Chapter 3
From Gay Rights to Same-Sex Marriage: A Brief History Through the Jurisprudence of US Federal Courts

Antonio D'Aloia

Abstract In their jurisprudence on same-sex marriage, the U.S. Federal Courts have touched on almost all aspects of constitutionalism, combining issues of federalism (e.g., the Full Faith and Credit Clause, the Tenth Amendment, and State or Federal jurisdiction in marriage and family cases) and substantial variations of concepts such as equality, dignity, and the anti-discrimination principle. In this sense, same-sex marriage is a unique lens through which to examine the development of constitutional commitments. The struggle for same-sex marriage has now reached a new crucial stage, after the decisions of the U.S. Supreme Court in *Hollingsworth v. Perry* and, above all, *United States v. Windsor*. The U.S. Supreme Court ruled that Section 3 of DOMA—which, for the purposes of 1,000 federal laws and multitudes of official regulations, defines marriage as the union of one man and one woman only—violates the Fifth Amendment and is, therefore, unconstitutional. Even after the decisions of the Supreme Court, however, the issue will continue to be controversial and to animate the political and legal debate, especially with respect to the question of parenting and child rearing.

3.1 Introductory Remarks. Same-Sex Marriage at the Crossroads: Between State and Federal Legislative and Judicial Powers

Two preliminary observations are necessary before discussing the topic of this chapter.

In the first place, it is not easy to write about American Federal jurisprudence on same-sex marriage in the wake of the recent decision (26 June 2013) by which the U.S. Supreme Court has rewritten the legal history of the subject. The cases *United*

A. D'Aloia (✉)
Department of Law, University of Parma, Parma, Italy
e-mail: antonio.daloia@unipr.it

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States v. Windsor and *Hollingsworth v. Perry* can be considered as the final chapter of a long and difficult path that has seen State and Federal powers, both judicial and legislative, intersect in such a way as to make it very hard to analyse them separately. In other words, this last stage seems to reflect precisely the intersection between the two levels of institutional power.

For sure, the decision in *Windsor* will have a strong impact on future developments in this field, as regards both legislation and the case-law.

A closed subject? I do not think so, for a number of reasons.

In the first place, the judgment in *Windsor* dealt with the issue of same-sex marriage from a particular point of view, namely that of the relationship between State and Federal jurisdiction, adopting a perspective which combined the doctrine of equal protection and that of federalizing process.

As I will point out in the final parts of the chapter, several questions are still to be resolved (not only with regard to Section 3 of DOMA, which has been declared unconstitutional, but also to the ways in which the Supreme Court's ruling will be enforced) and will probably lead to new decisions in both State and Federal courts. Moreover, we should not forget that the *Windsor* judgment was approved by a scanty majority (5/4) and that dissenting opinions were very clear-cut and emphatic.

The debate is thus still open, at least in part. This is also why it seems useful to illustrate the arguments that have so far been put forward in the case-law. Furthermore, we must take into account the interpretive approaches and tools underlying the two cases, that is the way constitutional principles and language are interpreted.

In the second place, it should be emphasized that, of course, Federal case-law is not limited to the decisions of the US Supreme Court. The particular characteristics of the Supreme Court's constitutionality review, especially the writ of certiorari and other instruments allowing the Supreme Court "to decide not to decide",[1] make the study of other segments of the American judicial system necessary and appropriate: the State segment on the one hand, and, on the other, the 'smaller', 'Federal' segment in the District and Appeals Courts of the various Circuits. This chapter will focus on the latter, and the discussion will not be limited to the jurisprudence of the Federal Supreme Court.

Given this premise, we may identify three turning points in the history of the American jurisprudence (and legislation) on same-sex marriage and, previously, on gay rights: the *Bowers v. Hardwick* case (1986), the *Lawrence v. Texas* case (2003), and the Supreme Court judgments of these last weeks. Following the development from one to the other, we will try to understand the evolution of legal thought on this very thorny topic, which in recent years has been one of the most important constitutional issues in the United States.

[1] Bickel (1986), p. 133.

3.2 The *Bowers* Case: A Wall with Many Cracks on the Road Towards Gay Rights Recognition

For many years, *Bowers* has been considered as a symbol of the typical American attitude to gay rights and same-sex marriage, or rather, as an obstacle that has strongly weighed against their recognition. Indeed, there is no room even to start discussing same-sex marriage if homosexual conduct is regarded, in itself, as a behavior that can be legitimately criminalized.

Seventeen years later, *Lawrence* overruled *Bowers*, bridging the gulf between the American attitude and the legal culture that had developed in Europe.

But let me not jump ahead. Before *Bowers*, there were two other cases concerning sodomy laws. The first was in Virginia, where a Federal Court refused to extend to homosexual behaviors the right to privacy, which had been affirmed by the US Supreme Court in *Griswold v. Connecticut* (1965), on the grounds that *Griswold* addressed the issue of privacy in a "marital situation". The Federal Court of Virginia was also clearer and more direct with regard to homosexual relations, establishing, in the majority opinion, that "homosexual conduct is likely to end in a contributing to moral delinquency".

The matter came to the Supreme Court, which, without an opinion, confirmed the judgment of the lower court. The decision in *Doe v. Commonwealth's Attorney for the City of Richmond* (1976) is basically an approval lacking in motivation: it is impossible to understand whether the Supreme Court (or, at least, the six judges who gave the majority judgment) agreed on the merits with the conclusions of the District Court of Eastern Virginia, whether it simply wanted to give deference to the State's punitive power, or whether it considered the issue to be culturally and socially premature.

It remains a fact that some years later—paradoxically the same year as *Bowers*—the Supreme Court denied certiorari in another sodomy case, this time a case from Texas (*Baker v. Wade*).[2]

The facts of *Bowers* are well known, therefore I will not comment on them at length. In short: the constitutional review concerned the Georgia sodomy law under which Michael Hardwick had been arrested at his home, while engaging in sexual acts with his male partner.

It should be emphasized that the Court had many uncertainties about the possibility to accept the judgment. The certiorari was granted only by four Justices, which was the minimum number required. Moreover, the motivations of the Justices who 'decided to decide' were deeply divergent: White (who wrote the Court's opinion) and Rehnquist aimed to restrict the right to privacy; Brennan, on the contrary, was convinced that it was possible to reach a majority of five votes to invalidate the Georgia law.

[2] Barsotti (2002).

The decision was short and, perhaps, unclear. Its background, however, is way more straightforward, in that it reveals the actual cultural approach of the defenders of the sodomy law. The concurring opinion of Justice Burger, for example, is a moral, as opposed to legal, condemnation of homosexuality:

> Decisions of individuals relating to homosexual conduct have been subject to State intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman Law [. . .]. [Eighteenth-century English legal scholar Sir William] Blackstone described the infamous crime against nature as an offense of deeper malignity than rape, a heinous act the very mention of which is a disgrace to human nature, and a crime not fit to be named [. . .]. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.[3]

The underlying debate concerned, therefore, the following issues: the interpretation of fundamental rights; the weight of history; the evolution of social and cultural dynamics as regards the identification of a society's fundamental values; and the meaning acquired over time by general constitutional provisions, such as those on privacy, due process, and equal protection. Laurence Tribe and Kathleen Sullivan supported Hardwick's reasons, trying to demonstrate that, if there was a public interest in "protecting public sensibilities", purposes like "protecting vulnerable persons such as minors from possible coercion" and "restricting commercial trade in activities offensive to public decency" could not apply to the facts of the case at issue.[4]

Bowers was a sodomy case and did not concern same-sex marriage. However, a connection between the two issues emerged at various levels. Chief Justice Burger, for example, identified the protection of traditional marriage as one of the possible purposes of the Georgia law. In the brief of the case, openness to gay marriage—which, quite significantly, was associated with polygamy, fornication, adultery, and incest—was indicated as the risk of a decision against the Georgian law. Finally, in contrast with Burger's position—who, in the summary of the case, stated that there was "no fundamental right to engage in sodomy, an activity that had been criminalized for centuries" and that "a privacy decision in favor of Hardwick would undermine laws against incest and prostitution"—Justice Blackmun noted that the decision in *Loving v. Virginia* (1967), a leading case on interracial marriage, could be an important precedent.[5]

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[3] Similar considerations can be found in the brief of the petitioner. In order to emphasize the difference from the previous case of *Stanley v. Georgia*, which concerned the right to use obscene materials in the privacy of one's home, the petitioner stated that: "homosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong". Richards (2009), p. 79, recalls that "the brief also argued (and is a very harsh and unpleasant argument) 'the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases'".

[4] *Ibidem*, pp. 88–89.

[5] *Ibidem*.

As mentioned above, the judgment in *Bowers* was not straightforward with regard to its purpose. The question of privacy (and of gay–lesbian identity) was almost hidden, thus denying any relationship between homosexual activity and personal liberty, family, marriage and procreation, which were the reference points of cases such as *Carey*, *Griswold* and *Roe*. In White's opinion, nothing in the decisions in those previous cases made it possible to legitimize "any kind of private sexual conduct among consenting adults" or to support the notion that "any State limitation is constitutionally invalid".[6]

As a matter of fact, in addition to this initial definition of the scope of the issue, the majority opinion focused on the existence of a fundamental right to practice homosexual sodomy, and the possibility to identify that right in the Constitution and in the wording of the due process clauses (5th and 14th Amendment).

The Court did not deny, also in the light of its precedents, that the Due Process Clauses aimed to guarantee substantial rights. The problem was whether a Judge could identify such rights, or better, to what extent he or she could do so.

According to Justice White, who wrote the opinion of the Court, the category of rights qualifying for "heightened judicial protection" included "those fundamental liberties that are implicit in the concept of ordered liberty". Moreover, he added that:

> the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

And he concluded his premise stating that:

> neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. [...] [T]o claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty", is, at best, facetious.[7]

The fact that homosexual behavior occurred in domestic settings was mentioned only briefly and nonchalantly. The right in question was not considered in connection with the First Amendment and the freedom of expression. Therefore, the case of *Stanley v. Georgia*—which concerned the possession of pornographic material—could not be cited as a precedent. On the other hand, according to White:

> otherwise illicit conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. [...] And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though are committed in the home.

[6] *Ibidem*.

[7] See Tushnet (2005), p. 157: "Gays rightly heard overtones of homophobia in White's opinion; the word facetious was particularly insensitive", even though "Burger's separate opinion was even worse".

The decision was adopted by a 5-4 majority, with Powell as a 'swing Justice'—just like in *Bakke*, the famous 1979 affirmative action case. By the term 'swing Justice' I refer not only to the judge who decides, breaking the balance of the Court, but also to the fact that his or her involvement in the opinion of the Court is asymmetric and his or her consent is based on fragile, unstable elements, in the sense that, had the judgment had a different line of reasoning, the position of that judge could have been different.

In this specific case, Powell considered that "imprisonment for homosexual sodomy would be cruel and unusual punishment"[8] and firmly supported the decision in *Roe*. However, he also doubted that the practice of homosexual relations could be a constitutional right deriving from the Due Process Clause. Unfortunately, the issue came before the Court in those terms. As recalled by Richards, Powell, who had already left the Court 3 years earlier, admitted to his mistake in a public debate at the NYU in 1990. In this sense, *Bowers* was a heavy precedent, whose relevance has been compared to the *Dredd Scott* case of 1837 on slavery and the rights of the black minority. At the same time, it was based on shaky grounds and, thus, destined to be challenged.

It is no coincidence that the Georgia sodomy law was declared unconstitutional by the Georgia Supreme Court and repealed in 1998, before *Lawrence* overruled *Bowers*. However, this somehow reflects an American dualism between State and Federal levels as regards the protection of fundamental rights.

In fact, the arguments in *Bowers* immediately seemed "highly questionable". The uncritical use of the historical argument and the dismissal of the constitutional principle of privacy—a dismissal which was barely justified and contradicted a number of opinions delivered by the same majority Justices in other cases (e.g., the 1992 Planned Parenthood case on abortion)—were 'weak' points destined to be modified by later case-law.[9]

As often happens in American jurisprudence, dissent paved the way for a possible overruling. The positions of Blackmun and Stevens were very clear. The first Justice maintained that:

> sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of personality" [. . .]. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

Both of them, moreover, emphasized that arguments based on dominant or conventional moral opinion, majoritarian offense, or long-standing religious tradition are insufficient to justify serious restrictions on a constitutionally protected right (like that claimed by Hardwick). In particular, while the opinion of the Court

[8] Richards (2009), p. 113.

[9] Richards (2009), pp. 113–114.

stated that the law "is constantly based on notions of morality", Stevens asserted that the fact that the governing majority in Georgia viewed sodomy as immoral was "not a sufficient reason for upholding a law prohibiting the practice" and that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack".

While the Supreme Court was going to address the *Bowers* case, 26 American States had already removed sodomy from their penal codes. Illinois was the first to do so in 1971, 2 years after the Stonewall riot, which had drawn media attention to discrimination against homosexuals and to the fight for gay rights.

At the same time, the situation in Europe was well advanced—gay/lesbian sex acts had already been decriminalized, in many countries since as early as the nineteenth century. In 1978, the decision of the European Court of Human Rights (further referred to as ECtHR) in *Dudgeon v. United Kingdom* established that legislation criminalizing homosexual acts violated Art. 8 of the European Convention of Human Rights (further referred to as ECHR), which provides for the right to respect for one's private and family life.[10]

3.3 After *Bowers*: *Romer v. Evans* and Justice Kennedy's Doctrine

Both the 'weak arrogance' of the Court in *Bowers* and the 'competition' on fundamental rights between Federal and State Courts (and, in general, between political institutions at the two levels)—a competition which is typical of US dual federalism—can explain a series of reactions and consequences.

First of all, those who feared that the Court's judgment would force States to keep sodomy laws, or even to re-criminalize homosexual conduct, have been contradicted. No State has reintroduced laws that punish homosexual relations, while many States have removed the crime of homosexual sodomy from their codes, starting with Kentucky, which was the first to do so in 1992.

As it has been already mentioned, *Bowers* was overruled 17 years later in *Lawrence*, but, in fact, homosexuality had already been largely liberalized. Thirteen States, however, kept sodomy laws in force, and four of them also imposed heavier penalties.

More interestingly, *Bowers* triggered a strong cultural mobilization on the part of the gay movement. As emphasized by B. Friedman, *Bowers* was a second Stonewall, "a display of antihomosexual spleen that fueled public responses from gay people and their growing number of allies".[11]

The Court called to hear the *Lawrence* case was deeply renewed. A remarkable six Justices of the Court had retired at the time of *Bowers*; however, the

[10] See the chapters by Crisafulli and Pustorino in this volume.

[11] Friedman (2009), p. 573.

appointment of Chief Justice Rehnquist and the entrance of Scalia and Thomas—who would, in fact, fiercely dissent from the opinion of the Court in *Lawrence*—seemed to preserve the conservative majority.

A key role in the overruling decision was played by Justice Kennedy, who had already agreed with the decision made by the majority of the Court in *Romer v. Evans* (1996), where the Supreme Court had declared that the amendment to the Constitution of Colorado that forbade all laws protecting gays and lesbians from discrimination was unconstitutional.

Romer v. Evans was the major step in the process that led to the overruling of *Bowers*, a process which took place mainly at the level of State case-law.

The first step in this process was *Commonwealth v. Watson*, where the Kentucky Supreme Court[12] struck down a state sodomy law, thus promoting the constitutional right to privacy denied in *Bowers*. The Court took an interesting position on the issues discussed here, relating them to the American system of dual sovereignty:

> it is our responsibility to interpret and apply our state constitution independently. We are not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution [. . ..]. [T]he Bill of Rights in the United States Constitution represents neither the primary source nor the maximum guarantee of State constitutional liberty.

Other cases of invalidation of sodomy laws concerned Minnesota, Tennessee, and—as mentioned earlier—Georgia itself, where the Supreme Court, 12 years after *Bowers*, invalidated the law it had previously saved.[13]

At the same time, the US Supreme Court was active in two other cases of discrimination based on sexual orientation. In both cases, the issue was the balance between the principle of non-discrimination (in this case related to sexual orientation) and the freedom of speech of groups and associations. The outcome was substantially the same, but the composition of the majority seems to reflect the evolution begun in *Romer* and completed in *Lawrence*.

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995), the Court unanimously found that it is the private citizens organizing a public demonstration who choose the groups to be included in their demonstration.[14] On the other hand, in *Boy Scouts of America v. Dale* (2000) only a 5-4 majority approved the opinion of Chief Justice Rehnquist that a private organization, such as the Boy Scouts, can exclude a gay person from membership, in accordance with the principle of 'freedom of expressive association', if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.

Let me now turn to *Romer v. Evans*. The case concerned an amendment to the Constitution of Colorado, approved by a referendum that was immediately 'blocked' on the initiative of the District Court of the State. The amendment was

[12] *Commonwealth v. Wasson*, 842 S. W 2d 487 (Ky. 1992).

[13] For an in-depth analysis of these cases, see Montalti (2007), pp. 115–117.

[14] Richards (2009), p. 120.

clearly 'anti-gay': a "non-protected status based on homosexual or bisexual orientation"[15] was obviously a way to perpetuate a form of denial and "segregation" of homosexuality, although on a slightly less punitive level than sodomy laws. Basically, the shift was from criminalization to discouraging the public acceptance of homosexuality[16] and, at the same time, identifying homosexuals as a distinct class, according to criteria unrelated to any legitimate State interest.

In fact, in the majority opinion (approved 6-3), Kennedy referred to the dissent of Justice Harlan in *Plessy v. Ferguson* (1896)—the famous case on racial segregation that was overruled by *Brown v. Board of Education* in 1954—stating that: "[T]he Constitution neither knows nor tolerates classes among citizens".

The judgment was apparently neutral on the issue of sexual orientation and homosexuals as a discriminated minority and, above all, did not refer to the *Bowers* case. Paradoxically, only Justice Scalia mentioned the connection with that case in his dissenting opinion: "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*". In other words, the authority of *Bowers* was hanging by a thread: it is hard to believe that a decision considering the constitutional legislative choice to punish homosexual sodomy could maintain its value, while a law (or rather, a State constitutional amendment) that "merely" prohibited rules in favor of homosexuals was declared unconstitutional.

3.4 A Parallel Story: The First Same-Sex Marriage Cases in Federal Courts

While the battle over gay rights was still formally at a standstill, and homosexual conduct still criminalized (in accordance with the position expressed in *Bowers*), the issue of same-sex marriage and/or legislation on same-sex couples began to be discussed at various levels of jurisdiction.

The first Federal cases on same-sex marriage occurred at the same time as the first sodomy cases. When compared to the European experience, this is yet another anomaly: the theme of homosexual partnership appeared only after sodomy or similar laws had been repealed or invalidated. However, it is clear that the issue was not yet fully developed. The judgments delivered by the courts seem 'overhasty' due to the surprise caused by the novelty of the problem: they just dismiss the claims at issue, often without any detailed discussion of their implications.

In *Baker v. Nelson*,[17] a same-sex couple who had applied for a marriage license in Minneapolis challenged the refusal of a clerk of the Hennepin County District

[15] Montalti (2007), p. 230.

[16] Richards (2009), p. 116.

[17] *Baker v. Nelson*, 191 N.W. 2d 185 (Minn. 1971).

Court to issue the license, alleging that said refusal was contrary to various provisions of the Federal Constitution (1st, 8th, 9th and 14th Amendments). The trial court dismissed the couple's claims without discussion, but distinguished the case from *Grinswold*, a leading case in the field of privacy, and especially *Loving v. Virginia*, a landmark civil rights decision that invalidated laws prohibiting interracial marriage (also known as "anti-miscegenation laws"), on the grounds that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex".

The following year, the case came before the US Supreme Court through mandatory appellate jurisdiction, thus giving the judges the opportunity to rule on the constitutional rights at issue and deliver a decision on the merits. However, the US Supreme Court summarily dismissed the appeal for "want of a substantial federal question".[18]

Another dismissal—this time on the merits—was made by the Washington Court of Appeals in *Singer v. Hara* (1974).[19] The judgment includes a short but meaningful passage on the Marriage Statute of the State of Washington, which is considered valid and constitutional insofar as it does not grant same-sex couples access to marriage. According to the Court, the state marriage law promoted "the public interest in affording a favorable environment for the growth of children".

Numerous other court decisions excluded same-sex partners from the institution of marriage and from the legal definition of "spouses". The judgment in *Adams v. Howerton* (1980)[20] is especially noteworthy. In this case, the Ninth Circuit Court of Appeals decided that there were rational bases for excluding homosexual partners from the legal definition of 'spouses', since "same-sex couples do not procreate, most or all States do not recognize marriages between persons of the same-sex, and same-sex marriages violate traditional mores".

Substantially restrictive positions of this kind led gay activists to move the battle for same-sex marriage from federal to state courts, whose jurisdiction is more suitable for dealing with cases concerning marriage and family. The strategy of gay rights groups aimed to avoid a face-off with the Federal judicial power, whose negative reaction could have much more devastating effects on the outcome of their struggle. As Evan Wolfson wrote in 1994, "the wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades".[21] On the other hand, 'local' victories could gradually contribute to change public attitudes and promote a progressive acceptance of a sexually open model of marriage.

However, besides raising problems with respect to the theory of federalism and the separation of powers, this strategy does not prevent multiple connections between federal and state levels. These connections do not simply relate to

[18] *Baker v. Nelson*, 409 U.S. 810 (1972). On this point, see Duncan (2006), pp. 30–31.

[19] *Singer v. Hara*, 522 P. 2d 1187 (Wash. Ct. App. 1974).

[20] *Adams v. Howerton*, 673 F. 2d 1036, 1038 (9th. Cir. 1980). See also *Bowers*, *Dean v. District of Columbia*, 653 A. 2d 307 (D.C. App. 1995): "we cannot overlook the fact that the Supreme Court has deemed marriage a fundamental right substantially because of its relationship to procreation".

[21] See Wolfson (1994), p. 611.

corresponding functions (i.e., federal congress/state legislatures, and federal courts/state courts), but are way more complex. This is clearly shown by two facts: first, the decisions taken at the state level with regard to legislative and constitutional review, and which defended a traditional definition of marriage, have been attacked on federal constitutional grounds even before being challenged in state courts; and second, the best response to the activism of state courts came from the Federal legislature with the famous Defense of Marriage Act of 1996 (DOMA).

3.5 The Federal Congress' 'Studs Up Tackle': DOMA and the Power to Reserve Marriage to Opposite-Sex Couples

The DOMA is a symbol of the double conflict between Federal/State and legal/judicial levels. It encompasses both perspectives; and, in the end, it is mainly a means to protect Member States against (legislative or judicial) decisions made by other States. It was followed by a series of reactions: to begin with, Hawaiian voters approved a referendum for a constitutional amendment adding the following provision to the Hawaii Constitution: "Marriage. The legislature shall have the power to reserve marriage to opposite-sex couples".

The fundamental reason for the intervention of the Federal Congress was certainly the decision of the Supreme Court in the Hawaii case of *Baher v. Lewin* (1993). The Supreme Court found that Hawaii's prohibition of same-sex marriage violated the Equal Protection Clause of the State Constitution—or better, it could violate that constitutional provision—and asked the trial court to demonstrate that the same-sex marriage ban furthered "compelling state interests".

In response to the court's ruling, in 1998 Hawaiian voters approved the aforementioned amendment to the state constitution, allowing the state to reserve marriage to opposite-sex couples. This enabled the Supreme Court, to which the trial court had once again asked to dismiss the case, to rule that the marriage amendment was decisive.

Apart from the outcome of the case (the State of Hawaii recognized some 'reciprocal' rights, or benefits, to same-sex couples, similar to those granted by the French *PACS*), the judgment in *Baher* marked the beginning of a path on which several other states followed.[22] The decision of the Massachusetts Supreme Court in *Goodridge v. Department of Public Health* (18 November 2003), for example, is especially noteworthy, also because it produced stable effects with regard to the recognition of same-sex marriage in Massachusetts.[23]

[22] Montalti (2007).

[23] After *Goodridge*, another important ruling was that of the New Jersey Supreme Court in *Lewis v. Harris* (2006), where the Court held that limiting the access of opposite-sex couples to civil marriage violated the state constitution, but did not rule that the State should allow same-sex couples to marry. Moreover, in 2008 the California Supreme Court ruled in favor of same-sex marriage in case *In re Marriage Cases*. See Knauer (2008), p. 101.

This judgment radically challenged the reservation of marriage to people of the opposite sex. The fundamental nature of the right to marry led the Court to emphasize that a marriage ban was contrary to the respect of individual autonomy, protected by the Due Process Clause and the Equal Protection Clause of the 14th Amendment, because it worked "a deep and scarring hardship on a very real segment of the community for no rational reason".[24] In the same way, it found that the attempt to distinguish between marriage, reserved to opposite-sex couples, and civil unions, open to same-sex couples, was unacceptable because it maintained "an unconstitutional, inferior, and discriminatory status" for homosexuals.

As already noted, *Baher* was the first case to challenge the idea of marriage as the union between a man and a woman; in particular, it was the sign that the battle had to be fought at the federal level, which shows that the relationship between central and local authorities was not as rosy as suggested by Justice Brandeis in his famous 1932 dissent in *New State Ice Co. v. Liebmann*:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Indeed, the decision was followed by an immediate reaction at Federal level, namely the DOMA,[25] which served as a model for a whole series of similar and sometimes more radical initiatives in many States,[26] such as the amendments to State constitutions known as "Mini-DOMAs".[27] Moreover, in some of the States that have amended their constitutions to include Mini-DOMAs, State courts have refused to establish the right to same-sex marriage as a matter of state constitutional law.[28]

That is not an obvious choice, since defining marriage and family has traditionally been a State matter. In *Sosna v. Iowa* (1975),[29] for example, the US Supreme Court found that the regulation of domestic relations was an area that had long been regarded "as a virtually exclusive province of the States".

There was a strong divide between the legal culture and society's perception of same-sex marriage, which has been partially solved only in recent times. State legislatures and voters basically opposed the attempts of the courts to invalidate same-sex marriage bans, or to extend the concept of marriage (or at least some marriage rights) beyond the traditional idea of the union between a man and a woman.

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[24] Montalti (2007), pp. 434–435.

[25] It is useful to remember that the Congress approved the DOMA by a large majority: 342-67 in the House of Representatives, and 85-14 in the Senate.

[26] On DOMA and the *Baehr* case, see Strasser (2011). It should be emphasized that DOMA was approved by a large majority: 342-67 votes in the House of Representatives and 85-14 in the Senate.

[27] See again Strasser (2011), *passim*.

[28] Solimine (2010), pp. 105–107.

[29] 419 U.S. 393, 404 (1975).

At present, 41 States still have statutory and/or constitutional provisions under which same-sex marriage is invalid or which simply state that it is not marriage at all.[30]

The situation is indeed very complex and multifaceted. Apart from Massachusetts and California, after the 2008 Supreme Court's decision *In re Marriage Cases* and before the introduction of Proposition 8, which recognized same-sex marriage, some States (New Jersey, Connecticut, New Hampshire, Oregon, Vermont) granted same-sex couples the same benefits or rights as married heterosexual couples, while others (Maine, Washington, District of Columbia) extended at least partial benefits.[31] In other words, the DOMA has in its turn unleashed a series of reactions: this confirms the essential pluralism of the American system, which encompasses both a federalist approach and the ancient conflict between legislative and judicial powers (especially in the field of fundamental rights).

This interplay of reactions and setbacks has been possible because the circle is not closed yet. The attempt to directly transfer into the US Constitution only heterosexual marriage has failed, and the Federal Marriage Amendment—according to which "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor State or Federal Law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups"[32]—has not been adopted.

3.6 Constitutional Problems Raised by DOMA. The Full Faith and Credit Clause in the Conflict Between the Judicial and Legislative Branches, and the 'Incidents' of Federalism

Let me now go back to the Defence of Marriage Act and examine the related constitutional issues. DOMA does not expressly prohibit same-sex marriage, even though it certainly "comes out strongly against same-sex marriage".[33] Moreover, it

[30] Among these, 17 states have particularly aggressive provisions that not only prohibit same-sex marriage, but also purport to prohibit all other forms of relationship recognition (Knauer 2008, p. 103). The only states without marriage restrictions are Massachusetts, New Jersey, New Mexico, New York, Rhode Island.

[31] In any case, there is no doubt that anti-marriage measures—some of which extremely hostile to same-sex relationships—were predominant: see Knauer (2008), p. 109.

[32] On this point, *ibidem*, p. 112, and Montalti (2007), p. 409.

[33] Simson (2010), p. 43.

does not exclude the possibility that some States will legalize same-sex marriage or enforce the laws or decisions adopted in the States that have already recognized this institution—namely, those States that have legalized it or passed legislation granting rights and benefits to same-sex couples, while still maintaining a distinct *status* (i.e., civil unions) for these couples.

At the same time, the DOMA allows States opposing same-sex marriage not to feel obliged to follow the decisions and regulations of other States in favor of giving homosexual couples access to marriage.[34] In essence, a couple legally married in Massachusetts has no guarantee that their status will be recognized also in other States and their marriage will have the same legal effects as those required under the Federal legislation.

The DOMA is divided into two parts: the first has a 'horizontal scope', since it concerns the interstate effects of a same-sex marriage contracted in a given State[35]; the second concerns the relationship between State and Federal powers. It seems appropriate to analyze them separately.

The first provision (Section 2) states that:

> No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Quite clearly, the purpose is here to avoid the risk of a 'progressive' use of legislative or judicial decisions that recognize same-sex marriage in individual states. In particular, this provision aims to prevent other states from being forced into adopting laws that may recognize same-sex couples by virtue of the Full Faith and Credit Clause doctrine.

As is well known, the Full Faith and Credit Clause is contained in Art. IV(1) of the US Constitution. It provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

This Clause is essential in order to make the complicated system of federalism work.[36] As noted by the US Supreme Court in *Milwaukee County v. M.E. White Company*,[37] the clause produced a change in the status of the States, transforming them into "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the State of its origin".

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[34] See Kramer (1997).

[35] "(I)t is horizontal because it primarily concerns the relations among the co-equal sovereign States of the Union" (Wardle 2010, p. 149).

[36] Jackson and Tushnet (1999), p. 193.

[37] 296 U.S. 268, 277 (1935). See Strasser (2011), p. 89.

It is basically a source of federal unity and loyalty, expressing a sense of convergence towards uniformity even in those areas where the weight of and the claim for state competences are stronger. The Clause itself contains elements of flexibility; in other words, it contains its exceptions, namely the possibility for the Congress to introduce provisions derogating from the Full Faith and Credit mechanism.

The point here is to understand the limits of this right to derogate from the Full Faith and Credit Clause. The connection of the Clause with important constitutional interests means that the individual states are not "free to ignore obligations created under the laws or by the judicial proceedings of the others".[38]

First of all, according to the most authoritative interpretation, it is only possible to disregard the Full Faith and Credit Clause when there are important or overriding public policy reasons, which, of course, must not be contrary to the Federal Constitution.

Moreover, judgments and statutes are not on the same level. Many decisions of the US Supreme Court agree that a distinction is necessary between "the credit owed to laws (legislative measures and common law) and to judgments".[39] As regards laws, the US Supreme Court recognized, in *Pacific Employers Company* (1998), that:

> The very nature of the Federal union of States, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a State to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.[40]

However, in other cases it has maintained that the Constitution does not support a "roving public policy exception to the full faith and credit due judgments".[41]

Section 2 of DOMA seems indeed to reflect the quest for a constitutional balance among the different States, protecting state sovereignty on certain issues reserved to the individual States, such as marriage and domestic relations, and preserving the right of each State to decide for itself whether to recognize same-sex marriage.[42]

It is difficult to assess with certainty whether the DOMA has exceeded the exception to the Full Faith and Credit Clause. Of course, we cannot but take into account the fact that, as noted above, at present the majority of States prohibit or do

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[38] See, again, *Milwaukee County v. M.E. White Company*.

[39] See *Baker v. General Motors Corp.*, 522 U-S. 222, 232 (1998).

[40] See *Pacific Employers Insurance Company v. Industrial Accident Commission*, 306 U.S. 493, 591 (1939).

[41] See *Baker v. General Motors Corp.* and *Sherrer v. Sherrer*, 334 U.S. 343, 356 (1948), on divorce and marital status. See also Strasser (2011), pp. 89–90.

[42] Wardle (2010, pp. 1345 and 1353) emphasizes that the DOMA "is an architectural provision protecting the architecture of federalism" and "the constitutional allocation of authority to set public policy regarding recognition of same-sex marriage", and that "it protects each State from aggressive Federal judges, and other governmental officials, who would use the supremacy of Federal law to force States to recognize same-sex marriage in their internal domestic relations laws".

not recognize same-sex marriage. However, this is a 'quantitative' argument, which may not be decisive per se, even though several years ago (*McKeiver v. Pennsylvania*, 1971) the US Supreme Court stated that:

> the fact that a practice is followed by a large number of States [...] is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

The issue is far more complex. A Federal State is based on a series of interests of the Union, which in their turn affect the fundamental rights of US citizens. The freedom of movement and the right to work in all the States of the Union seem to imply that all citizens can move from one state to another, taking their rights and fundamental freedoms with them, including the right to marry as recognized in any one of the States of the Union.[43] If connected to these fundamental 'interests', the Full Faith and Credit Clause seems to acquire greater strength: the procedural dimension is enriched with elements that recall the due process, equal protection, and individual autonomy doctrines and, ultimately, the exception to the recognition of other States' laws and judgments appears to need more rigorous justifications, which perhaps are now difficult to find.

Moreover, this provision combines horizontal and vertical effects, the latter concerning the relationship between the States and the Federation. The Full Faith and Credit Clause, as already noted, provides the Congress with the authority to regulate interstate recognition processes and their effects, which also includes the power to "tell the States when they must, and when they may not, recognize the domestic relations laws, records, judgments of other states".[44]

To conclude on this point, the critical issue is "[w]ho decides whether, when, and to what extent same-sex marriages created in one American state will be recognized by other state governments, and by the Federal government".[45] DOMA resolves it as follows: Congress cannot prevent a given state and its courts to legalize same-sex marriage, but it protects the discretionary power of other American states to do the same, or to recognize 'external' laws and judgments, or to maintain their own system, above all the legislative one.

Section 3 of DOMA, also known as the 'vertical section', is not less important, nor does it pose fewer problems. It provides that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and

[43] In this regard, Strasser (2011, p. 197) notes that: "Marriage is a fundamental interest for right-to-travel purposes, and states have a heavy burden of justification when making citizens sacrifice their marriages as a price of migrating to the State. That right-to-travel guarantees are triggered when states force citizens seeking to immigrate to leave their marriages at the border does not somehow create National marriage law".

[44] Wardle (2010), p. 149.

[45] *Ibidem*.

wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.

The aim seems here stated more directly, and the provision is less ambiguous than Section 2.[46] For all purposes, regulations, and programs that may be provided for by Federal laws, the definition of 'marriage' only includes opposite-sex unions. We are thus facing a legislative issue, which can be overcome only through constitutional judicial review.

Once again, we are confronted with the question of the complicated relationship between the legislative and judicial branches.[47] In other words, the legislature 'raises the stakes'; it explains itself and tries to impose the scope of application/interpretation of the law. However, that is an impossible task, especially in the field of fundamental rights, which, as noted by Finnis,[48] is a complex terrain on which nobody can really have the last word. Of course, this applies also to mini-DOMA statutes, which can be overturned by a judicial interpretation of the State Constitution: the Iowa Supreme Court, for example, declared unconstitutional a State statute defining marriage as the union of a man and a woman.[49]

3.7 Development of the Federal Case-Law on DOMA

In *United States v. Windsor*, the Supreme Court struck down the DOMA, in particular its Section 3, a decision that was to be expected since, as noted above, the signs were never very encouraging. All the same, it seems important to examine the development of the case-law on this Act.

It cannot be denied that, at least in a first stage, the DOMA proved effective in developing substantive objectives. In the individual States, legislative and jurisprudential 'progress' (as regards the recognition of same-sex marriage or of equal rights and benefits for same-sex couples) stopped at a 'middle' stage, and was thus "inadequate to secure broad based minority rights".[50] As we have seen, this Federal law has addressed and influenced the evolution of legislation in most American States, which have taken a strong position against the option of same-sex marriage.

Moreover, the DOMA was not declared unconstitutional in many Federal cases where there was an attempt to prove that making law by creating a classification

[46] Strasser (2011), p. 74.

[47] Wardle (2010, p. 177) notes that Section 3 has both federalism and separation of powers dimensions, which protect Congress "from aggressive federal judges and executive branch officials who may use their power to force the recognition of state-created same-sex marriages into federal programs, policies, laws, without congressional approval".

[48] See Finnis (1980), p. 220.

[49] See *Varnum v. Brien*, 763 N.W. 2d 862, 907 (Iowa 2009).

[50] See Knauer (2008, p. 118): "this confusing and conflicting status of relationship recognition weighs heavily on same-sex couples, [...] creates a level of uncertainty that complicates daily life in ways that opposite-sex couples need never consider".

based on sexual orientation—which has a disparate impact on homosexuals—is unreasonable and contrary to the Equal Protection Clause.

For example, in *Smelt v. Orange County* (2005),[51] the Central District of California rejected the claim that the DOMA constituted discrimination based on sex, since the law had no disparate impact on either men or women, and found that a classification based on sexual orientation was rationally justified, since it encouraged "the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children, by both biological parents". Moreover, the Federal judge maintained that the often-cited precedent set in the case *Loving v. Virginia*, which concerned interracial marriages and anti-miscegenation laws, was not relevant to same-sex marriage cases, for the simple (and, to some extent, unfounded) reason that the "fundamental right to marry was not a fundamental right to same-sex marriage".[52]

Similarly, other Federal Courts have ruled that the DOMA is not unconstitutional. In particular, in *Wilson v. Ake* (2005),[53] the Florida District Court concluded that DOMA did not violate the Full Faith and Credit,[54] Equal Protection, or Due Process Clauses; and in *In re Kandu* (2004)[55] the US Bankruptcy Court rejected the claim that DOMA violated the Fifth Amendment's guarantees of due process and equal protection, and the Tenth Amendment's reservation on the power of States to regulate marriage. In the latter case, the Court found that there was no conflict between State and Federal policy, noting that "Washington State has adopted its own definition of marriage identical to DOMA, defining marriage for State purposes as the legal union of one man and one woman".[56]

More recently, however, very different positions have emerged,[57] showing the vulnerability of DOMA[58] under different concurring aspects. This seems to point to a path leading close to what many consider as the final chapter on the issue (namely, the *Windsor* case).

The turning point in this case-law, which seemed consistent in rejecting the claim of unconstitutionality of DOMA, can be found in two 2010 decisions of the

[51] 374 F. Supp. 2d 861 (C.D. Cal. 2005).

[52] Duncan (2006), pp. 40–43.

[53] *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

[54] See *Wilson v. Ake*, 354 F. Supp. 2d, 1302, where it is stated that DOMA was an appropriate exercise of Congress' power to regulate conflicts between the laws of different States, and that holding otherwise would create "a license for a single State to create National policy". The Federal District Court also rejected the argument that "Congress may only regulate what effect a law may have, it may not dictate that the law has no effect at all" (1303).

[55] *In re Kandu*, 315 B.R. 123 (Bankr. WD. Wash. 2004).

[56] *Ibidem*, p. 132.

[57] According to Strasser (2011, p. 147), "this lack of uniformity is unsurprising, both because the language in one State Constitution might differ from that of another and because, even where the language is the same, the jurisprudence in the respective states fleshing out the depth and breadth of the guarantees might differ".

[58] *Ibidem*, p. 85.

Massachusetts Federal Court,[59] where Judge Tauro declared the law of 1996 unconstitutional—in particular its Section 3—on the grounds that it violated the Fifth Amendment's Equal Protection Clause, the Spending Clause (which prevents Congress from exercising its spending power in such a way that may induce any of the States to violate its citizens' constitutional rights), the Tenth Amendment and constitutional principles of federalism, because only the States—and not the Federal government—have valid constitutional interests in regulating marriage. The District Court, moreover, enjoined federal officials and agencies from enforcing Section 3.

These judgments have been heavily criticized as contradictory and even 'ideologically' biased. More specifically, putting together the arguments concerning the competence of individual states on marriage and the Equal Protection Clause has been regarded as a 'startling' move in that the "two opinions are at war with themselves".[60]

In any case, the US Court of Appeals for the First Circuit confirmed Judge Tauro's opinion, even though for different reasons. In fact, some arguments put forward at first instance were overturned and struck down by the higher court on appeal.

In particular, the Court of Appeals accepted that the DOMA violated the Tenth Amendment and the Spending Clause, but declined to apply intermediate scrutiny in its equal protection analysis of the Act ("extending intermediate scrutiny to sexual preference classifications is not a step open to us"), since that would have meant overruling a US Supreme Court precedent (which a lower court is never allowed to do), namely the precedent set in *Baker King*, which had not been affected by *Lawrence* and *Romer* (the latter case did not specifically concern same-sex marriage).

The DOMA failed to pass even the 'rational basis' test (i.e., the lowest standard of review), which in this case, however, was somehow 'reinforced' by the connection with the issue of federalism[61] and that of the protection of the States' power to regulate marriage.

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[59] *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010), and *Massachusetts v. U. S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010). The year before, two Federal courts of appeals had expressed strong doubts about the constitutionality of the DOMA. Chief Judge Kozinski, of the 9th. Circ., *In re Golinsky* (587 F. 3d 901, 903, 2009), expressed doubts about the possibility of identifying "legitimate governmental end" for the exclusion of same-sex spouses from the coverage of the Federal Employees Health Benefit Act (FEHBA); Judge Reinhardt, also from the 9th Circ., *In re Levenson* (560 F. 3d 1145, 1149, 2009), stated even more firmly that "the denial of benefits here cannot survive even rational basis review, the least searching form of constitutionality scrutiny".

[60] According to Jack M. Balkin (quoted in Wardle 2010, p. 1347): "the credibility of the judgments was undermined for several reasons: the District Court, in an 'Alice-in-wonderland' judicial moment, brushed aside all differences between conjugal marriages and same-sex relationships; Judge Tauro was painfully unpersuasive in his attempt to ignore the long history of Federal preemption of State marriage law for purposes of Federal programs; and he desperately focused on 'straw man' equality arguments."

[61] The Court of Appeals stated that: "In our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA; Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily accorded".

The Court of Appeals considered the reasons given by the House Committee Report for supporting the DOMA, namely (1) defending and nurturing the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; and (3) preserving scarce government resources. It concluded that these reasons were not sufficient to justify the exclusion of same-sex married couples.[62]

The Court reached the same conclusions with regard to the argument that the law supports child-rearing in the context of stable marriage, for the simple (and maybe elusive) reason that:

> The evidence as to child rearing by same-sex couples is the subject of controversy, but we need not enter the debate. Whether or not children raised by opposite-sex marriages are on average better served, DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners.[63]

As for the moral disapproval of homosexuality, the Court regarded the argument as completely unfounded, since *Lawrence* (and *Romer*) had ruled that moral disapproval alone could not justify legislation discriminating on that basis.

Finally, the Court also found that the argument that DOMA would save money for the federal government was not decisive:

> This may well be true, or at least might have been taught true; more detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.
>
> But, where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction.[64]

In other words, the weakness of a group or class (in this case, homosexuals), which alters the normal balance of the financial costs connected with the choice to invalidate or legitimize a law, has a greater weight than the type of legal review (intermediate scrutiny or rational basis standard).

Moreover, before confirming the judgment of the District Court, the Court of Appeals stated that:

> [M]any Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage.[65]

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[62] In particular, Judge Boudin's ruling concluded that: "Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest."

[63] See the decision written by Judge Boudin, p. 26, which also states that: "Although the House Report is filled with encomia to heterosexual marriage, DOMA does not increase benefits to opposite-sex couples [...] or explain how denying benefit to same-sex couples will reinforce heterosexual marriage."

[64] *Ibidem*, p. 25.

[65] *Ibidem*, p. 30.

This is a perfect description of the virtues of federalism and of the 'anti-majoritarian' (or 'non-majoritarian') role of the judiciary, which, as noted by Dogliani,[66] gives greater consideration to constitutional judicial review.

These decisions visibly extended the debate,[67] which eventually came to involve the Federal Administration.

As a matter of fact, it was the US Supreme Court that, with its decision in the *Lawrence* case, set in motion the questioning of DOMA's constitutionality and the erosion of its legitimacy, whether intentionally or not. Once again, gay rights and same-sex marriage cases intersect and show their intimate connection. For this reason, it seems appropriate to make some observations on this important 'precedent'.

3.8 *Lawrence*, or the Case That Put a Positive End to the Quest for Individual Gay Rights and Opened Up the Possibility of Homosexual Partnership and Same-Sex Marriage

The *Lawrence* case is considered one of the leading cases in the American jurisprudence on civil rights and, in particular, gay rights. The judgment did not directly concern the issue of same-sex marriage, but somehow paved the way and legitimated the case-law which, especially at the State level, had begun to establish gay rights in all their dimensions, extending their protection beyond the principle of non-discrimination to include not only individual rights, but also relational rights.

If sexual orientation is part of the individual's liberty and personal identity, this identity must have the possibility to be fully realized also in terms of relationships, (sexual) intimacy, companionship, mutual responsibility, and love.[68] As noted by L. Tribe:

> *Lawrence* laid the groundwork for striking down bans on same-sex marriage in much starker terms than did Brown for invalidation of anti-miscegenation laws (in the case *Loving v. Virginia*).[69]

I will not comment on this comparison, but the quotation is meant to emphasize the importance of *Lawrence* for the topic here discussed.[70]

According to the Court's ruling (adopted 6-3), the Texas sodomy statute at issue was unconstitutional. Significantly, *Bowers* was totally overruled, and considered

[66] Dogliani (1982), p. 40.

[67] See also *Diaz v. Brewer*, 656 F. 3d 1008, 1014–1015 (Court of Appeals of the 9th Cir. 2011).

[68] Nussbaum (2010), p. 1.

[69] Tribe (2011), p. 1.

[70] In this sense, see also Montalti (2007), pp. 447–448 and Sunstein (2003), 30 ss.

as a wrong decision at the very moment it was adopted. As emphasized by Justice Kennedy,

> our laws and traditions [...] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex

and these developments "should have been apparent when Bowers was decided".[71]

His conclusion is even clearer: "*Hardwick* was not correct when it was decided, and it is not correct today".[72]

The Supreme Court held that the sodomy ban violated the constitutional principle of privacy and was not only a matter of equal protection, since the law prohibited homosexual sodomy but allowed heterosexual sodomy.

In Justice Kennedy' view, liberty is a shifting concept,[73] whose meaning and components can reveal themselves in "manifold possible ways" which reflect the evolution of times and social issues,[74] so that "as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom".

This is a demonstration of the dynamism of American jurisprudence thanks to the different types of Justices' opinions (majority, dissenting and concurring). Stevens's dissent in *Bowers* became the crucial point of the Court's reasoning in *Lawrence*: the protection of the Due Process Clause of the 14th Amendment "extends to intimate choices by unmarried, as well as married, persons".[75]

Paradoxically, the link between sodomy cases and the problem of same-sex marriage (or same-sex relationships), which seems unrelated to the issue in *Lawrence* (which "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"),[76] becomes

[71] Justice O'Connor concurred with the majority opinion in *Lawrence* that the Texas criminal statute, which banned only gay/lesbian sexual acts, was unconstitutional, but she did not agree that a statute such as the Georgia ban in *Bowers*, equally applicable to heterosexual and homosexual forms of non-procreational sex, should be regarded as unconstitutional. For O'Connor, therefore, it was not necessary to reverse *Bowers*. On this point, see Friedman (2009), p. 339.

[72] Tribe (2008, p. 135) considers this conclusion "unusual (indeed, I think, unprecedented)".

[73] D'Aloia (2003).

[74] Sunstein (2009), p. 55.

[75] Tushnet (2005), p. 157.

[76] And maybe only implicitly hinted at, as noted by Nejaime (2012, p. 1216), according to whom Kennedy's rhetoric moved beyond "(private) same-sex sex and instead gestured toward the (potentially public) same-sex relationships that enact lesbian and gay identity [...] thereby suggesting the way in which relationships are linked to the actualization of identity". Nejaime also notes that: "Lawrence constitutes a crucial moment in the developing shift toward recognizing that unequal treatment of same-sex relationships is unconstitutional sexual orientation discrimination" (p. 1218). A connection between same-sex relationships and lesbian and gay equality is supported also by Strasser (2004) and Glazer (2011). The latter notes that: "it seems reasonable to argue that Lawrence paved the way for successful same-sex marriage decisions".

apparent especially in the dissenting opinion of Justice Scalia,[77] which is the most direct and radical criticism[78] of the Court's opinion.[79] Here, the Justice's usual skepticism with regard to the constitutional principle of privacy is expressed in very aggressive terms. According to Scalia, the overruling of *Bowers* would entail a "massive disruption of social order", because:

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity are [...] sustainable in light of Bowers' validation of laws based on moral choices.

This is clearly a stronger position against same-sex couples, whereas Kennedy's opinion simply stated that the question involved "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle".

According to Scalia, Kennedy's opinion was a "bald unreasoning disclaimer". He concludes: "what justification could there possibly be for denying the benefits of marriage" to homosexuals?

Same-sex marriage had already made its appearance on the stage, becoming the new goal of gay rights activists, once the obstacle of sodomy laws had been removed. It is no coincidence that many cases which in the last years have attacked the DOMA as unconstitutional (starting from the recent decisions of the Federal Courts of Massachusetts, examined above) have identified precisely in *Lawrence* the starting point of that new approach to liberty and equality, which, on the one hand, made it possible to secure the protection of individual rights for homosexuals and, on the other hand, opened the debate on same-sex relationships.

The constitutional impact of *Lawrence* goes beyond the gay rights issue. The two fronts, symbolically represented by Kennedy and Scalia, fought also on the issue of whether the case-law and legislation of other countries was relevant to American constitutional law. Kennedy referred to a major decision of the Strasbourg Court in *Dudgeon* (1981), holding that bans on consensual homosexual conduct violated the fundamental human rights enshrined in the ECHR.[80]

Justice Scalia's dissent was clear-cut and original also on this point—according to Tribe, its tenor was 'anti-globalist'. Indeed, Scalia saw the Constitution as embodying "American conceptions of decency", not international ones; therefore,

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[77] As observed by Richards (2009, p. 168), although "*Lawrence* held that gay/lesbian sex may not be criminalized, not that gay/lesbian relationships must be accorded marriage rights. Justice Scalia may nonetheless be right that grounding the holding of *Lawrence* in the right of constitutional privacy [...] must have normative implications for the recognition of same-sex marriage".

[78] Or "ferocious criticism", according to Tribe (2008), p. 183. See also Friedman (2009), p. 338, who underlines that in his dissent, Scalia wrote that the decision was "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda".

[79] In fact, rather than being in favor of sodomy ban, Justice Thomas was persuaded that the legislator was entitled to decide whether to maintain it. On this point, see Tushnet (2005), p. 96.

[80] On this topic, see Bychkov Green (2011).

he regarded as a danger the fact that the Supreme Court thought of imposing foreign styles, trends, and opinions on Americans.

As is well known, this issue had emerged also at other times in the history of the case-law of the US Supreme Court, in both of the Court's opposing sides (i.e., conservative and liberal). Indeed, in his minority opinion in *Lawrence* Chief Justice Rehnquist had previously claimed that:

> constitutional law is [now] firmly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

For example, in *Roper v. Simmons* (2005), which concerned the application of death penalty to people under 18 years of age, the Supreme Court referred to values (especially human dignity) adopted in other countries in order to conclude that:

> the execution of individuals who were under 18 when they committed their capital crimes is prohibited by a combination of Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's ban on deprivation of life without due process of law.[81]

Again with regard to the application of death penalty, but this time to mentally retarded criminals, we should mention the decision in *Atkins v. Virginia* (2002), where the Court noted that executing "mentally retarded offenders is overwhelmingly disapproved [...] within the world community", an argument that Scalia considered "rhetorical". Finally, another reference to precedents set by the Constitutional Courts of other democracies can be found in *Washington v. Glucksberg* (1997), a case concerning physician-assisted suicide. In particular, the concurring opinion of Justice Souter referred to the fact that "in almost every western democracy [...] it is a crime to assist a suicide", and emphasized the risk of abuse under Dutch law.

The divide in the American constitutional debate seems irreversible also in this regard. The two extremes are reflected, respectively, in the position of L. Tribe and that of R. Bork. According to Tribe:

> it is hard to imagine that the attempt to isolate the American Constitutional thought from events elsewhere in the word will last very long or get very far. [...] the global mode of construction deserves a continuing place in the panoply of tools for making more concrete the norms that define the invisible Constitution.[82]

On the other hand, according to Bork (who was substituted by Anthony Kennedy after his appointment to the Supreme Court by President Reagan was not approved by the Senate)[83] there is a "New Class of militantly secular, eclectically socialist, faux intellectuals, [...] whose international agenda contains a toxic measure of anti-Americanism".[84]

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[81] Tribe (2008), p. 183.

[82] *Ibidem*, p. 189.

[83] On this case see Fisher (1988), pp. 139–140.

[84] Bork (2003), pp. 2–16.

As noted by Justice Breyer in his opinion in *Prinz v. United States*, despite the reference to foreign precedents, the Supreme Court interprets the Constitution of its own country, not that of other nations: it simply makes use of solutions and approaches belonging to a wider juridical context in order to examine problems that may have universal importance.

3.9 Beyond the Question of Powers and Federalism. Same-Sex Marriage and the Embarrassing (and, Perhaps, Not Entirely Correct) Comparison with the Precedent of the Interracial Marriage Ban (the *Loving* Case)

From the overview so far provided, which has included both gay rights and same-sex marriage cases, there emerges an irregular development in which different positions have encompassed all fields of constitutionalism.

More generally, the issue of same-sex marriage is extraordinarily multifaceted, almost a kaleidoscope of all the main conceptual categories of constitutional law (and of their conflicts) with regard to both rights and powers. This issue shows how these two sides affect each other, in the sense that the potential conflicts arising out of the great dilemmas concerning the application of the great constitutional values and the general clauses reflecting fundamental individual rights (dignity, equality, privacy, personal autonomy and liberty) have an impact on the issue of the division of powers, and, in their turn, the various decisions of the state and federal apparatus (i.e., legislative, judicial, and administrative institutions) fuel debate on the purposes of these clauses.

Whatever the issues related to federalism (such as the Full Faith and Credit Clause, the Tenth Amendment and the Spending Clause), the crucial arguments in favor or against same-sex marriage include: the principles of dignity, equal protection and anti-discrimination; the possibility to extend the right to marry beyond the traditional, subjective concept of marriage; and the consequences of a possible recognition of the rights of procreation and child-rearing for same-sex married couples.

The strongest and most widespread position is to treat same-sex marriage cases in the same way as previous cases on the prohibition of interracial marriage, which was declared unconstitutional by the Supreme Court in the famous case of *Loving v. Virginia* (1967).

This is an important and tragic analogy, especially for the history of American law. Anti-miscegenation laws, such as those on the segregation from public services, were the "poisoned fruit" of the tragedy of slavery. *Brown v. Board of Education and Loving* removed the last two formal "gears" of racial discrimination, thereby starting the long and complicated process that, through various desegregation cases, led to the Civil Rights Act, and the controversial strategy of affirmative

action—and we may say that Obama's presidency symbolically summarizes and concludes this process.

Considering gays and lesbians in the same was as black people and, similarly, regarding them as a suspect class means using an argument that admits almost no opposition, and that actually ends up condemning the defense of heterosexual marriage, putting it through an almost insuperable test of strict scrutiny.

However, is this argument really so obvious? I am not entirely convinced of this, for a very simple reason: the prohibition of marriage between whites and blacks was the mirror of a frightening ideology of racial superiority. Those who fought against interracial marriage and defended the anti-miscegenation laws wished to protect the superiority of the white race over the black minority. On the contrary, those who have opposed same-sex marriage do not necessarily think that gays and lesbians are inferior or immoral, but may simply be persuaded that marriage is traditionally linked to the two roles of man and woman, also with regard to its effects on procreation and child rearing.

In other words, the defense of heterosexual marriage might have no links with discriminatory ideas, but only reflect a particular vision of the institution of marriage.

Even leaving aside the comparison with *Loving*, and with the highest levels of discrimination, I believe that before claiming a fundamental right and alleging discrimination if that right is not recognized, it is essential to identify the content of such right.

In this case, is marriage an empty 'container', open to various uses? What is the relationship between marriage and procreation? Can gay/lesbian rights be suitably protected only by granting homosexuals access to marriage? There is no 'conclusive' answer to these questions. Or, at least, I do not have such an answer. I will expand on this in my final remarks.

3.10 *United States v. Windsor* and *Hollingsworth v. Perry*: The Final Turning Point. The US Supreme Court Declared Section 3 of DOMA Unconstitutional

In any case, the US Supreme Court has now written what is perhaps the final chapter of this intriguing history.

After all, the two cases heard on 26 and 27 March 2013 concerned the very essence of the issues discussed here: on the one hand, the relationship between State constitutions and the Federal Constitution and, on the other, the doubts concerning DOMA's constitutionality.[85] This last aspect was dealt with in the more significant of the two decisions.

[85] The question of whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection as applied to same-sex couples legally married under state law is also presented in the government's petition for a writ of certiorari in *United States Department of Health and Human*

A brief description of each case seems appropriate here—not only to follow the historical perspective of this chapter (which aims to outline the path that gradually led to the judgment in *Windsor*), but also to better understand the importance and consequences of the recent decision of the Supreme Court.

Hollingsworth v. Perry concerned a complex Californian story I will briefly summarize. In May 2008, the Supreme Court of California[86] ruled that the State Constitution guaranteed the fundamental right to marry to same-sex couples and invalidated a State Statute restricting civil marriage to opposite-sex couples. In response to this decision, a constitutional referendum was announced and approved, which introduced a provision (the famous Proposition 8) providing that "only marriage between a man and a woman is valid or recognized in California".

At the same time, gay and lesbian couples had full access to the legal incidents of marriage through domestic partnerships. The judicial response against the initiative for a constitutional amendment was immediate and direct and led a District Judge (Justice Vaughn R. Walker, from San Francisco) to hold Proposition 8 unconstitutional under the Equal Protection and Due Process Clauses of the 14th Amendment.[87] The case was tried in the Court of Appeals of the Ninth Circuit and then referred to the US Supreme Court.[88]

The second case on which the Federal Supreme Court was called to rule, and which led to the landmark decision of a few days ago, is *United States v. Windsor*. It focused on Section 3 of DOMA and, therefore, marriage as defined within the heterosexual paradigm. The plaintiff and his partner were legally married in Canada (State of Ontario) but domiciled in the State of New York, which, for tax purposes, does not recognize the marriage celebrated in Canada. Without entering into the facts of the case, which was referred to the US Supreme Court, it should be noted, in order to better identify the issues involved, that the position of the district court was as follows: even though the DOMA is sufficiently related to an interest of the government in ensuring the uniform distribution of federal benefits nationwide, this interest is illegitimate because under the Constitution it is the States and not the Congress that have the power to define 'marriage', including for Federal law purposes.

The new element in both cases was the Federal administration's position that any law or provision limiting or preventing same-sex marriage is unconstitutional. Indeed, according to the brief filed by Solicitor General Donald B. Verrilli Jr. (on 28 February 2013), the President and the Attorney General determined that

Services v. Massachusetts (filed 3 July 2012), and in the government's petition for a writ of certiorari before judgment in *Office of Personnel management v. Golinski* (filed same day).

[86] See *In re Marriage* cases, 183 P. 3d 384 (Cal. 2008).

[87] See *Strauss v. Horton*, 207 P. 3d 48 (Cal. 2009). It is interesting to note that the Court first found that gays and lesbians were the type of minority strict scrutiny was designed to protect and that strict scrutiny was the appropriate standard of review to apply to legislative classifications based on sexual orientation, but then ultimately held that Proposition 8 was unconstitutional under any standard of review, because proponents had failed to identify any rational basis for Proposition 8 in denying the right to marry to same-sex couples.

[88] On this case, see Conte (2012).

"classifications based on sexual orientation should be subject to heightened scrutiny for equal protection purposes". Their reasons were as follows:

(1) Gays and lesbians have "suffered a significant history of discrimination in this country", not only because, before *Lawrence*, criminal laws in many States prohibited their private sexual intimacy, but also as regards discrimination in a variety of contexts, including but not limited to employment, immigration, criminal violence and voter referenda[89];
(2) Sexual orientation "generally bears no relation to ability to perform or contribute to society"[90];
(3) Discrimination against gay and lesbian people is "based on an immutable or distinguishing characteristic" that defines them as a group; and
(4) Despite the fact that the situation has begun to change, it is undisputed that gay and lesbian people, as Proposition 8 itself underscores, are a minority group with limited power to protect themselves from adverse outcomes in the political process. In other words, the advancement of gay rights has resulted mainly from "judicial enforcement of constitutional guarantees", not political action, and:

> The recent history of marriage initiatives confirms that gay and lesbian people continue to lack any consistent or widespread 'ability to attract the favorable attention of the lawmakers.'[91]

The "heightened scrutiny" mentioned by the Administration is neither the strict scrutiny still reserved for laws that classify based on race or ethnicity (see the well-known *Korematsu* case), nor the rational basis review that in certain areas of federal law had already been considered sufficient to strike down the DOMA, but, rather, the so-called intermediate scrutiny. According to such scrutiny, the classification must be justified by a significant and appropriate purpose, whereas, in the case of a rational basis review, a rational connection to a legitimate governmental purpose is sufficient, and the burden of proving that a statute is unconstitutional falls on the parting challenging that statute.[92] In addition, an enhanced measure of protection

[89] U.S. Merits Brief (*Windsor*), p. 23. Concerning employment, the brief states that: "By the 1950s, based on Presidential and other directives, the federal government investigated its civilian employees for 'sexual perversion,' i.e., homosexuality. Until 1975, '[t]he regulations of the Civil Service Commission for many years ha[d] provided that [. . .] immoral or notoriously disgraceful conduct, which includes homosexuality or other types of sex perversion, are sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service" (p. 23). With regard to immigration, the brief noted that: "For decades, gay and lesbian noncitizens were categorically subject to exclusion from the United States on the ground that they were 'persons of constitutional psychopathic inferiority,' 'mentally . . . defective,' or sexually deviant" (p. 24). As for voter referenda: "Efforts to combat discrimination have engendered significant political backlash, as evidenced by a series of successful state and local ballot initiatives [. . .] repealing anti-discrimination protections for gay and lesbian people" (p. 26). See also Wintermute (1995).

[90] U.S. Merits Brief (*Windsor*), pp. 27ff.

[91] U.S. Merits Brief, cit., p. 33.

[92] See *Baker v. Carr*, 369 U.S. 186, 266 (1962).

must be provided where there is a higher risk that the classification may be the result of impermissible prejudice or stereotypes.[93]

It is important to briefly examine the observations of the Administration in the two cases: on the one hand, they represent a 'new mood' that is the outcome of a long, complex process of cultural and political development in the fields of gay rights and same-sex partnerships; on the other, they have certainly helped the US Supreme Court to become quickly aware of this 'new mood'.

To begin with, we should note that the precedent in *Lawrence* underlies this new position (not only on the part of the Administration, but also of 'lower' courts), at least for three main reasons: first, the premise that "sexual orientation is a core aspect of human identity, and its expression is an integral part of human freedom" (Brief); second, as mentioned above, the opportunity to rely on a "more searching form of rational basis review" (*Lawrence*); and third, the argument that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"(Justice Stevens in *Bowers*, quoted also in *Lawrence*).

At the same time, the similar precedent of *Baker v. Nelson* is set aside, since summary dispositions are "not of the same precedential value as would be an opinion of this Court treating the question on the merits" (*Hollingsworth v. Perry*).

Moreover, the Administration believed that none of the arguments supporting the DOMA or Proposition 8 would pass the test of heightened scrutiny, and some of them not even the 'more searching' rational basis standard, according to O'Connor's 'doctrine' in *Lawrence*.

The "proceeding with caution" argument was rejected, for the simple reason that: with regard to the DOMA, "there is nothing temporary or provisional about Section 3", which "contains no sunset provision" (US Merits Brief Windsor); with regard to Proposition 8, it "permanently amends the California Constitution to bar any legislative change to the definition of marriage" (US Government Amicus Brief (*Hollingsworth v. Perry*)); and this permanent amendment really contradicts the "step by step" approach.

The aim of protecting the traditional form of marriage can be 'catching' as well. In fact, the DOMA does not prevent States from recognizing same-sex marriages or partnerships. Moreover, according to the US briefs, the 'historical' argument can be dangerous, since it relies on notions found in *Bowers* that have now become useless and basically reflect the moral disapproval of homosexuality.

The point here is that constitutional language changes over time. It evolves and acquires new meanings according to the evolution of society.

Indeed, the US Amicus Brief states that: "reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles".

In *Windsor* and *Hollingsworth*, another argument opposing same-sex marriage is that decisions regarding the recognition of same-sex marriage must be left to the

[93] See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

democratic process. In other words, we should take into account the fact that Proposition 8 was the result of a voter initiative and that the US Congress passed DOMA by a large majority.

Yet, this is the classic dilemma of constitutional democracy. A quick answer is that constitutional principles are also a challenge to political and social majorities.

For sure, that is true and incontrovertible, but the issue is more complex, especially considering that the Constitution is made of visible and invisible parts, of formal elements and interpretations, which are the resources through which constitutional language can keep up with the flow of time and maintain relevance and the ability to have an impact on current issues. Therefore, it is not easy to determine what issues are constitutionally relevant, and who has the power to establish that.

The conflict between political process and judicial power, and between different levels of these two "institutional giants", is confined in this space; the Constitution is a fixed and unchangeable reference (according to constitutional originalism, or at least its most radical version), but there are also other factors that must be taken into account: constitutional ideas; the expansive force of principles; the fact that cases may be enlightening; and the pressure of cultural and social movements. This is especially true with regard to rights, or to the contents or implications of clauses such as equality and dignity, which are the outcome of a social as well as an individual struggle.

In any case, the Administration has come to the following conclusion concerning Section 3 of DOMA:

> Section 3 of DOMA violates the fundamental constitutional guarantee of equal protection. The law denies to tens of thousands of same-sex couples who are legally married under state law an array of important federal benefits that are available to legally married opposite-sex couples. Because this discrimination cannot be justified as substantially furthering any important governmental interest, Section 3 is unconstitutional (US Merits Brief in *Windsor*).

The Court eventually decided the cases, reaching different conclusions in each: in one case it refused to examine the merits, whereas in the other it accepted the claim of inconstitutionality of Section 3 of DOMA. The majorities in the two cases, moreover, were clearly asymmetric: in *Hollingsworth v. Perry* the opinion of the Court was delivered by Chief Justice Roberts, joined by Scalia, Ginsburg, Breyer and Kagan; in *Windsor*, however, Roberts and Scalia (together with Alito and Thomas, even though for different reasons) dissented from the opinion of the Court, which was delivered by Kennedy and supported by Ginsburg, Breyer, Sotomayor and Kagan.

This is a strange situation, and the foreseeable effects of the judgment also on Proposition 8 do not seem to justify the reversal between majority and dissenting positions within the Supreme Court.

But let me follow the order of events.

The outcome of the *Hollingsworth* (*Perry*) case was a 'procedural' decision. The US Supreme Court denied that the petitioners (who opposed same-sex marriage, asking the US Supreme Court "to decide whether the Equal Protection Clause

prohibits the State of California from defining marriage as the union of a man and a woman") had standing to appeal the District Court's order. As a consequence, the Supreme Court concluded that it did not have authority to decide the case on the merits and "neither did the Ninth Circuit".

The decision was far from obvious as regards the new constitutional principle. The Chief Justice himself wrote in the Court's opinion that: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here".[94]

According the Supreme Court, when a state's voters have approved new legislation or a new state constitutional amendment, and the State's own officials refuse to defend it in court, the sponsors of the ballot measure "have no personal stake in defending its enforcement that is distinguishable from the general interest of every citizen of California".[95]

The Supreme Court's majority decision focuses on Article III of the US Constitution, which establishes special requirements for justifying the intervention of Federal courts, in particular: the need to decide an actual case or controversy—as noted in the opinion of the Court, "those words do not include every sort of dispute, but only those historically viewed as capable of resolution through the judicial process"—and that the parties have suffered a concrete and particularized injury. Also this latter requirement was not met in this case.

It is not easy to foresee the practical consequences of this decision.

On the one hand, Proposition 8 is unaffected; therefore, under the Constitution of California access to marriage is still limited to people of the opposite sex. This seems in line with that part of the *Windsor* decision where the Supreme Court emphasized that the competence on marriage and family matters has traditionally lied with the individual states. In other words, also Proposition 8 is a result of a political process, and it must be complied with, just like state legislation allowing same-sex marriage is complied with.

This is also consistent with another passage of the opinion of the Court, where Chief Justice Roberts underlines the connection between a strict (and thus 'negative') interpretation of standing requirements and the need "to ensure that we act as judges, and not engage in policymaking properly left to elected representatives".[96]

For sure, the opinion of the Court does not mention the question of how Judge Walker's injunction should be applied. This means that such injunction remains in effect the law of the case,[97] also because the US Supreme Court concluded that the

[94] 570 U.S., 26 June 2013, p. 17.

[95] *Ibidem*, p. 8. Contra, see the dissent of Justice Kennedy (570 U.S., 2013, dissenting, p. 14), which sustain that "In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying...".

[96] *Ibidem*, p. 2.

[97] See Lederman (2013).

Ninth Circuit was without jurisdiction to consider the appeal: its judgment "is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction".[98] As noted by Justice Kennedy in his dissenting opinion, "the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed".

There is no doubt, then, that the two same-sex couples who sued in the case were entitled to the marriage licenses they requested. But what about all the other same-sex couples in California?

In my opinion, there cannot be automatic effects. Other officials (i.e., county clerks) may keep on refusing to grant these benefits pursuant to Proposition 8, which remains the constitutional provision in force in California.[99]

Nevertheless, three factors seem to undermine California's status as a non-marriage-equality state[100]: the now explicit claim that Proposition 8 of the State jurisdiction is unconstitutional, the US Supreme Court's denial of standing in *Perry* and, at the same time, its observations on DOMA's unconstitutionality in *Windsor*. It is very unlikely that state officials (including the Governor and the Attorney General) will decide to take a position that can be successfully challenged before state courts, as well as district courts and circuit courts.

In *Windsor*, the US Supreme Court accepted to bear the burden of a decision on the merits; it declared Section 3 of DOMA unconstitutional; and, despite basing its reasoning on the protection of the competence of individual states as regards family and marriage matters, it strongly asserted the connection between same-sex marriage, personal dignity and equality, and the conclusions reached in previous cases (e.g., *Lawrence*) with regard to individual gay rights.

Also in this case, however, the judgment does not seem decisive. As we will see, it does not create a constitutional obligation to fully recognize homosexual marriage, and each state is free to choose whether to define marriage only as the union of a man and a woman.

Let me examine in detail the arguments of the Court.

The basic premise of the majority opinion is linked to the issue of the division of powers between the Federation and the States. Since the competence on marriage, family, and their implications (including the minimum age for marriage, consanguinity, and other requirements) has traditionally been reserved to the States, DOMA "disrupts the federal balance", and "departs from this history and tradition of reliance on state law to define marriage".

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[98] *Ibidem*, p. 17.

[99] Also the Supreme Court, in a sentence of the majority opinion (*ibidem*, p. 3), seems to highlight that the officials in charge of applying the Judge Walker's injunction should be those "named as defendants" in the case.

[100] At present, the "marriage equality States" are: Connecticut, Delaware (where a new law took effect on 1 July 2013), Iowa, Maine, Maryland, Massachusetts, Minnesota (where a new law will take effect on 1 August 2013), New Hampshire, New York, Rhode Island (where a new law will take effect on 1 August 2013), Vermont, Washington, and District of Columbia. See Lederman (2013).

Moreover, the main problem lies in the general, absolute nature of Section 3 of DOMA. On the one hand, the Court acknowledges that the Federal Congress has the power to make determinations that have a bearing on marital rights and privileges, but only through specific, limited measures. On the other, it maintains that the DOMA "has a far greater reach", since it enacts a directive concerning social security, housing, taxes, criminal sanctions, and veterans benefits that is "applicable to over 1,000 federal statutes and the whole realm of federal regulations". In other words, the Act does not only amend or harmonize state family law with a number of important federal laws (e.g., immigration law), but, in many ways, it ends up in blocking legislative measures that the individual states are free to introduce (e.g. the recognition of same-sex marriage).

Besides, the issue of the division of powers is intertwined with and strengthened by the rights discourse. For this reason, the review concerns whether Section 3 of DOMA violates the Fifth Amendment.

When State competence is violated, "a class of persons that the laws of New York, and of 11 other States, have sought to protect"[101] is unreasonably affected. The Supreme Court expressly attacks the decision of the legislature, even though, in order to do so, it provides an interpretation of the purposes of the DOMA that seems far-fetched. In its eyes, these purposes cannot consist only in the expression of "a moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality".[102]

However, the two perspectives remain closely connected, which may be a way to make the decision more acceptable in a social and cultural context that is still sharply divided on this issue. The Fifth Amendment thus represents a framework allowing the states that oppose same-sex marriage some scope for action and, as already noted by Scalia in his dissenting opinion, this issue must be addressed by the democratic process. According to the Court, the DOMA (1) "is unconstitutional as a deprivation of the liberty of the person"; (2) "*demeans the couple, whose moral and sexual choices the Constitution protects*" (it's important, here, the reference to Lawrence); and (3) "*humiliates tens of thousands of children now being raised by same-sex couples*". The couples to which *Windsor* refers are, however, those "*whose relationship the State has sought to dignify*", and the persons suffering a 'deprivation of liberty' are "*those persons who are joined in same-sex marriages made lawful by the State*".[103]

To sum up, once a State has recognized same-sex marriage, no Federal law can annul that legislative decision, refusing to grant a certain class a status that the State finds to be dignified and proper and, thus, "creating two contradictory marriage regimes within the same State".[104]

[101] *Ibidem*, p. 16.
[102] *Ibidem*, p. 21.
[103] *Ibidem*, p. 25.
[104] *Ibidem*, p. 22.

This means that the ruling on the unconstitutionality of Section 3 of DOMA will have an impact on the States that have already allowed same-sex marriage, since access to federal benefits will no longer depend on the status of 'spouse'. By contrast, the decision will have no direct, immediate impact on the states that do not recognize homosexual marriage (still the majority of states) and that use a legislative parameter which duplicates the DOMA at the State level.

The fact that the doctrine of equality is combined with that of 'family/marriage federalism' probably means that the so-called 'traditionalist' states are not obliged to allow and recognize same-sex marriage.

However, what happens if a same-sex couple, legally married in a State that allows it, wants to transfer their domicile, for work or other reasons, in a State that prohibits same-sex marriage?

In this case, there is a conflict between two fundamental principles of the Federal system: on the one hand, the power of individual states to decide issues that are so delicate from an ethical and social point of view; on the other hand, the freedom of movement, which seems to imply that all citizens can move from one state to another, taking their rights and fundamental freedoms with them.

Quite clearly, the question has not been fully resolved, and it will probably be dealt with at other levels, starting with lower courts. As noted by Roberts in his dissenting opinion:

> While the state's power in defining the marital relation is of central relevance to the majority's decision to strike down DOMA here, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions [. . .]

Moreover, the US Supreme Court did not made any explicit observation on Section 2 of DOMA, which gives the States the right to refuse to recognize same-sex marriages performed in other States.

3.11 Final Remarks: Some Doubts Concerning Same-Sex Marriage, the Anti-Discrimination Principle, and Homosexual Parenting

To sum up, after the recent decisions of the US Supreme Court, same-sex marriage is a constitutionally legitimate option, and individual States are free to legalize and regulate it. Moreover, it is an option that, once adopted, cannot be limited by Federal law.

This is now the prevailing position in the legal and political culture of the United States, and we feel that it will gradually become widespread also in the states that have not yet fully acknowledged it in their laws.

Furthermore, it should be noted that this is a global trend, as shown by the case of France and by the recent decisions of the ECtHR on same-sex parenting.

In this regard, I would like to make some final observations concerning the 'irresistible' rise of the issue of same-sex marriage. I will try to proceed in order. First of all, I believe that same-sex couples deserve, or rather, are entitled to have their relationships legally recognized. Certain rights, benefits, and consequences are always part of the decision of two people, whether of the same or the opposite sex, to live together, to create a loving environment, to be mutually responsible for each other, and to share an intimate and sexual relationship.[105]

This position has been expressed also by the Italian Constitutional Court, even though the constitutional validity of the heterosexual paradigm of marriage has been, in my view, confirmed. To my mind, regulating same-sex unions through an institution other than marriage, as is often the case in many countries, does not constitute discrimination. According to Nussbaum, as well as to some Federal Courts, that is a second-class status,[106] but I think that it is just a different *status*, not necessarily second-class or less important.

There is an obvious objection to this point of view: why not marriage? If marriage is a fundamental right, why should it be denied to homosexuals? That marriage is a fundamental right is an absolutely uncontested truth, and even a commonplace assertion. With regard to American law, let it suffice to recall that in a number of famous cases (such as *Turner v. Safley*, *Loving v. Virginia*, *Skinner v. Oklahoma*, and *Zablocky v. Redhail*) the marriage was considered "a fundamental right" or "a basic right", crucial to our very existence and survival. What I do not believe—or, at least, what I do not see as an automatic, mandatory next step—is that everyone is entitled to the right to marry, that it belongs to the individual as such, and that everybody can marry everybody, whether a person of the same or the opposite sex.

I do not think that this matter can be addressed in terms of opposite constitutional options. The statements on the right to marry refer (at least in the American case-law) to a particular form of marriage. In fact, marriage is not only an individual right, but also an institution based on a series of principles, structural elements, and requirements that, so far, have been typical of the traditional model of marriage.

I concede that some people might consider this point of view as a "circular"[107] or tautological argument. Yet, on the other hand, also the argument that denying marriage to homosexuals constitutes discrimination based on personal circumstances (i.e., sexual orientation) appears to be self-referential in that, as far as legal reasoning is concerned, its premise should actually be a conclusion: marriage is an institution that can be modified on the basis of the development of social customs and cultural forces; it is an "empty shell", undefined and therefore open to any 'reconstruction'[108] or 'deconstruction'.[109]

[105] Nussbaum (2010), pp. 1–2.

[106] *Ibidem*, p. 10.

[107] See Eskridge (1993), pp. 1419 and 1495.

[108] See also Novak (2010), p. 713.

[109] For an in-depth analysis, see Lee (2010), pp. 126–127.

I also think that there is another aspect that should be carefully considered in connection with the possible recognition of same-sex marriage: the relationship between marriage, procreation and child rearing.

Of course, family and marriage do not necessarily imply procreation and parenthood (couples may choose not to have children, or they may be prevented from doing so because of a physical condition or because they do not satisfy certain legal requirements, as in the case of adoption); otherwise, it would be easy to maintain that "marriage never has been limited [. . .] to the fertile, or even those of an age to be fertile".[110]

Nevertheless, this is an important connection; family, marriage, and parenting represent a 'preferred' progression, or at least an important one also in terms of mutual interaction.

If this is true, once we recognize that marriage is an institution constitutionally open to same-sex relationships, we have to draw some consequences with regard to these couples' child-rearing. Saying that no parental relationship is required in order to protect marriage as a fundamental right is one thing; saying that there should not be a parental relationship, that it should be prohibited, that the main elements of a legal institution (i.e. marriage) can (or rather, must) take different and not necessarily related forms is another thing.

Accepting same-sex marriage raises the issue of accepting same-sex parenting (of course, in its legal forms, such as adoption and medically assisted procreation), or that of finding a rational justification for denying parenting rights only in the case of this specific kind of marriage.

Do we want this? Do we think that the prohibition of homosexual parenting (along with the same-sex marriage ban) is no longer reasonable or rationally justifiable? Do we think that the presence or the absence of different (in terms of gender) parental figures is essentially irrelevant for the purpose of parenting?

In this case, marriage and parenting are not and cannot be the same thing, especially because on this second level of the debate there is a new question to be taken into consideration: the child, and his or her best interests, is crucial to the legal definition of parenting relationships. Therefore, we cannot address this problem only with regard to the rights 'of existing and future parents'.

The link between procreation and heterosexuality is truly and objectively 'natural', and I don't know whether the law can completely do without its natural reference points (what we often call "the nature of things") and thus become a purely technical activity, capable of modelling any institution or relationship.[111] On the other hand, there is no proof that removing the 'legal' requirement of the two traditional parental figures is not relevant to the need of a harmonious development of the child's personality in all its aspects.

[110] Nussbaum (2010), p. 679.

[111] For similar observations, see Novak (2010), p. 715.

It is true that the ECtHR, since its 1999 decision in *Salgueiro*, has maintained that (homo)sexual orientation is not sufficient to reject a fostering application, and that same-sex couples can be considered fully capable of child-rearing.[112]

So far, however, the Court has always dealt with cases where the child was the son of one of the same-sex partners, which is different from granting a same-sex couple the right to adopt or to access assisted reproduction.[113]

Obviously, I do not dispute the sensitivity and the affective ability to educate that same-sex couples may have or not in comparison with heterosexual couples. The problem is more general and concerns the suitability of a parental structure of this type (in this social and cultural context) in relation to the development of the child's personality; on this point, doubts and uncertainties are still strong, as shown by the psycho-pedagogical literature.

This is the last in a series of arguments that can no longer justify the uniqueness of heterosexual marriage and that oppose the last step in the gay rights strategy: same-sex marriage.

However, this seems to apply more in Europe, where there is a certain way of connecting marriage, the family, and child protection—which is reflected also in the Italian Constitution, in particular Art. 29 (on the family as the natural society based on marriage), 30 (responsible procreation and the rights and duties of parents and children) and 31 (promotion and protection of families, especially large ones).

As for the American debate, a fact is undeniable. In recent cases, the argument based on marriage as a stable institution for responsible procreation and child rearing has been easily overturned, by noting that in many States same-sex couples have the same parental rights as married heterosexual couples (they can adopt and can access assisted procreation). For this reason, Proposition 8 and the DOMA neither promote child rearing by married opposite-sex couples, nor prevent same-sex parenting.

In addition to the argument of the inconsistency of the law or that of its inability to achieve the aim pursued, it has been more and more recognized that "no sound basis exists for concluding that same-sex couples who have committed to marriage are anything other than fully capable of responsible parenting and child-rearing", and that "children raised by gay and lesbian parents are as well adjusted as children raised by heterosexual parents".[114]

If also this distinction is dropped, the question of State competence will no longer be center stage, since there will be no reasonable legal obstacles to same-sex marriage, which could thus become, as noted by others, constitutionally unavoidable.[115]

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[112] See, recently, *X* et al. *V*. *Austria*, n. 19010/07, 19th February 2013 on which see the chapters by Crisafulli and Pustorino in this volume.

[113] This distinction can be found also in Novak (2010), p. 718.

[114] Brief Administration, case *Windsor*, 42-43.

[115] Tribe (2011) states "in the end the Court must do its duty and recognize a right to same-sex marriage. There is no other way".

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