The Supreme Court on *U.S. v. Windsor*:

Federalism or Equal Protection?

Lauren Aguirre

Abstract

The legalization of gay marriage has been a heated topic in the United States for many years. Most recently, the debate has turned to the nation's courts. In 2013, the Supreme Court decided *United States v. Windsor*. The Court's opinion struck down Section 3 of the Defense Of Marriage Act of 1996 (DOMA), allowing same-sex marriages to be recognized on the federal level. However, the opinion's reasoning is quite ambiguous. Part of the opinion cites federalism and states' rights as the reason for striking down the law, but another part depends on the equal protection and liberty guaranteed by the Fifth Amendment of the Constitution. I aim to assess and answer the question: Is the *U.S. v. Windsor* decision based in federalism or equal protection logic? The logic and reasoning behind this decision will play a big role in how the Court will decide potential future cases concerning same-sex marriage bans in the states. If the argument is based in federalism, it is likely future cases will be decided on the premise of states' rights and not in favor of same-sex marriage. On the other hand, if the argument is based in equal protection logic, future cases will most likely be decided in favor of legalizing same-sex marriage in the United States. While a section of the federal law was struck down, the reasoning in this case establishes whether state or federal law is absolute in the area of marriage.

Introduction

Gay marriage and gay rights has been a heated topic of discussion in the United States for many years. The legalization of gay marriage has come to the forefront most recently. In 2013, the Supreme Court decided *United States v. Windsor*. The Court's opinion ultimately struck down Section 3 of the federal Defense of Marriage Act of 1996 (DOMA). This section had defined marriage as an explicitly and solely heterosexual institution for the purposes of federal law. *Windsor* allows same-sex marriages to be recognized on the federal level. However, the reasoning behind the Court's decision is quite ambiguous. A part of Justice Anthony Kennedy's majority opinion relies on the doctrine of federalism and states' rights, while another part depends on the equal protection guaranteed by the Fifth Amendment of the Constitution. I aim to assess and answer the question: Is the *U.S. v. Windsor* decision based in federalism or equal protection logic? The logic behind this decision will likely determine how the Court will rule in future cases that involve same-sex marriage bans passed by states. While a part of DOMA was struck down, the reasoning in *Windsor* will help establish whether state or federal law is absolute in the area of marriage. Discovering and determining which argument is the main thrust of the *Windsor* decision will clear up any legal conflicts between state and federal power this decision may have caused.

My analysis of this decision will begin, obviously, with the Court's opinion. Kennedy's argument is indefinite and the dissents in this case demonstrate the split in support for federalism logic or equal protection logic. Chief Justice John Roberts argues that the opinion is based in federalism logic while Justice Antonin Scalia asserts that the opinion is actually based in equal protection logic. These two dissents provide the framework for support on either side of this argument. Recent lower court decisions and secondary sources will be analyzed in light of these

two viewpoints. Lastly, I will examine the implications of the *Windsor* decision in light of Kennedy's past opinions in cases that discuss similar and pertinent topics to gay marriage. Kennedy has been the swing vote on the Court for many controversial cases. Given that the balance of the Court will not be altered drastically in the meantime, Kennedy's own tendencies and political leanings will likely play a huge role in determining how the Court will rule in future cases like *Windsor*.

While both interpretations of the opinion are plausible, it is more likely that the Court will rule future cases in line with equal protection logic. Interestingly, most lower court decisions that occurred after *Windsor* have chosen the equal protection argument over federalism logic. Only one recent decision in the Sixth Circuit has argued in favor of states' rights. Additionally, Kennedy and the Court have supported the expansion of gay rights and liberties in past decisions. This decision history points to the Court using the equal protection argument embedded the *Windsor* opinion to decide future cases that pertain to state gay marriage bans.

The Supreme Court Opinion

Kennedy wrote the majority opinion in *U.S. v. Windsor*. His argument relies on both the federalism, or states' rights, doctrine and the equal protection guaranteed by the Fifth Amendment in the Constitution. These arguments are not necessarily mutually exclusive, but using both can cause legal contradictions in relation to federal and state power. It is unclear which reasoning is the main thrust behind the decision. Dissents from both Scalia and Roberts attempt to explain which argument the case truly depends on. These justices end up on opposite sides – Roberts arguing for federalism and Scalia arguing for equal protection.

Kennedy's Majority Opinion

Kennedy's argument in the majority opinion is very indistinct. He argues with the support of both federalism and equal protection logic. Either reasoning is credible, but using both makes it unclear whether state or federal law is absolute in the area of marriage.

The first part of the opinion focuses entirely on federalism. Kennedy states that the federal government has always deferred to the states with respect to domestic decisions, like those that involve marriage (*Windsor* 2013, majority opinion, 17). This allows each state to individually decide what marriage means. As a result, several states have declared gay marriage to be legal while many others have passed laws that ban same-sex marriage. This also allows states to set different age requirements to enter into a marriage (*Windsor*, 18). Because the ability to decide what marriage is and what it means is not delegated to the federal government, the Tenth Amendment leaves that decision up to the states. Kennedy further argues that the Defense of Marriage Act is a "federal intrusion on state power [and] is a violation of the Constitution because it disrupts the federal balance" (*Windsor*, 18). With this statement, Kennedy is essentially asserting that DOMA intrudes on states' rights and is therefore unconstitutional. This is very obviously federalism logic.

However, the opinion then shifts to consider an argument supported by the equal protection guaranteed under the Fifth Amendment. Here, Kennedy cites *Lawrence v. Texas* in stating that the consensual intimacy of two people of the same sex is a protected right that cannot be punished by the state (*Windsor*, 19). Kennedy also believes that New York's legalization of gay marriage is an extension of this idea and "gives further protection and dignity to that bond" (*Windsor*, 20). Under the Fifth Amendment, every private citizen has the right to love, lust after,

and marry any other person – regardless of sex. This is a basic liberty guaranteed to every single person in the United States. Therefore, DOMA "seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government" (*Windsor*, 20). Kennedy states here that DOMA seeks to limit the rights of citizens and is therefore unconstitutional. This part of the opinion is obviously based in equal protection logic.

While these two pieces of Kennedy's argument may not directly contradict each other logically, it presents a problem legally. The federalism argument still allows the states freedom to decide what marriage means. Under this logic, the state bans on same-sex marriage would hold. On the other hand, the equal protection argument gives federal law supremacy over any state laws that could be considered a violation of the people's right to liberty. By this reasoning, any and all state bans on gay marriage are unconstitutional. Kennedy never definitively states which argument has priority over the other. While he does make clear that this decision is not to be applied to the constitutionality of state bans on gay marriage, Kennedy essentially leaves his argument up to interpretation.

Roberts' and Scalia's Dissents

In response to the confusion in Kennedy's opinion, both Scalia and Roberts use their own dissents to determine whether federalism or equal protection is the main thrust of the *Windsor* decision.

Roberts supports the federalism argument. He argues that the "dominant theme of the majority opinion is that the Federal Government's intrusion into an area" usually reserved for the states is unsettling and unusual (*Windsor*, Roberts dissenting, 2). Roberts defends his position by pointing out that the majority opinion specifically discusses the historical precedent of states

deciding what it means to be legally married within its borders. He basically dismisses Kennedy's foray into equal protection as a swerve "off course" (*Windsor*, 2). Most significantly, Roberts states that the constitutionality of DOMA is neither an issue nor a part of the *Windsor* decision. He writes his dissent "only to highlight the limits of the majority's holding and reasoning…lest its opinion be taken to resolve…a question that…is not properly before" the Court (*Windsor,* 4). Roberts asserts that Kennedy's opinion is rooted in federalism logic and urges that the decision not be applied to the question of the legality of gay marriage.

Meanwhile, Scalia asserts that the opinion is actually based in equal protection logic. He argues that the majority opinion is confusing, but seems to claim "that this law is invalid on equal protection grounds" (*Windsor,* Scalia dissenting, 18). Scalia's scathing dissent states several times over that the majority opinion is insulting and demeaning to the federal government by claiming that DOMA is nothing less than institutionalized bigotry (*Windsor*, 21). Scalia believes DOMA should stand as it was signed into law. He also argues that the Court's majority opinion presents a slippery slope. Even though Kennedy explicitly states that the decision does not apply to the constitutionality of state bans on gay marriage, Scalia fears that it will be applied to those laws anyway. He believes the Court's opinion is mainly supported by the claim that DOMA harms the freedoms of individuals on the federal level. Scalia writes, "How easy it is…to reach the same conclusion with regard to state laws denying same-sex couples marital status" (*Windsor*, 23). Scalia states that Kennedy's opinion is based in equal protection logic and believes that the application of *Windsor* to state bans on gay marriage is wrong, but inevitable.

The dissents of Roberts and Scalia frame out the discussion of federalism and equal protection arguments as embedded in the *Windsor* decision. These arguments carry over into the application of *Windsor* in lower court decisions.

The Meaning of *Windsor*

As the Supreme Court had feared, *Windsor* has been applied to many state bans on gay marriage. In the majority of these lower court decisions, the opinions applied federal protection logic – in line with Scalia's interpretation of *Windsor.* Only one recent case in the U.S. Court of Appeals for the Sixth Circuit applied federalism logic – as Roberts had argued. Additionally, scholars are almost evenly split between the federalism and equal protection argument. However, judging from the decisions made in lower courts, it is more likely that equal protection logic will outlast the federalism argument.

Federalism Interpretation

The federalism argument has seldom been used in lower court decisions that apply and/or rely on *Windsor*. One of the few cases to do so is the recent decision in the Sixth Circuit. The opinion has argued to uphold state bans on gay marriage using federalism logic. This decision overturns the equal protection argument state courts have previously used to declare these bans on same-sex marriage unconstitutional.

The Sixth Circuit decision, called *DeBoer v. Snyder,* is the sole case decided after *Windsor* that upholds state bans on gay marriage. Circuit Judge Jeffery Sutton delivered the

opinion of the Sixth Circuit Court. While his discussion of *Windsor* clearly discusses both the equal protection argument and the federalism argument, Sutton's opinion ultimately falls in line with the federalism side of the discussion. He cites the Full Faith and Credit Clause. This guarantees that a legal heterosexual marriage in one state is also legal in all other states (*DeBoer* 2014, majority opinion, 38). Sutton also cites precedent, which argues that this Clause "does not require a State to apply another State's law in violation of its own legitimate public policy" (*DeBoer*, 38). Therefore, states that have bans on gay marriage are not required to recognize same-sex marriages that happen in other states because that would be in contradiction to their own laws. Sutton continually argues in favor of the sovereignty of the states over equal protection logic. He reasons that the "preservation 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" (*DeBoer*, 39). With this federalism reasoning, Sutton upholds state bans on same sex marriage. Therefore, this Sixth Circuit decision overturned the equal protection decisions of the state courts in Ohio, Michigan, Kentucky, and Tennessee.

Law and scholarly analysis of *Windsor* is just as divided as its majority opinion. Many of those that argue that the case is based in federalism doctrine assert that the Supreme Court is adjusting its view on federalism. Unlike in *DeBoer*, marriage definitions are not a large part of their arguments, but often can be applied to the gay marriage debate.

Out of the articles that use federalism logic, Marc Poirier's argument most closely resembles that of *DeBoer*. Poirier believes that *Windsor* uses the federalism argument, but he slightly redefines his understanding of federalism. He asserts that the federalism logic in Kennedy's opinion is actually what he terms as "localism" (Poirier 2014, 936). Poirier asserts

that the changing understanding of "how the state and federal levels of government relate to one another and how both levels relate to…evolving understandings of liberty…inevitably occur[s] locally" (Poirier, 939). These understandings of federalism and liberty, or equal protection, are decided at the local level, and simply float up to the higher levels of government. Considering this, the states would have the license to define marriage however they want, and it would be the federal government's responsibility to acknowledge that license. This argument also allows for states to include same-sex couples in their definition of marriage. The federal government would then follow the lead the states set. The states do not order the federal government around, but the upper levels of government sense the changes in the wind and end up jumping on the bandwagon. Poirier's argument essentially echoes Sutton's reasoning in *DeBoer*. His "localism" definition of federalism is not all that different from the original definition. He simply approaches at the idea from a slightly different angle. Poirier's interpretation of *Windsor* means that the states, at the local level, ultimately decide what federalism and liberty are in the country.

While Poirier basically falls in line with Kennedy's simple understanding of federalism, Fulks and Range argue that *Windsor* actually sets a stronger standard for federalism. They believe that this decision "will undoubtedly be used as fuel for the ever-more-difficult war for federalism" (Fulks and Range 2013, 309). Fulks and Range assert that the "strong federalism undertones" of *Windsor* could be applied to any number of cases that deal with the intersection of federal and state law (326). *Windsor* might have applications outside of the area of gay marriage, like discrepancies in immigration law. Part of Tennessee's immigration law helps illegal immigrants transition to legal citizens of the United States, but the federal law would require the immediate arrest of these persons (Fulks and Range, 330). However, the state's police power and sovereignty gives the authority "to define sentences, consequences, and disabilities of

state crimes…[to the] province of the states" (Fulks and Range, 330). Therefore, any federal law that has a similar function or purpose would be overstepping state power and should be declared unconstitutional. This is a similar situation as what is presented in *Windsor*. The Court struck down Section 3 of DOMA because this portion of the federal law oversteps each states' right to define what marriage is within its own borders. Fulks and Range interpret *Windsor* to be based in federalism logic and can be applied to areas of law outside of same-sex marriage.

Poirier along with Fulks and Range agree with *DeBoer* that *Windsor* is based in federalism logic. However, not all of these scholars agree in explicit terms. While Poirier and *DeBoer* argue that the federal government should simply stay out of state business, Fulks and Range assert that state sovereignty should actually overpower federal law in some instances. All of the discussed arguments show a range of interpretations inside the federalism logic camp. However, considering that there is only one single court decision that chooses this interpretation of *Windsor*, it is more likely that Kennedy's equal protection argument will become the basis for future decisions in the Supreme Court.

Equal Protection Interpretation

The federalism argument is not without its merits, but there is much more support in the case law for an equal protection interpretation of *Windsor.* All of the state court decisions that incorporate *Windsor* argue in favor of equal protection. So far, *DeBoer* is the only case in which the courts have chosen a federalism interpretation. Considering this trend in court decisions, it is more likely that the Supreme Court will use the equal protection in upcoming cases of this nature.

While *Windsor* mostly discusses the Fifth Amendment in support of the equal protection argument, many of the lower court cases were presented with equal protection arguments that were rooted in the Fourteenth Amendment. However, this does little to change the substance of equal protection reasoning. In *Windsor*, Kennedy briefly mentions that "the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved" (25). Considering the reasoning of the equal protection argument in *Windsor*, it is rational that this logic would evolve to rely on the Fourteenth Amendment. This Amendment was more explicitly intended to protect the liberties and freedoms of American citizens.

Courts in states across the nation have heard cases pertaining to gay marriage rights. In Utah, *Kitchen v. Herbert* declared certain state provisions unconstitutional because they banned same-sex marriage. Equal protection logic was the reasoning for declaring these laws void under the Constitution (*Kitchen* 2013, 2). Judge Robert Shelby wrote the opinion in this case. He argues that Utah's Amendment 3 "interferes with the exercise of the Plantiff's fundamental right to marry" (*Kitchen,* 33). This is a deprivation of the citizen's right to equal protection under the Fourteenth Amendment. Because the state did not show that the law "meet[s] a compelling government interest," the law is unconstitutional (*Kitchen,* 33). Shelby's argument is definitely draws from the equal protection logic embedded in *Windsor*.

In Ohio, *Obergefell v. Wymyslo* declared the state ban on gay marriage unconstitutional by requiring the state to recognize same-sex marriages on death certificates (2013, 2). Just as in *Kitchen,* Judge Timothy Black uses equal protection logic. Black cites *Loving v. Virginia*, stating that the freedom to marry is a right protected by the due process clause of the Fourteenth Amendment (*Obergefell v. Wymyslo*, 10). Because this right is taken from citizens with the state

ban on same-sex marriage, the ban is consequently unconstitutional. Black's argument also closely echoes the equal protection portion of *Windsor*.

In Texas, *De Leon v. Perry* struck down the state's constitutional amendment that defines marriage as a heterosexual-only institution (2014, 48). The Texas court uses the equal protection argument. In the opinion, Judge Orlando Garcia argues that the amendment is unconstitutional because "the right to marry is a fundamental right protected by the United States Constitution" under the Fourteenth Amendment (*De Leon v. Perry*, 31-32). Just as in the other cases, this reasoning also follows Kennedy's equal protection argument in *Windsor*.

These three decisions are just a small snapshot of the many cases decided in state and appeals courts concerning gay marriage after the Supreme Court's *Windsor* decision. All of these cases are listed on the SCOTUS blog as they have been decided on all governmental levels of the judiciary, and were eventually appealed to the Supreme Court. Every single one, with the exception of *DeBoer*, utilizes some version of the equal protection argument. Some draw on the Fifth Amendment, while others use the Fourteenth. Still others use the Due Process Clause while more decisions use the Equal Protection Clause. Yet, all of these decisions are firmly rooted in the equal protection logic Kennedy laid out in the majority opinion of *Windsor*.

Although the majority of decisions that reference *Windsor* use the equal protection argument, scholarly analysis of this case is pretty evenly divided between the two camps. However, those that believe *Windsor* is based in equal protection logic will most likely be proven right when this topic returns to the Supreme Court.

While scholarly analysis on the federalism side brought different understandings of federalism into the discussion, the analysis on the equal protection side is mostly uniform,

though there is some extrapolation. These analyzes essentially follow the pattern of the equal protection argument in *Windsor*.

Bower discusses Kennedy's two-tiered opinion while arguing in favor of the equal protection interpretation. He argues that the *Windsor* opinion is too "nuanced and integrative" to endure on its own without "a methodology that is detailed, coherent, and replicable" (Bower 2014, 972). Kennedy's two-pronged reasoning in the opinion does lead to confusion, and is the reason for the split in interpretations of the case. However, Bower suggests that this situation could be remedied had Kennedy set up a guideline that could be applied to future cases. In the absence of such a guideline, the opinion is simply left up to individual interpretation. Bower explains his equal protection argument, and details a test that the Court could apply to future cases. He believes state bans on gay marriage should be declared unconstitutional because the "purported costs of same-sex marriage, even when viewed in a light most favorable to opponents of same-sex marriage, are insufficient to override the relative strength of the due process and equal protection interests of gay and lesbian individuals" (Bower, 972). Through devising this specific test using mathematical theory, Bower argues in favor of the equal protection interpretation of *Windsor*. Bower's analysis demonstrates that even with a strict test, the equal protection argument survives over any federalism concerns.

Like Bower, Araiza also wants the *Windsor* opinion to be more explicit, but his main contention with the decision is that it did not go far enough in applying the equal protection argument. He argues that the Supreme Court should have gone a step further than just simply evaluating the constitutionality of DOMA. Rather than only saying that DOMA violated the equal protection rights of citizens, *Windsor* should have also examined whether or not sexual orientation is a cause for discrimination alone – regardless of current or desired martial status

(Araiza 2014, 367). At the very least, the Court could have examined the possibility of marriage discrimination outside of federal law. Had it applied equal protection logic more broadly, it is likely *Windsor* would have been the decision that legalized gay marriage in the United States. Instead, Kennedy explicitly states that this opinion is not intended to answer the broader question of the legality of gay marriage and should not be taken as a discussion of this question. The decision only removes discrimination against gay marriage at the federal level, still allowing the states to define marriage however they should see fit. Araiza believes that *Windsor* is firmly rooted in equal protection logic. So much so, that the Court could have further extended its reasoning to invalidate all state bans on same-sex marriage in the United States. In addition, the Court could have gone even further and determined that sexual orientation is a cause for discrimination in multiple areas of law, not just in obtaining a marriage license. However, to do so, Kennedy would have had to ignore the federalism side of his reasoning. This is not something that he, nor the Court, could have logically or feasibly done.

Both Bower and Araiza argue that *Windsor* is couched in equal protection doctrine. However, they disagree in how much support the case has for this doctrine. Bower attempts to clear confusion in the Court's opinion by surmising a test that can be applied to similar cases in the future. Conversely, Araiza states that equal protection logic is so completely entrenched in the *Windsor* decision that the Court could have went ahead and banned all definitions of marriage that excluded same-sex couples on all levels of government. These two analyzes provide an interesting clash of ideals on the equal protection argument side of this debate. Considering that the majority of court decisions follow equal protection logic, it is probable Araiza will get his wish in the near future. Once the Court is able to revisit this topic, it will most likely use equal protection logic to decide cases of a similar nature.

The Implications of *Windsor*

Since *Windsor* was decided, the national debate surrounding same-sex marriage has reached its height. As previously discussed, analysis of the opinion split into two main camps – federalism and equal protection. But this discussion was not seen in lower court decisions until *DeBoer*. In considering Court precedents, it becomes very likely that the Court will use the equal protection argument to decide future cases that concern
gay marriage.

Prior to *DeBoer*, the Supreme Court seemed reluctant to decide on same-sex marriage once again. When the first round of lower court decisions that argued in favor of equal protection reached the Court, the justices denied all of the certs (Howe 2014). As a direct result, the lower court decisions were upheld as law. This situation essentially legalized gay marriage in the states that had brought appeals to the Supreme Court. The Court may have decided not to hear or decide these cases because there was not a single point of contention between any of the lower court decisions. All of them had reached the same conclusion, so a ruling from the Court could be seen as unnecessary and redundant. However, the federalism-supporting ruling in *DeBoer* overturned all of the equal protection arguments that were brought to the Sixth Circuit. This contention will likely push the Supreme Court into deciding *DeBoer* on appeal.

If the Court decides to hear *DeBoer*, it is very likely that the opinion will reflect and expand upon the equal protection argument in *Windsor*. Because Justice Kennedy has been the swing vote in many controversial cases, the Court's majority opinion will ultimately depend upon his reasoning. Even though Kennedy was largely unclear about which doctrine he fully

supports in *Windsor*, he is still much more likely to argue in favor of equal protection logic over any federalism concerns.

Kennedy has a record of deciding controversial cases like *Windsor* in light of equal protection concerns. This history includes the sexual orientation discrimination case *Romer v. Evans* and the sodomy law case *Lawrence v. Texas.* Kennedy wrote the majority opinion for both of these decisions. In *Romer*, the Court struck down one of Colorado's constitutional amendments in light of the Equal Protection Clause of the Fourteenth Amendment; this amendment precluded all laws that were designed to prevent discrimination based on sexual orientation (*Romer* 1996, 1). Kennedy asserted that the state constitutional amendment "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else" (*Romer,* 13). This argument falls directly in line with the equal protection logic he employs in *Windsor*. Kennedy's tendency to agree with this reasoning is continued with *Lawrence*. This decision struck down a Texas statue, which criminalized certain intimate sexual relations between two people of the same sex, because it violated the Due Process Clause of the Fourteenth Amendment (*Lawrence* 2003, majority opinion). Kennedy argued that "liberty protects the person from unwarranted government intrusion into a dwelling or other private places" (*Lawrence*). This reasoning is also fairly similar to the equal protection reasoning he included in *Windsor*. Kennedy tends to decide in favor of expanding the rights and freedoms of gay citizens of the United States. He is also very partial to the equal protection argument. Considering Kennedy's decision history on subjects similar to those discussed in *Windsor*, it is all the more likely that the Court will decide *DeBoer* with the application of the equal protection argument.

The Court may also be swayed to employ an equal protection argument due to the presence of legal same-sex marriages in many different states across the nation. It seems logical that the justices would hesitate to overturn what is already law in a majority of the states (Liptak 2014). This kind of reasoning can also be seen in *Windsor*. The Court specifically stated that the decision did not address nor discuss the larger question of the legality of gay marriage. This statement might have been included because the Court did not want to cause too many ripples and disruptions in the status quo with a single case decision. If this is assumed to be true, then it is reasonable to extrapolate that the Court would do the same for future cases. This situation only gives the Court more reason to employ equal protection doctrine when deciding *DeBoer* – if only to reinforce current legal gay marriages in the select states.

Finally, if all of the above is assumed to be true, the Court may use *DeBoer* to ultimately legalize gay marriage on all levels of government. If the Court decides to do so, it would apply the reasoning of the equal protection argument. This kind of situation is not without precedent. The Court struck down all anti-miscegenation laws as unconstitutional in the 1967 case *Loving v. Virginia*. Unsurprisingly, the Court did this because these laws violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment (*Loving*, 1). This decision resulted in the automatic legalization of all interracial marriages and still allows interracial couples to freely marry today. This decision severely limited state policies. Considering this precedent, it becomes even more likely that the Court will make a similar ruling should it decide to hear *DeBoer*.

The immediate effects of *Windsor* in the lower courts, along with the Court's decision history on subject matters similar to gay marriage, point to the use of equal protection logic in future decisions of this nature. Past precedent brings more plausibility to the Court finally striking down any and all state bans on gay marriage in America.

Conclusion

In light of the unclear opinion in *Windsor*, two interpretations of its reasoning have emerged – federalism and equal protection. The majority of lower court decisions have depended upon equal protection logic. *DeBoer* is the only case to employ a federalism argument. Meanwhile, scholars are fairly evenly divided between these two interpretations. Eventually, the Court will join this debate and re-examine the *Windsor* decision on its own. I assert that the Court will determine that *Windsor* was based in equal protection logic the entire time. This clarification will most likely occur in the near future when the Court hears and decides *DeBoer* to clear up discrepancies and conflicts between lower court decisions. With this decision, the Court will assert that federal law is absolute in the area of marriage. Any and all state bans on same-sex marriage will be declared unconstitutional. Essentially, the *Windsor* decision is a huge precursor to the implementation of *Loving*-like limitations on state policies. *Windsor* has kick-started a chain reaction that will eventually lead to the legalization of gay marriage in the United States.

Bibliography

Table of Cases

DeBoer v. Snyder Nos. 14-1341; 3057; 3464; 5291; 5297; 5818 (2014)

De Leon v. Perry Case No. SA-13-CA-00982-OLG (2014)

Kitchen v. Herbert Case No. 2:13-cv-217 (2013)

Lawrence v. Texas 539 U.S. 558 (2003)

Loving v. Virginia 388 U.S. 1 (1967)

Obergefell v. Wymyslo Case No. 1:13-cv-501 (2013)

Romer v. Evans 517 U.S. 620 (1996)

United States v. Windsor 570 U.S. ___ (2013)

Secondary Sources

Araiza, W. D. (2014). After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism. *Boston University Law Review*, *94* (2), 367 – 413.

Bower, C. (2014). Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of United States v. Windsor. *California Law Review*, *102*, 971.

Fulks, M. A., and Range, R. S. I. (2013). Could Windsor Revive Federalism: The States' Right to Protect Citizens Following DOMA's Demise. *Tennessee Law Review*, *81*, 307 – 338.

Howe, A. (2014, October 6). Today's orders: Same-sex marriage petitions denied (UPDATED). Retrieved December 1, 2014, from http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitins-denied/

Poirier, M. R. (2014). Whiffs of Federalism in United States v. Windsor: Power, Localism, and Kulturkampf. *University of Colorado Law Review*, *85*, 935 – 1002.

SCOTUSblog. (2014, December 2). Special Feature: Same-Sex Marriage. Retrieved December 2, 2014, from http://www.scotusblog.com/category/special-features/same-sex-marriage/

Liptak, A. (2014, October 6). Supreme Court Delivers Tacit Win to Gay Marriage. *The New York Times*. Retrieved from http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html