federal laws that depend on a definition of marriage. If there were no such federal laws, the federal right to be recognized would amount to nothing. The right to recognition exists only in relationship to what the government requires or provides. Given the existing state of federal law, such recognition undoubtedly has important practical consequences for same-sex married couples. But the recognition is not a freedom or right in any meaningful sense. If, contrary to political trends, every state eliminated same-sex marriage, *Windsor* would not protect any specific marriage rights.

Moreover, recognition rights, by definition, cannot be applied equally to different groups of people. Individual freedoms apply universally—every individual can attend public school without regard to his or her race; each person can choose to marry a person of any race; the Nazi and holocaust survivor enjoy equal freedom to speak. By contrast, recognition rights, standing alone, require picking one groups' claim over another. For example, in the context of same-sex marriage, the Court has said that those marriages, where they exist, must receive equal recognition to heterosexual marriages. If this is not about the right to same-sex marriage and the state is in the business of recognition, what about the groups sincerely seeking recognition exclusively for traditional marriage? Indeed, that is what many proponents of traditional marriage claim to want, exclusive state recognition for marriage between one man and one woman based on beliefs about the traditional family structure and its social benefits. Public opinion is shifting against an exclusionary definition of marriage, a change that I support as a political matter. Nonetheless, both sides claim "recognition" by the state for what marriage should be.

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Under the reasoning of *Windsor*, a claim for recognition of traditional marriage, a claim enshrined in Section 3 of DOMA, is impermissible because driven by animus and exclusion.²⁷ The political process, however, regularly favors recognition of one group over another. Such classifications are generally tolerated unless they violate a constitutional protection. In *Windsor*, however, the Court invalidates a distinction between same-sex and heterosexual marriages but does not identify a right to same-sex marriage. Instead, it invalidates DOMA with a demand for recognition. Yet divorced from an enforceable right, favoring recognition of one group's claims over another is a political choice, not a judicial one.

Some Supreme Court precedents support a common law method of constitutional interpretation.²⁸ Although I am not advocating such an approach, identifying a constitutional right to same-sex marriage could plausibly be extended from the Court's precedents with respect to marriage and rights for homosexuals. By contrast, a right of recognition standing alone does not enjoy support even in the Court's evolving equal protection and due process jurisprudence. Instead, *Windsor* creates an unprecedented constitutional right to a particular status.

Recognition of a group's status may sound like liberty or freedom; but the focus on validation does not necessarily increase liberty or freedom. Indeed, claims for recognition and claims for individual rights will often point in opposite directions. To provide just one example, with respect to hate speech regulations the dignity of individual rights to freedom of expression can conflict with the dignity of recognition for particular groups. Consistent with our constitutional traditions, the Court has interpreted the First Amendment to protect the dignity of the speaker, irrespective of the hatefulness of the speech.²⁹ By contrast, many European countries as well as Canada have strict restrictions on hate speech, recognizing the dignity of

²⁷ *Windsor*, slip op. at 21–23 (arguing that DOMA expresses “disapproval” of same-sex marriage, interferes with the “equal dignity of same-sex marriages,” and treats those marriages as “second-class marriages for purposes of federal law”).

²⁸ See David A. Strauss, *The Living Constitution* 34 (2010) (“On a day-to-day basis, American constitutional law is about precedents, and when the precedents leave off, it is about commonsense notions of fairness and good policy.”).

²⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (treating hate speech as protected by the First Amendment).

groups who may be humiliated or offended.³⁰ Our First Amendment jurisprudence defends freedom of individual expression, not the recognition of particular groups that may be offended by hate speech. Recognition rights can conflict with individual rights in other contexts too, such as privacy³¹ and racial preferences.³²

When such dignities conflict, the dignity most closely connected with the U.S. Constitution is the dignity of individual autonomy and freedom—the dignity of being left alone as much as possible from the government. Supreme Court decisions largely confirm this understanding of dignity—linking the concept of dignity with protections for individual freedom in a variety of contexts.

IV. RECOGNITION CREATES UNCERTAINTY IN THE FEDERAL BALANCE

In *Windsor*, the dignity of recognition is not an individual right and not about the federal balance and therefore it creates a tension with existing state laws that prohibit same-sex marriage. *Windsor* could have been decided along federalism lines, recognizing the limited nature of federal power with respect to definitions on marriage.³³ This would have left unprejudiced the political development of the issue in the fifty states. Yet the Court did not follow this line of reasoning. Instead its federalism focused on the fact that some states had given “dignity” and status to same-sex marriages. As Randy Barnett has explained, the Court found that state laws allowing same-sex marriage created a “liberty interest” protected by the

³⁰ See Stephen J. Heyman, *Free Speech and Human Dignity* 171 (2008) (“Recognition is the most fundamental right that individuals have . . . individuals have a duty to recognize one another as human beings and citizens. Hate speech violates this duty in a way that profoundly affects both the targets themselves and the society as a whole.”); see also Rao, *supra* note 3, at 251–52 (discussing constitutional cases).

³¹ See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *Yale L.J.* 1151, 1161 (2004) (explaining how American privacy culture is “oriented toward values of liberty” where as Europeans focus on privacy as a matter of respect and personal dignity).

³² See Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg’s Equality Jurisprudence*, 70 *Ohio St. L.J.* 1053, 1053 (2009) (discussing competing conceptions of equality with respect to racial preferences).

³³ See Brief for Federalism Scholars as Amici Curiae Supporting Respondent at 2–3, *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013) (explaining that DOMA falls outside of Congress’ power because not an exercise of any enumerated power and not necessary and proper for carrying into effect any enumerated power).

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Fifth Amendment.³⁴ While there is a whiff of federalism here, same-sex marriage must have a special status under the Court's rationale, because laws allowing same-sex marriage create a liberty interest, but laws upholding only heterosexual marriage do not create a similar interest. In enacting DOMA in 1996, Congress "recognized" state laws preserving traditional marriage. If such recognition is unconstitutional, it must be because the Court has concluded that same-sex marriage has some (as yet undefined) constitutional priority.

By contrast, a decision that DOMA was simply beyond Congress' limited powers would be neutral between different state marriage laws. The Court's decision in *Windsor* is decidedly not neutral when it finds that states with same-sex marriage have advanced dignity and equality. The failure of federal recognition for greater marriage equality is the constitutional harm. The Court tells us that the Constitution somehow favors greater marriage equality, but does not guarantee it.

This leaves unresolved the conflict between the dignity of recognition and the dignity of equal state sovereignty. The constitutional structure, which gives the federal government only limited and enumerated powers and protects the sovereignty of states, was designed to maintain individual freedom. This was a central aspect of the Court's decision in *Shelby County v. Holder*, invalidating Section 4 of the Voting Rights Act. Chief Justice Roberts, in an opinion joined by Justice Kennedy, upheld limits on federal power that "preserve[] the integrity, dignity, and residual sovereignty of the States."³⁵ As the Court has repeatedly recognized, the federal balance serves individual liberty,³⁶ in part by leaving many decisions to the people of each state, allowing greater accountability and responsiveness to local needs.

Only Justice Kennedy voted both to invalidate Section 4 of the Voting Rights Act and Section 3 of DOMA—the cases reaffirmed the equal dignity of states and identified the dignity of having federal

³⁴ See Randy Barnett, Federalism marries liberty in the DOMA decision, SCOTUSblog (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision>.

³⁵ *Shelby County v. Holder*, No. 12-96, slip op. at 9 (U.S. June 25, 2013) (citation omitted) (internal quotation marks omitted).

³⁶ *Id.* at 10 ("[T]he federal balance is not an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (citation omitted) (internal quotation marks omitted)).

recognition for same-sex marriages. There now remains some doubt whether in the next case the Court will respect the equal dignity of different state marriage definitions, or instead, the dignity of individuals pressing for same-sex marriage within their states.

In other civil rights cases, the Court eliminated conflicts with state laws by upholding a particular individual right and invalidating inconsistent state laws, such as in the context of school segregation or anti-miscegenation laws. In those cases, the Court identified an individual right that trumped contrary state laws. Because *Windsor* identifies only a right to recognition, laws prohibiting same-sex marriage are fine, so far at least. Recognition may be just a stepping stone to a broader constitutional right, a purportedly “minimalist” decision on the way to a right to same-sex marriage. Detractors have denounced the lawlessness of the opinion, but even supporters of the decision in *Windsor* should recognize that this is a strange and uncertain way station. Imagine if in *Loving* the Court required Virginia simply to recognize mixed-race marriages sanctioned by other states but failed to guarantee a right to marriage across racial lines.³⁷

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Undoubtedly the unusual constitutional reasoning of the opinion will continue to be unpacked by lower courts, scholars, and commentators. The constitutional right at issue—some form of free-standing dignity of recognition—has little connection to our constitutional text or history and leaves important questions unanswered. Regardless of what happens in the next case, constitutional dignity in the United States should be about individual rights and liberties or about the related limits on government power. The dignity of recognition, no doubt pressing for individuals wishing to be recognized, is better left to the political process.

³⁷ *Loving*, 388 U.S. 1, 2–3 (1967) (explaining that the Lovings were lawfully married in the District of Columbia but upon returning to live in Virginia were indicted for violating Virginia’s ban on interracial marriage).