

Baker v. Nelson: Flotsam in the Tidal Wave of Windsor's Wake¹

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INTRODUCTION

In June 2013, the Supreme Court of the United States issued rulings in two cases dealing with issues of same-sex couples' constitutional rights to marry and to have their marriages recognized. In *Hollingsworth v. Perry*, the Court failed to reach the merits of the question whether California's initiative that amended the state constitution to strip same-sex couples of their right to marry violated the Constitution of the United States; instead, the Court dismissed the case because the ballot sponsors attempting to appeal their losses in the federal district court and court of appeals lacked standing under Article III of the U.S. Constitution. In *United States v. Windsor*, the Court held unconstitutional Section 3 of the so-called Defense of Marriage Act (DOMA), which had purported to define "marriage" for federal law purposes as a "union of one man and one woman," requiring the federal government to ignore the marriages many same-sex couples had by then entered in various U.S. states or other countries.

In *Windsor's* wake, we have seen a metaphoric "tidal wave" of litigation,³ in every state that still exclude same-sex couples from marriage as well as Puerto Rico, brought by same-sex couples seeking the right to marry under the Due Process and/or Equal Protection Clauses of the Constitution. As of the writing of this Article, the cases that have ruled on preliminary or final relief for same-sex couples seeking to secure the right to marry or to live their lives as a married couple in their home states after marrying elsewhere have unanimously ruled in favor of marriage equality/same-sex couples' access to civil marriage.

Part I of this Article sketches the virtually unbroken string of pro-marriage decisions since *Windsor* to give a sense of the size and magnitude of this "tidal wave" of precedent. Next, Part II briefly explores some of the reasons that might help account for the flood of litigation and overwhelmingly positive outcomes. Part III tentatively suggests one way this flow of decisions in favor of marriage equality might influence the Supreme Court when it returns to the issue and then shows one particular aspect of *Windsor's* wake: the way it has helped lower federal courts unanimously conclude that doctrinal developments after the Supreme Court summarily rejected a same-sex couple's constitutional claims to a right to marry in *Baker v. Nelson* in 1972⁴ have rendered that

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³ *Bourke v. Beshear*, ___ F. Supp. 2d ___, 2014 WL 556729, at *2 (W.D. Ky. Feb. 12, 2014).

⁴ *Baker v. Nelson*, 409 U.S. 810 (1972).

decision no longer dispositive. Although *Baker* would in no event prevent the Supreme Court itself from revisiting the constitutional issues, the ability to declare *Baker* doctrinally undermined has positive repercussions for the social equality and lived reality of same-sex couples across the country in the mean time. Finally, Part IV of the Article addresses some of the ways in which *United States v. Windsor* itself developed constitutional doctrine in ways that advance the cause of constitutional justice and same-sex couples' rights to equal protection and to marry.

I. THE TORRENT OF *WINDSOR'S* WAKE

United States v. Windsor was decided June 26, 2013. Less than a month later, on July 22 a federal court Ohio in *Obergefell v. Kasich*, relying on *Windsor* and the Equal Protection Clause of the Fourteenth Amendment, granted a preliminary injunction requiring the state to recognize the Maryland marriage of an Ohio couple, one of whom was terminally ill.⁵ On September 27, a New Jersey court in *Garden State Equality v. Dow* relied on *Windsor* to hold that civil unions failed to provide same-sex couples the full equality required by the state constitution⁶; when New Jersey chose not to appeal, marriage equality became the law in the Garden State. On December 10, a federal court in Illinois in *Lee v. Orr*, following an earlier decision for one couple, relied on *Windsor* and the Equal Protection Clause to grant a temporary restraining order and a preliminary injunction requiring Illinois to let a class of medically critical plaintiffs marry in advance of the July 1 effective date for the new state law allowing same-sex couples to marry.⁷ Just over a week later, on December 19, New Mexico's high court relied on *Windsor* to hold in *Griego v. Oliver* that the state constitution's Equal Protection Clause required same-sex couples be allowed to marry.⁸ The next day, December 20, a federal court in Utah in *Kitchen v. Herbert* relied on *Windsor* to grant summary judgment on federal equal protection and due process claims requiring the state to let same-sex couples marry and to recognize their marriages from other jurisdictions,⁹ resulting in hundreds of couples marrying there before the U.S. Supreme Court eventually stepped in to stay the judgment pending appeal. Three days later, on December 23, the same federal judge in Ohio who ruled in *Obergefell v. Kasich*, now acting under the case name *Obergefell v. Wymyslo (Obergefell II)*, granted a declaratory judgment & permanent injunction requiring Ohio to recognize marriages of same-sex couples from other states on death certificates, a conclusion which Judge Timothy Black said "flow[ed] from the *Windsor* decision of the United States Supreme Court."¹⁰

After the public enjoyed a break for the holidays, on January 14, 2014, a federal court in Oklahoma decided *Bishop v. U.S.*, granting summary judgment in favor of the

⁵ *Obergefell v. Kasich*, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013).

⁶ *Garden State Equality v. Dow*, 82 A.3d 336, 368 (N.J. Super. Sept. 27, 2013).

⁷ *Lee v. Orr*, 2013 WL 6490577, at *1-2 (N.D. Ill. Dec. 10, 2013).

⁸ *Griego v. Oliver*, 316 P.3d 865, 871-72 (NM 2013).

⁹ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1188, 1193-94 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

¹⁰ *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 973 (S.D. Ohio 2013).

plaintiffs challenging the state's marriage exclusion laws, citing *Windsor*.¹¹ Less than a month later, on February 12 a federal court in Kentucky in *Bourke v. Beshear* relied on *Windsor* and granted the plaintiff couples final judgment requiring the state to recognize valid marriages of same-sex couples from other jurisdictions as a matter of federal equal protection law.¹² The next day, a second federal court gave the country a Valentine's present: On February 13, a Virginia federal court granted the plaintiffs summary judgment in *Bostic v. Rainey*,¹³ the marriage case joined by Prop 8-challenging attorneys Ted Olson and David Boies. It ruled, again relying on *Windsor*, that the Constitution requires Virginia to let same-sex couples marry and to recognize their marriages from other jurisdictions.¹⁴ A week and a half later, on February 21 a federal court in Illinois granted unopposed final summary judgment in *Lee v. Orr II*, requiring the state to allow marriage for all gay and lesbian couples in Cook County immediately, not July 1 when the state legislature's new law opening civil marriage to same-sex couples was to go into effect.¹⁵ Less than a week later, on February 26, a federal court in Texas in *de Leon v. Perry* relied on *Windsor* to grant the plaintiffs a preliminary injunction requiring the state to allow same-sex couples to marry and to recognize such marriages from other jurisdictions.¹⁶ Less than two and a half weeks after that, on March 14, a federal court in Tennessee in *Tanco v. Haslam* invoked *Windsor* in granting a preliminary injunction requiring interstate recognition of validly contracted marriages of three same-sex couples.¹⁷ The week after that, a federal court in Michigan ruled on March 21 in *DeBoer v. Snyder*, citing *Windsor* and granting the plaintiffs a permanent injunction requiring marriage (and it seems recognition of marriages from other jurisdictions)¹⁸ following a trial that eviscerated the junk science of Mark Regnerus.¹⁹

Three weeks plus a weekend later, on April 14, the same judge of the U.S. District Court for the Southern District of Ohio who ruled in the *Obergefell* litigation relied on *Windsor* and granted permanent injunctive relief in *Henry v. Himes* against any enforcement of Ohio's laws refusing to recognize valid marriages of same-sex couples contracted elsewhere, concluding that the state's marriage recognition ban "is facially

¹¹ Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252, 1258, 1279, 1288, 1294, 1296 (N.D. Okla. 2014), aff'd sub nom. Bishop v. Smith, ___ F.3d ___, 2014 WL 3537847 (10th Cir. July 18, 2014).

¹² Bourke v. Beshear, 2014 WL 556729, at *1, *6-8 & n.14, *12 (W.D. Ky. Feb. 12, 2014).

¹³ Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014).

¹⁴ Bostic, 970 F. Supp. 2d at 483-84, 475-76.

¹⁵ Lee v. Orr (II), 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014).

¹⁶ de Leon v. Perry, 975 F. Supp. 2d 632, 639-40, 655, 659, 662 (W.D. Tex. 2014).

¹⁷ Tanco v. Haslam, ___ F. Supp. 2d ___, 2014 WL 997525, at *1-2, *5-6 (M.D. Tenn. Mar. 14, 2014). See also Tanco v. Haslam, 2014 WL 1117069 (M.D. Tenn. Mar. 20, 2014) (denying defendants' motion for stay pending appeal).

¹⁸ DeBoer v. Snyder, 973 F. Supp. 2d 757, 759, 774 (E.D. Mich. 2014).

¹⁹ DeBoer, 973 F. Supp. 2d at 765-66 ("The Court finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration.").

unconstitutional and unenforceable in any context whatsoever.”²⁰ Four days after that, relying on *Windsor* for both standing and its merits analysis, a federal court in Indiana granted a TRO requiring the state to recognize an out-of-state marriage of a lesbian couple one of whom was diagnosed with terminal cancer, in *Baskin v. Bogan*.²¹ The court extended this to a preliminary injunction on May 8, relying on *Windsor* and post-*Windsor* district court decisions to find a likelihood of success.²² Five days later, a federal magistrate judge ruled Idaho’s marriage exclusion laws unconstitutional in *Latta v. Otter*, again relying on *Windsor*.²³ Less than a week later, a different federal trial judge in Utah relied on *Windsor* and preliminarily enjoined the state from denying recognition to those same-sex couples married lawfully between *Kitchen v. Herbert* and the Supreme Court’s issuance of a stay of that judgment.²⁴ The same day as *Evans*, a federal district court in *Geiger v. Kitzhaber* relied on *Windsor* and held Oregon’s marriage exclusions unconstitutional.²⁵ The next day, a federal district court relied on *Windsor* in ruling in *Whitewood v. Wolf* that Pennsylvania’s marriage exclusions were unconstitutional.²⁶

Two and a half weeks later, on June 6 in a different *Wolf* case, *Wolf v. Walker*, a federal court invoked *Windsor* and held Wisconsin’s marriage exclusions unconstitutional.²⁷ Less than three weeks later the federal court in *Baskin v. Bogan* extended the preliminary injunction against Indiana’s marriage exclusions to a permanent injunction.²⁸ The same day, the U.S. Court of Appeals for the Tenth Circuit affirmed *Kitchen v. Herbert* by a two-to-one vote, the majority relying on *Windsor*.²⁹ Six days later, on July 1 the federal court that ruled in *Bourke v. Beshear* extended its holding from interstate recognition to the right to enter into marriage in Kentucky, holding in the

²⁰ Henry v. Himes, ___ F. Supp. 2d ___, 2014 WL 1418395, at *6, *9-10, *12 (S.D. Ohio Apr. 14, 2014). The court did allow the parties to brief whether or not this injunction should be stayed pending appeal, *id.* at *18 n.27, and on April 16 granted such a stay of the facial invalidation but not of the injunctive relief as applied to the specific plaintiff couples. Henry v. Himes, 2014 WL 1512541, at *1-2 (S.D. Ohio Apr. 16, 2014).

²¹ Baskin v. Bogan, ___ F. Supp. 2d ___, 2014 WL 1568884, at *1 (S.D. Ind. Apr. 18, 2014) (facts and holding); *id.* at *2 (standing); *id.* at *3-4 (merits).

²² Baskin v. Bogan, 983 F. Supp. 2d 1021, 1023, 2026 (S.D. Ind. 2014).

²³ Latta v. Otter, ___ F. Supp. 2d ___, 2014 WL 1909999, at *1, 18, 21, 24, 26, 28 (D. Idaho May 13, 2014).

²⁴ Evans v. Utah, ___ F. Supp. 2d ___, 2014 WL 2048343, at *1-2, 8, 21 (D. Utah May 19, 2014).

²⁵ Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1139, 1147-48 (D. Oregon May 19, 2014).

²⁶ Whitewood v. Wolf, 992 F. Supp. 2d 410, 421, 424-26, 431 (M.D. Pa. May 20, 2014).

²⁷ Wolf v. Walker, 986 F. Supp. 2d 982, 986-87, 990-91, 1010, 1015, 1017-18, 1023-24 (W.D. Wisc. June 6, 2014).

²⁸ Bogan v. Baskin, ___ F. Supp. 2d ___, 2014 WL 2884868, at *15-16 (S.D. Ind. June 25, 2014).

²⁹ Kitchen v. Herbert, 755 F.3d 1193, 1199, 1213-16, 1226, 1228 (10th Cir. June 25, 2014).

poetically named *Love v. Beshear* that the state's marriage exclusion violated the Equal Protection Clause of the U.S. Constitution.³⁰

Less than three weeks later, on July 18 the same Tenth Circuit Court of Appeals panel majority that struck down Utah's marriage exclusions continued the summer loving, holding Oklahoma's marriage exclusions unconstitutional in *Bishop v. Smith*.³¹ Ten days later, the U.S. Court of Appeals for the Fourth Circuit became the second federal appeals court to hold state marriage exclusions unconstitutional, relying on *Windsor* and ruling two-to-one in *Bostic v. Schaefer* that Virginia's exclusion of same-sex couples from civil marriage, like its earlier exclusion of different-race couples, violated the fundamental right to marry protected by the U.S. Constitution.³² Three and a half weeks later, in the final marriage ruling before Labor Day 2014, a federal district court also invoked *Windsor* and granted same-sex couples a preliminary injunction against enforcement of Florida's marriage exclusions.³³

II. EXPLANATIONS FOR *WINDSOR'S* WAKE

Why are we seeing what the Kentucky decision in *Bourke v. Beshear* called "a virtual tidal wave of ... judicial judgments in other states [that] have repealed, invalidated, or otherwise abrogated state laws restricting same-sex couples' access to marriage and marriage recognition"?³⁴ Why are we seeing so much litigation and such uniformly positive results? The answers are probably overdetermined.

The post-*Windsor* precedential landscape may seem more striking due to the seeming rapidity with which it has been shaped by the lower courts – dozens of rulings with victories for marriage equality within fourteen months after *Windsor*. Some of this speed is genuine. Cincinnati couple James Obergefell and John Arthur flew to Maryland to marry on July 11 and secured a TRO July 22³⁵; on September 26 an Ohio funeral director joined the suit as a plaintiff to broaden the scope of the litigation and eventual relief.³⁶ The plaintiffs in the Illinois, Kentucky, Virginia, Tennessee, New Mexico, and Utah cases I described all filed their suits no earlier than the U.S. Supreme Court's arguments in the marriage cases March 2013. Other cases, however, preceded the Supreme Court's consideration of *Windsor*. The original complaint in the Michigan case was filed in 2012; the New Jersey case in 2011; and the Oklahoma suit was filed in 2004. *Windsor* may thus be seen as an accelerator for these cases.

³⁰ *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. July 1, 2014).

³¹ *Bishop v. Smith*, ___ F.3d ___, 2014 WL 3537847 (10th Cir. July 18, 2014).

³² *Bostic v. Schaefer*, ___ F.3d ___, 2014 WL 3702493, at *1, 10-11 (4th Cir. July 28, 2014).

³³ *Brenner v. Scott*, ___ F. Supp. 2d ___, 2014 WL 4113100, at *1, 10 (N.D. Fla. Aug. 21, 2014).

³⁴ *Bourke v. Beshear*, 2014 WL 556729, at *2 (W.D. Ky. Feb. 12, 2014).

³⁵ *Obergefell v. Kasich*, 2013 WL 3814262, at *1-2 (S.D. Ohio July 22, 2013).

³⁶ See Second Amended Complaint for Temporary Restraining Order and Declaratory and Injunctive Relief, *Obergefell v. Wymyslo*, Case No. 13-cv-501 (S.D. Ohio Sept. 26, 2013), <http://www.clearinghouse.net/chDocs/public/PB-OH-0003-0005.pdf>.

Although some of this litigation pre-dated *Windsor*, why are we seeing *so much* now – sixty cases pending in thirty states or territories? The motivations of same-sex couples offer a partial explanation. Many same-sex couples want to marry. They want to secure the legal protections for their relationship, and for the children that many are raising, that marriage affords. Like Indiana marriage plaintiffs Lane Stumler and Michael Drury, they are sick of being treated as second-class citizens by governments that are supposed to serve us all:

Stumler, 66, said he is now motivated to stand up for his rights after seeing gay rights openly discussed each day in the media debating “my worth as a human being or trying to decide [if] the DNA I was born disqualifies me from being equal to everyone else.”

Drury said public opinion has evolved to be more accepting of same-sex couples, and he is ready for Indiana leaders to catch up.³⁷

They are sick of waiting, and they believe that justice delayed is justice denied. For example, as one news story reported:

[Another Indiana marriage plaintiff Jo Ann] Dale said *U.S. vs. Windsor* has caused a lot of confusion for same-sex couples trying to understand what their rights are, and it's made some in Indiana impatient with the state's stand against gay marriage.

“Right now is the time,” she said. “Let's clear it up. Let's get it straightened out. Let's make sure it is the same understanding everywhere.”³⁸

Part of the wave of marriage equality litigation can be explained as the concerted effort of national advocacy organizations, loosely comparable to the campaign against segregation waged by the NAACP.³⁹ In the words of the ACLU: “Following our victory last June in the *Windsor* case at the Supreme Court, which largely ended federal marriage discrimination, ... the ACLU has been organizing legislative and ballot initiatives and also building lawsuits across the country – so far in Pennsylvania, Virginia, North Carolina, and Oregon – to ensure that the case that reaches the Supreme Court next leads to the nationwide solution we are all working so hard for.”⁴⁰

³⁷ Gary Popp, Eight plaintiffs challenge Indiana's gay marriage ban in lawsuit filed Friday, News and Tribune, Mar. 7, 2014, <http://www.newsandtribune.com/local/x1974695570/Same-sex-couples-sue-state-of-Indiana> (on file with Indiana Journal of Law and Social Equality).

³⁸ *Id.*

³⁹ *Cf., e.g.,* Jennifer Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 8-12 (2000), <http://scholarship.law.wm.edu/wmjowl/vol7/iss1/3> (describing NAACP campaign to overturn segregation).

⁴⁰ John M. Becker, Six Couples Sue to Overturn Florida Marriage Ban, Bilerico, Jan. 21, 2014, http://www.bilerico.com/2014/01/six_couples_sue_to_overturn_florida_marriage_ban.php.

And the advocacy organizations have understandably filed suits in many states that offer same-sex couples *no* relationship recognition following the seemingly baffled responses of several Justices at oral argument in the Prop 8 case *Perry* to suggestions that it rule narrowly that it is unconstitutional for states to offer same-sex couples everything but the official status of “marriage.” Justice Kennedy, for example, when Ted Olson asked the Court to invalidate all marriage bans, suggested:

The rationale of the Ninth Circuit was much more narrow. It basically said that California, which has been more generous, more open to protecting same-sex couples than almost any State in the Union, just didn't go far enough, and it's being penalized for not going far enough.

That's a very odd rationale on which to sustain this opinion.⁴¹

Justices Alito, Roberts, Ginsburg, Breyer, and Sotomayor all expressed similar sentiments. I believe this line of questioning reflected confusion between conditions sufficient for a marriage regime's unconstitutionality and conditions *necessary* for unconstitutionality. That is, those challenging California's Proposition 8 were not arguing that it was *necessary* to the unconstitutionality of a state's relationship recognition laws that they offer same-sex couples all the same legal consequences but withhold the designation “marriage.” Rather, they were arguing that the existence of a parallel domestic partnership status under state law showed that the state had no functional justification for denying same-sex couples access to civil marriage and so *sufficed* to make California's marriage exclusion unconstitutional. Be that as it may, the reactions of the Justices make sensible the targeting of states that do *nothing* for same-sex couples and their families for constitutional challenges after *Perry* and *Windsor*.

Moreover, the successes in *Windsor's* wake are themselves breeding further litigation: “Courts throughout the country are recognizing that this is an issue of basic dignity and fundamental fairness,” explained an attorney in one challenge to Florida's marriage exclusion.⁴² In the words of the Florida ACLU: “We are hopeful that the court hearing this case will agree with courts across the country that the Constitution requires that same-sex couples be permitted to marry.”⁴³ An attorney for Indiana plaintiffs explained to the press that: “We are asking the Indiana federal court to recognize what every other court in the country has recognized” since *Windsor*.⁴⁴

III. THE IMPACTS OF *WINDSOR*: THE SUPREME COURT, THE DYNAMIC MEANING OF *WINDSOR*, AND THE INSIGNIFICANCE OF *BAKER V. NELSON*

This Part addresses two aspects of the possible impact of *United States v. Windsor*. First, it briefly broaches the possibility that the meaning of *Windsor* will be determined in a dynamic process in which the spreading consensus on *Windsor's* implications for state marriage exclusions will influence courts' or at least the Supreme

⁴¹ Hollingsworth v. Perry, No. 12-144, transcript of oral argument, at *42/p.20, 2013 WL 1212745 (U.S. Mar. 26, 2013).

⁴² <http://eqfl.org/sites/default/files/images/pr012114.pdf> (Jan. 21, 2014).

⁴³ Becker, *supra* note 40.

⁴⁴ Popp, *supra* note 37.

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Court's future understanding of *Windsor*. Second, this Part in more detail evaluates lower courts' near unanimous conclusion that the Supreme Court's summary 1972 decision in *Baker v. Nelson*, rejecting due process and equal protection challenges to state laws excluding same-sex couples from civil marriage, has been swept away by subsequent doctrinal developments. Although not every facet of the lower courts' reasoning on this point is persuasive, most of the argument is sound, and these courts have been right not to let *Baker* preclude them from doing justice under the Constitution to the real people who have turned to them for vindication of their rights.

A. The Potential Relevance of Windsor to Its Ultimate Meaning

Part of the reason I presented the extent of marriage equality precedent after *United States v. Windsor* in some detail in Part I above is that it is plausible that this dramatic consensus among the lower courts might influence the federal courts of appeal and even the U.S. Supreme court in their resolution of the constitutionality or unconstitutionality of state marriage exclusions in *Windsor's* wake. When the Supreme Court decides a case without a majority opinion,⁴⁵ black letter doctrine from *Marks v. United States* is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds."⁴⁶ This means that the position of a plurality of Justices need not state the holding; a single Justice concurring in the judgment states the holding if her or his position is narrower. Yet the *Marks* inquiry is not as straightforward as that formulation might suggest, however, for the Court has never defined what makes reasoning narrow or the narrowest; "[c]onsequently, for decades, commentators and judges alike have vocally lamented the opacity of this instruction."⁴⁷

Scholarship by Justin Marceau from the University of Denver, however, has argued that when the Supreme Court decides cases without a majority opinion, thus leaving the actual holding of the case up to contestation under *Marks*, the Supreme Court in future decisions tends to read such cases as holding in accordance with a plurality opinion if the lower courts converged on that position. "If lower courts settle on the holding of a Supreme Court plurality, then the Court is likely to embrace that as the law of the land."⁴⁸ Thus, in Professor Marceau's view, "the *Marks* rule is less a device for divining clear precedent and more profitably viewed as an invitation for a referendum among the lower courts on the statutory or constitutional question at issue."⁴⁹

⁴⁵ *Windsor* was decided by a majority opinion, but the analogical relevance of the discussion above will be made explicit.

⁴⁶ *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁴⁷ Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 936 (2013).

⁴⁸ *Id.* at 965.

⁴⁹ *Id.* at 938.

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Windsor was not a plurality decision, but in not resolving the constitutionality of state marriage bans⁵⁰ or refusals to give interstate recognition to same-sex couples' marriages, and in delivering a doctrinally opaque opinion,⁵¹ *Windsor* may function like a plurality decision. The meaning of *Windsor* and of the constitutional guarantees of equality and liberty on which it rests need to be resolved.⁵² And a consensus in the lower courts about *Windsor* could stiffen the resolve of some Justices to follow the Supreme Court's logic where it leads, as Justice Scalia even recognized in his *Windsor* dissent⁵³ – which was cited, incidentally, by the district courts in the Ohio recognition,⁵⁴ Utah,⁵⁵ Oklahoma,⁵⁶ Kentucky recognition,⁵⁷ Virginia,⁵⁸ Pennsylvania,⁵⁹ and Wisconsin⁶⁰ cases, as well as by the Court of Appeals for the Fourth Circuit in the Virginia case.⁶¹

B. Flushing Baker v. Nelson as an Obstacle to Marriage Equality

The proliferation of LGBT equality litigation could also be in some measure, prompted by the development of constitutional doctrine in *Windsor*, although *Windsor*

⁵⁰ At least one version of this question was at issue in *Hollingsworth v. Perry*, though the Court ducked it at by holding that the petitioners lacked standing to appeal from the trial court's judgment in *Perry*.

⁵¹ *Accord*, e.g., Marc R. Poirier, "Whiffs of Federalism" in United States v. Windsor: *Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 941 (2014) ("In *Windsor*, Justice Kennedy exercises considerable caution, refraining from articulating either a clear federalism rule or a clear equal protection or substantive due process liberty rule that would resolve the marriage equality question once and for all.").

⁵² *Cf.* David B. Cruz, "Amorphous Federalism" and the Supreme Court's Marriage Cases, 47 LOYOLA (L.A.) L. REV. ____ (forthcoming 2014) ("[T]he meaning of *Windsor* for questions of interstate recognition will unfold with experience and time.").

⁵³ United States v. Windsor, 133 S.Ct. 2675, 2709-10 (2013) (Scalia, J., dissenting) ("[T]he view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion.... [T]he real rationale of today's opinion ... is that DOMA is motivated by bare desire to harm couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.... As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.") (some internal quotation marks and citation omitted).

⁵⁴ *Oberfegell v. Kasich*, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013).

⁵⁵ *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1278 (N.D. Okla. 2013).

⁵⁶ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013).

⁵⁷ *Bourke v. Beshear*, ____ F. Supp. 2d ____, 2014 WL 556729, at *4, * 6 n.14 (W.D. Ky. Feb. 12, 2014).

⁵⁸ *Bostic v. Raney*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014).

⁵⁹ *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 425-26 (M.D. Pa. May 20, 2014).

⁶⁰ *Wolf v. Walker*, 986 F. Supp. 2d 982, 1010, 1017 (W.D. Wisc. June 6, 2014).

⁶¹ *Bostic v. Schaefer*, ____ F.3d ____, 2014 WL 3702493, at *30 (4th Cir. July 28, 2014).

offered little to no *explicit* new constitutional equality law doctrine.⁶² The development of doctrine, however, is important not just to trying to understand the phenomenon we are seeing sweeping the courts of the nation, but also as a matter of constitutional doctrine.

Prior to the Supreme Court's decision in *United States v. Windsor*,⁶³ lower courts had reached differing conclusions concerning whether the Supreme Court's 1972 summary decision in *Baker v. Nelson*⁶⁴ requires lower courts to dismiss challenges to state marriage exclusions.⁶⁵ Following *Windsor*, however, the federal courts to reach the

⁶² I put to one side the way in which *Windsor* articulated new doctrine regarding standing to appeal.

⁶³ 133 S. Ct. 2675 (2013).

⁶⁴ *Baker v. Nelson*, 409 U.S. 810 (1972).

⁶⁵ Compare, e.g., *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012) ("Even if *Baker* might have had resonance for *Windsor's* case in 1971, it does not today.... In the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence."); *Hernandez v. Robles*, 855 N.E.2d 1, 9 & 17 n.4 (N.Y. 2006) ("reject[ing]" claim that *Baker* bars New York courts from hearing parallel claim under parallel constitutional provision), with *Massachusetts v. HHS*, 682 F.3d 1, 8 (1st Cir. 2012); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1070 (D. Hawai'i 2012) (concluding in suit challenging state marriage exclusion that "Plaintiffs' claims are foreclosed by the Supreme Court's summary dismissal for want of a substantial federal question in *Baker*"); *Citizens for Equal protection v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) (noting but not relying on *Baker*, which the court cited in its Conclusion only after having conducted equal protection analysis of state constitutional amendment); *McConnell v. U.S.*, 188 Fed.Appx. 540 (8th Cir. 2006) (in suit by *Baker* plaintiffs seeking federal tax refund due to their supposed marriage, using merits determination in *Baker* as part of basis, along with *McConnell v. Nooner*, *infra*, for issue preclusion against plaintiffs); *Hernandez v. Robles*, 26 A.D.3d 98, 115 (N.Y. App. Div. 2005) (Catterson, J., concurring) (in contrast to majority, which reached merits, asserting that plaintiffs' equal protection challenge to marriage exclusion "is foreclosed by" *Baker* due to supposed equivalence of state and federal constitutional rights, relegating treatment of subsequent doctrinal developments to one shallow sentence in footnote about *Lawrence v. Texas*), judgment affirmed in opinion rejecting this conclusion about *Baker*, 855 N.E.2d 1, 9 & 17 n.4 (N.Y. 2006); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005) (holding *Baker* binding as to non-existence of "fundamental right to enter into a same-sex marriage" and so dismissing claims that federal non-recognition of marriage of lawfully married same-sex couple pursuant to Defense of Marriage Act violates Constitution, though curiously proceeding to analyze and reject plaintiffs' claim on their merits); *Morrison v. Sadler*, 821 N.E.2d 15, 20 (Ind. App. 2005) (using *Baker* as persuasive merits precedent as to U.S. Constitution in case involving solely claims of right to marry under state constitution and descriptively/predictively opining that "[t]he five justices of the *Lawrence* [*v. Texas*] majority, as well as Justice O'Connor in her concurring opinion, do not appear to be prepared to extend the logic of their reasoning to the recognition of same-sex marriage."); *Matter of Cooper*, 187 A.D.2d 128 (N.Y. App. Div. 1993) (using

David B. Cruz, *Baker v. Nelson: Flotsam in the Tidal Wave of Windsor's Wake*, 3 IND. J.L. & SOC. EQUALITY (forthcoming 2014).

issue have unanimously held that *Baker* is no obstacle to adjudicating such challenges.⁶⁶ While I believe the best understanding of doctrine and the precedents is that *Baker* was not dispositive even before *Windsor*, this seems to be an area where *Windsor* has left a wake of legal repercussions.

Ultimately, the Supreme Court will be the court to rule definitively upon whether the Constitution forbids states to exclude same-sex couples from civil marriage and refuse to recognize the marriages they have entered in an increasing number of states or countries. For the Court, a more than four decades old summary disposition is likely to pose no obstacle to consideration of that constitutional question on the merits. And, if Justice Ginsburg's assessment is correct, the Court will do so soon, ruling by the end of

Baker as precedent supporting application of rational basis review to case where surviving member of unmarried same-sex couple sought an incident of marriage without stating that plaintiff's constitutional claim in fact depended on a constitutional right to marry); *Matter of Estate of Cooper*, 149 Misc. 2d 282, 564 N.Y.S. 2d 684 (Surrogate Court. 1990) (concluding in case brought by surviving member of unmarried same-sex couple seeking an incident of marriage that "persons of the same sex have no constitutional rights to enter into a marriage with each other," citing *Baker* as precedent but not even noting "subsequent doctrinal developments" rule), *aff'd*, *Matter of Cooper*, 187 A.D.2d 128 (N.Y. App. Div. 1993); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (deeming *Baker* "controlling" in federal immigration case involving putative marriage of same-sex couple in Colorado, though failing even to note "subsequent doctrinal developments" exception); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (in suit by *Baker* plaintiffs for extra veteran's educational benefits due to supposed spouse, holding them collaterally estopped from relitigating their claim to be married).

⁶⁶ *Accord* Mark Strasser, *When A Baker Summary Dismissal Becomes Stale: On Same-sex marriage Bans and Federal Constitutional Guarantees*, 17 J. GENDER RACE & JUST. 137, 162 (2014) ("[S]ince *Baker* was decided, significant developments in equal protection and due process jurisprudence make it difficult to understand how courts can plausibly claim the decision binding.").

One federal court adhered to *Baker* in a pro se prison inmate's case without addressing whether subsequent doctrinal developments have rendered *Baker* no longer binding. *See Merritt v. Attorney General*, civ. no. 13-00215-BAJ-SCR (M.D. La. Nov. 14, 2013), 2013 WL 6044329., at *1 (plaintiff status and claim); *id.* at *2 (citing *Baker* for proposition that "the Constitution does not require States to permit same-sex marriages" without even acknowledging existence of subsequent doctrinal developments exception to binding force of summary rulings such as *Baker*). And one state trial court claimed to have rejected the subsequent doctrinal developments contention, but in a logically weak argument that suggested he was leaving that issue to higher courts to resolve. *See Borman v. Pyles-Borman*, No. 2014CV36 (Cir. Ct. Roane County, Tenn. Aug. 5, 2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/complete-copy-Tennessee-ruling.pdf>, discussed *infra* notes AAA-BBB and accompanying text.

June 2016.⁶⁷ Nonetheless, whether lower courts are bound by *Baker* is a vitally important question. Although broad judicial invalidations of many states marriage bans have been stayed to allow defenders to seek Supreme Court review, in a number of cases courts have ruled that individuals who have terminal illnesses may marry without delay. Every day that same-sex couples are denied the right to marry or recognition of their marriage, they and their families suffer injuries, but the potential for grievous irreparable injury where one is terminally ill is not a contingency – anyone could have a fatal accident and be robbed of all opportunity to marry – but a near certainty.

In *Baker*, a same-sex couple had challenged Minnesota's refusal to let them marry on grounds that it violated their constitutional rights under the Fourteenth Amendment, including their fundamental right to marry and their right to equal protection of the laws. The Minnesota supreme court rejected the claims, and the U.S. Supreme Court dismissed the couple's appeal on the ground that it did not present a substantial federal question.⁶⁸ Such a summary dismissal counts as a decision on the merits,⁶⁹ binding on lower courts as to "the precise issues presented [to] and necessarily decided by" the Court in concluding that a case presented no substantial federal question.⁷⁰

Accordingly, a question that has frequently arisen in the post-*Windsor* wave of litigation seeking to vindicate same-sex couples' constitutional rights to marry and to equal protection, is whether *Baker v. Nelson* is dispositive of the constitutionality of state marriage exclusions. Defenders of such measures claim that *Baker* compels lower courts to uphold state laws barring same-sex couples from marrying.⁷¹

Yet the Supreme Court has articulated an important exception to the binding nature of summary dispositions like that in *Baker v. Nelson*: The Supreme Court has specified, in *Hicks v. Miranda*,⁷² that a summary dismissal is no longer binding "when doctrinal developments indicate otherwise."⁷³ Some litigants defending state marriage

⁶⁷ Mark Sherman, Associated Press, Justice Ginsburg: Supreme Court Won't "Duck" Gay Marriage, *Seattle Times*, July 31, 2014, http://seattletimes.com/html/nationworld/2024212965_ginsburgduckxml.html.

⁶⁸ *Baker*, 490 U.S. at 810.

⁶⁹ *E.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n. 20 (1979).

⁷⁰ *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

⁷¹ *See, e.g.*, Defendant-Intervenors' Motion for Summary Judgment, at 6, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW); Chad Muir, Note, *Perry v. Schwarzenegger: A Judicial Attack on Traditional Marriage*, 187 22 U. FLA. J.L. & PUB. POL'Y 145, 167 (2011) (claiming that "the district court was bound by *Baker* and therefore should have granted the defendants' motion for summary judgment"); Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 137-43 (2007).

⁷² *Hicks v. Miranda*, 422 U.S. 332 (1975).

⁷³ *Id.* at 344. *Hicks* does also endorse the proposition that "the lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." *Id.* at 344-45 (internal quotation marks and alterations omitted). Presumably the

exclusions, such as Utah, have argued that the subsequent doctrinal developments exception articulated in *Hicks* has been overruled by the Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁷⁴ *Rodriguez de Quijas* stated that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”⁷⁵ The *Kitchen* majority distinguished *Rodriguez de Quijas* on the ground that it was addressing the treatment to be given to opinions Supreme Court opinions on the merits, and thus did not “overrul[e] the doctrinal developments rule as to summary dispositions.”⁷⁶

Judge Kelly dissented in *Kitchen* from this conclusion, contending that “that is just another way of stating that a summary disposition is not a merits disposition, which is patently incorrect.”⁷⁷ Had the majority judge said that, it would indeed be patently incorrect as a matter of established doctrine. But they did not say that. What Judge Kelly’s objection overlooks is that the majority did not distinguish summary decisions from *Rodriguez de Quijas* on the ground that summary affirmances are not “merits disposition[s],”⁷⁸ but on the ground that they are not “opinions on the merits.”⁷⁹ Because the Court aspires to give reasons for its constitutional judgments⁸⁰; summary decisions offer no reasons; *Rodriguez de Quijas* did not say that it was overruling *Hicks*’s subsequent doctrinal developments rule; and *Rodriguez de Quijas*’s pronouncement and the regime it contemplates have been cogently criticized as unsound,⁸¹ the *Kitchen* majority’s distinction appears proper and the *Hicks* rule intact.

Court “informs” lower courts they are no longer bound to a conclusion that a constitutional claim is insubstantial via decisions that “indicate” this.

⁷⁴ See, e.g., *Kitchen v. Herbert*, ___ F.3d ___, 2014 WL 2868044, at *8 n.2 (10th Cir. 2014) (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)).

⁷⁵ *Id.* at 484.

⁷⁶ *Kitchen, supra*, at *8 n.2.

⁷⁷ *Id.* at *34 (Kelly, J., dissenting).

⁷⁸ *Id.* at *34 (Kelly, J., dissenting) (emphasis added)

⁷⁹ *Id.* at *8 n.2 (emphasis added).

⁸⁰ Cf. Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1402 (2000) (“The Court is expected not only to determine the victor in the specific lawsuit before it, but also to provide standards to guide lower courts in disposing of similar controversies that may arise in the future.”). Admittedly, “a substantial number of cases are resolved [without a statement of reasons from any of the Justices], either because the Court disposes of them summarily or (much more rarely) because the Court divides equally on an issue.” *Id.* at 1396 (footnotes omitted).

⁸¹ See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39 (1990); cf. Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 NEV. L.J. 608, 617 (2002) (“[T]he Supreme Court has elided the

While the subsequent doctrinal developments rule thus remains, the Supreme Court has given little express guidance on how strongly doctrinal developments must “indicate” that a summary dismissal is no longer binding. But it should not be the case that the doctrinal developments sufficient to indicate that such a dismissal is no longer binding need be strong enough to dictate a decision upholding the right claimed in the case dismissed before lower courts can address the merits of similar disputes.

To be specific in this context: The plaintiffs in *Baker v. Nelson* had argued that Minnesota’s exclusion of them from civil marriage violated their rights to equal protection and due process protected by the Fourteenth Amendment, and the Minnesota supreme court rejected these claims. The Supreme Court dismissed their appeal in 1972, ruling without opinion that it did not present a substantial federal question. Unless subsequent developments in the Supreme Court’s equal protection and due process jurisprudence indicate otherwise, the propositions necessarily decided by the Supreme Court in *Baker* remain binding on state and lower federal courts, which would then have to rule against marriage plaintiffs presenting indistinguishable legal issues.

But we should not think that lower courts can escape *Baker* through the subsequent doctrinal developments exception only if later Supreme Court decisions inexorably compel the conclusion that state marriage exclusions actually do violate same-sex couples’ equal protection or due process rights. Unlike most merits dismissals, summary dismissals contain no legal reasoning, merely a conclusion. That conclusion in *Baker v. Nelson* was not simply that Minnesota’s marriage exclusion did not violate the plaintiffs’ rights, but that the broader conclusion that the plaintiffs’ claim that Minnesota did violate their rights *did not even raise a constitutional question of substance*. Accordingly, for an unreasoned summary dismissal to be adjudged no longer binding, it should be enough that subsequent doctrinal developments “indicate” that the types of claims at issue do, under those doctrines, *present a substantial federal question*.⁸² It should not be necessary for the subsequent developments to go further and establish unequivocally that the plaintiffs should now win on the merits of their federal constitutional claim. This is particularly true since the Supreme Court has ruled that summary affirmances are “not of the same precedential value as would be an opinion of this Court treating the question on the merits.”⁸³

And this appears to be the understanding of courts confronted with post-*Windsor* challenges to state marriage exclusions. U.S. District Judge Robert J. Shelby analyzed *Baker v. Nelson* in the challenge to Utah’s marriage exclusions, *Kitchen v. Herbert*, and concluded “that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law.”⁸⁴ Judge Terence C. Kern

distinction between jurisdiction and the merits when the substantiality of a federal question is at issue.”).

⁸² *Accord Cf.* *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (“[P]revious Supreme Court decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.”).

⁸³ *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

⁸⁴ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014).

concluded in the Oklahoma litigation *Bishop v. U.S. ex rel Holder* that “[t] seems clear that what was once deemed an ‘unsubstantial’ question in 1972 would now be deemed ‘substantial’ based on intervening developments in Supreme Court law.”⁸⁵ As the Court of Appeals for the Fourth Circuit summarized the rule when it affirmed the decision holding Virginia’s marriage exclusion laws unconstitutional, “[s]ummary dismissals lose their binding force when doctrinal developments illustrate that the Supreme Court no longer views a question as unsubstantial, regardless of whether the Court explicitly overrules the case.”⁸⁶ And in holding that it was legitimate for it to reach the merits of the challenge to Utah’s marriage exclusions, which it affirmed were unconstitutional, the Court of Appeals for the Tenth Circuit concluded that “[a]lthough reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial.”⁸⁷

Regardless of the precise strength of the “indications” from post-*Baker v. Nelson* Supreme Court decisions, there is an especially strong case that at least *Baker*’s equal protection holding is no longer binding.⁸⁸ At the time the Court decided *Baker*, it had been less than a year since it had first found a law that discriminated against women to violate the Equal Protection Clause,⁸⁹ the Court did not explicitly adopt intermediate scrutiny for laws that (as laws barring same-sex couples from marrying do) discriminate on the basis of sex until 1976;⁹⁰ the Court did not apply the Equal Protection Clause to

⁸⁵ *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1276 (N.D. Okla. 2014), *aff’d sub nom. Bishop v. Smith*, ___ F.3d ___, 2014 WL 3537847 (10th Cir. July 18, 2014).

⁸⁶ *Bostic v. Schaefer*, ___ F. 3d ___, 2014 WL 3702493, at *6 (4th Cir. July 28, 2014).

⁸⁷ *Kitchen v. Herbert*, 755 F.3d 1193, 1208 (10th Cir. 2014).

⁸⁸ *Accord* Robert E. Rains, *The Legal Status of Same-Sex Married Couples in Pennsylvania after the U.S. Supreme Court Decision in the DOMA Case*, 85 PA. B.A. Q. 1, 13 (2014) (“Clearly, *Romer*, *Lawrence*, and especially *Windsor* constitute enormous doctrinal developments for the rights of gays and lesbians in the United States since *Baker* was decided.”). By saying this I by no means intend to imply that doctrinal developments have left insubstantial the question whether state marriage exclusions violate the fundamental right to marry of same-sex couples.

⁸⁹ *Baker v. Nelson* was decided on October 10, 1972. *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional an Idaho estate administrator law categorically preferring men over women of equally close relationship to decedents), was decided November 22, 1971.

⁹⁰ *Craig v. Boren*, 429 U.S. 190 (1976). This is relevant because marriage exclusions do categorize on the basis of sex, an argument with much academic support, *see, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 214 (1994); ++, though extremely limited judicial acceptance. Contrast, *e.g. Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (accepting sex discrimination argument); *Baker v. State*, 744 A.2d 864, 904-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (same); with *In re Marriage Cases*, 183 P.3d 384, 436-39 (Cal. 2008) (rejecting sex discrimination argument in dicta when court found strict scrutiny applicable under state equal protection guarantee); XXX. Justice Kennedy, at least, finds the question whether the exclusion of same-sex couples from marriage is,

prohibit a law that discriminated on the basis of sexual orientation (as virtually all courts have concluded laws excluding same-sex couples from marriage do) until two decades later with *Romer v. Evans* in 1996;⁹¹ and a number of commentators have taken *Romer* to apply more than minimal rational basis review.⁹²

The first lower court decision to engage with *Baker* after the Supreme Court decided *Windsor* was U.S. District Judge Robert Shelby's opinion holding Utah's marriage exclusions unconstitutional in *Kitchen v. Herbert*.⁹³ Although Judge Shelby could have relied solely on arguments like the foregoing, which he made,⁹⁴ he chose also to take guidance from – or perhaps seek cover beneath – *Windsor*, which he treated as a “significant doctrinal development.”⁹⁵ The precise development is not spelled out in his

constitutionally speaking, sex discrimination, to be “a difficult question that [he has] been trying to wrestle with.” *Hollingsworth v. Perry*, No. 12-144, transcript of oral argument, at 13 (Mar. 26, 2013), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf.

⁹¹ 517 U.S. 620.

⁹² See, e.g., Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not 'Argle-Bargle': The Inevitability of Marriage Equality after Windsor*, 23 TUL. J. L. & SEXUALITY 17, 35 (2014) (“The Court in *Romer* engaged in a less deferential form of rational basis review”); Karen G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQ. 275, 296 (1997) (arguing that “the Court [in *Romer*] perceived no need to utilize its traditional two-tiered analytic framework nor did it need to explicitly invoke either strict scrutiny or a rational basis test. Instead, the Court implicitly drew elements from each.”); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 93 (1993) (“The Court's opinion [in *Romer*] implicitly invokes a defect in the political process that contaminates, at least to some extent, *all* laws that discriminate against gays. That contamination, however, implies that gays ought to be a ‘suspect class,’ and that laws discriminating against gays should be presumptively unconstitutional.”) (footnote omitted); Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 COLO. L. REV. 287, 333 (1997); Peter J., Smith, Note, *The Demise of Three-Tiered Review: Has the Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 476 (1997) (“*Romer v. Evans* reflected an enhanced version of the rational basis inquiry”). But see, e.g., Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 891 (2000-2001) (“*Romer v. Evans* did not apply heightened scrutiny to classifications based on sexual orientation.”); *id.* at 895 (“One of the paradoxes of the Court's decision in *Romer* is the contrast between the simplicity of what we understand as the normal rational basis test and the complications of the Court's deployment of it in the opinion.... *Romer*'s reasoning is multidimensional, not linear, in the way that it alters the logic of equal protection analysis.”) Larry Alexander, *Sometimes Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis*, 68 U. COLO. L. REV. 335 (1997).

⁹³ 961 F. Supp. 2d 1181 (D. Utah 2013).

⁹⁴ *Id.* at 1194-95.

⁹⁵ *Id.* at 1195.

David B. Cruz, *Baker v. Nelson: Flotsam in the Tidal Wave of Windsor's Wake*, 3 IND. J.L. & SOC. EQUALITY (forthcoming 2014).

Baker analysis, but he takes apparent comfort from the fact that some Supreme court Justices including dissenters Roberts and Scalia foresaw post-*Windsor* marriage litigation challenging state exclusions,⁹⁶ coupled with the Supreme Court's reliance on standing doctrine to dismiss the appeal in *Hollingsworth v. Perry*⁹⁷ rather than dismissing it on the strength of *Baker* as not presenting a substantial federal question.⁹⁸

The latter argument is not strong. If, as the Court held in *Perry*, the proponents who were trying to defend California's marriage ban lacked Article III standing, the Court would lack jurisdiction over their appeal. Thus, the Court would not have the constitutional authority to render judgment on the merits of that case.⁹⁹ Since a ruling that a case does not present a substantial federal question is, as noted above, a ruling on the merits, the Supreme Court arguably had no power to issue a *Baker*-based dismissal in *Perry*, even if *Baker* were still good law. Moreover, the reasoning of the Ninth Circuit Court of Appeals in the *Perry* case relied on the fact that same-sex couples in California enjoyed a right to marry under the California constitution prior to Proposition 8's taking that right away and enshrining that deprivation in the state constitution. This differs from the situation in *Baker v. Nelson*, where same-sex couples were simply excluded from marriage by state statutory law. Thus, even were *Baker* binding, it would not necessarily establish the constitutionality of California's Prop 8, and the Supreme Court's failure to invoke *Baker* as the basis for dismissing *Perry* by itself need not signify that *Baker* no longer required courts to uphold a straightforward exclusion of same-sex couples from civil marriage.¹⁰⁰

Similarly, in the next post-*Windsor* opinion to consider *Baker*, Judge Terrence Kern of the Northern District of Oklahoma held in *Bishop v. United States ex rel. Holder* that "*Baker v. Nelson* is not binding precedent."¹⁰¹ After providing a persuasive account of the doctrinal developments that supported this conclusion,¹⁰² including *Windsor* itself

⁹⁶ *Id.*

⁹⁷ 133 S. Court. 2652 (2013).

⁹⁸ *Kitchen*, 961 F. Supp. 2d at 1195.

⁹⁹ *Cf. Equitable Life Assurance Society of the United States v. Brown*, 187 U.S. 308, 315 (1902) (concluding in case where "the unsubstantiality of the [f]ederal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing" that "the better practice is to cause our decree to respond to the question which arises first in order for decision," that is, to dismiss for lack of jurisdiction due to want of a substantial federal question).

¹⁰⁰ Moreover, *Baker v. Nelson* involved an appeal as of right from the Minnesota supreme court to the U.S. Supreme Court. Due to statutory changes, such appeals as of right are now quite rare. In *Perry*, in contrast, the Court had exercised its discretion over its jurisdiction to grant certiorari to hear the case. *Cf. Francisco Ed. Lim, Determining the Reach and Content of Summary Decisions*, 8 REV. LITIG. 165, 166-67 (Spring 1989) (distinguishing appellate jurisdiction from certiorari jurisdiction with respect to precedential value). This difference also may counsel against attributing much significance to the Court's not invoking *Baker* to dispose of *Perry*.

¹⁰¹ 926 F. Supp. 2d 1252 (N.D. Okla. 2013).

¹⁰² *See id.* at 1276 (addressing *Craig v. Boren*, *Romer v. Evans*, and *Lawrence v. Texas*).

for its constitutional reasoning that the federal government's discrimination against married same-sex couples "demeaned" them,¹⁰³ Judge Kern reasoned much as Judge Shelby had about *Windsor's* import: "If *Baker* is binding, lower courts would have no reason to apply or distinguish *Windsor*, and all this judicial hand-wringing [in the Roberts and Scalia dissents] over how lower courts should apply *Windsor* would be superfluous."¹⁰⁴

Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia followed suit in *McGee v. Cole*.¹⁰⁵ Ruling in a summary judgment motion in a case challenging that state's marriage exclusions, he too concluded that "*Baker* is nonbinding" on the basis of doctrinal developments.¹⁰⁶ He recounted the analysis from the Second Circuit in its *Windsor* decision (prior to the Supreme Court ruling),¹⁰⁷ but went on to recount and rely upon *Kitchen's* and *Bishop's* "persuasive" reasoning about how *Windsor* demonstrated the Justices' expectations that lower courts would reason about state marriage bans based on *Windsor* (rather than *Baker*).¹⁰⁸ *McGee* also dismissed contrary lower court decisions about *Baker* both as substantively incorrect and as distinguishable precisely because they were rendered before the additional "doctrinal development" of *Windsor*.¹⁰⁹

With no new analysis of its own, the U.S. District Court for the Eastern District of Virginia concluded (before granting the plaintiffs summary judgment) in *Bostic v. Rainey* that "that doctrinal developments in the question of who among our citizens are permitted to exercise the right to marry have foreclosed the previously precedential nature of the summary dismissal in *Baker*."¹¹⁰ Judge Arenda L. Wright Allen relied in *Bostic* on the analyses in the Second Circuit *Windsor* decision, *Kitchen*, *Bishop*, and *McGee*.¹¹¹

Likewise, the next pro-marriage equality decision to consider *Baker v. Nelson*, *De Leon v. Perry*,¹¹² also ruled that "*Baker* is not controlling."¹¹³ It considered the same sorts of doctrinal developments addressed above, including the Supreme Court's decision in *Windsor*,¹¹⁴ made the same dubious failure-to-dismiss-for-want-of-substantial-federal-

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1277.

¹⁰⁵ 2014 WL 321122 (S.D. W. Va. Jan. 29, 2014).

¹⁰⁶ *Id.* at *9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at *10 ("Both cases preceded the Supreme Court's decision in *Windsor*, a decision which, as explained above, showed additional doctrinal development in relevant jurisprudence. The Court disagrees with the analysis of doctrinal developments conducted in those two cases and accordingly finds that *Baker* is not binding on the current case and does not justify abstention here.).

¹¹⁰ 970 F. Supp. 2d 456, 470 (Feb. 13, 2014).

¹¹¹ *Id.* at 469-70 & n.7.

¹¹² 975 F.Supp.2d 632 (W.D. Tex. 2014).

¹¹³ *Id.* at 648.

¹¹⁴ *See id.* at 647-48.

question argument *Kitchen* made about *Hollingsworth v. Perry*,¹¹⁵ and expressly aligned itself with *Bostic*, *Bishop*, and *Kitchen*.¹¹⁶

*DeBoer v. Snyder*¹¹⁷ continued the clear trend, rejecting the defendants' *Baker* argument in a footnote that extensively quoted and expressly adopted *Kitchen*'s analysis, including *Kitchen*'s reliance on *Windsor*.¹¹⁸ *Latta v. Otter*¹¹⁹ pointed to the same doctrinal developments these cases have noted,¹²⁰ again including *Windsor* itself,¹²¹ in which U.S. Chief Magistrate Judge Candy Wagahoff Dale believed "the Court dramatically changed tone with regard to laws that withhold marriage benefits from same-sex couples."¹²² In addition to recycling the *Hollingsworth v. Perry* argument,¹²³ *Latta* considered significant *Windsor*'s equal protection reasoning and its affirmation of the Second Circuit panel decision holding *Baker* no longer to be controlling.¹²⁴ And after remarking upon the unanimity of lower court rejections of *Baker* after the Supreme Court's *Windsor* decision, the district court "concludes that *Baker* is not controlling and does not bar review of Plaintiffs' claims."¹²⁵ U.S. District Judge John E. Jones III fell in line on May 20, 2014, rejecting the defendants' *Baker* argument before holding Pennsylvania's marriage ban unconstitutional in *Whitewood v. Wolf*.¹²⁶ He too included

¹¹⁵ *Id.* at 648.

¹¹⁶ *Id. de Leon* stated that *Bourke v. Beshear*, ___ F. Supp. 2d ___, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014; Opinion Continuing Stay March 19, 2014) also "reject[ed] the argument that *Baker* still has precedential value and bars courts from addressing the issue of same-sex marriage." 975 F. Supp. 2d at 648 (citing *Bourke*, 2014 WL 556729 at *1). *Bourke*, however, did not analyze whether *Baker* was no longer controlling due to doctrinal developments after that decision. Rather, *Bourke* distinguished *Baker* as involving the constitutionality of a state refusal to issue a same-sex couple a marriage license, whereas the *Bourke* plaintiffs were lawfully married in other states and asking Kentucky to recognize and treat them as married. *Bourke* at *1, *13 n.1.

¹¹⁷ 973 F. Supp. 2d 757 (E.D. Mich. Mar. 21, 2014).

¹¹⁸ *Id.* at 773 n.6. The district court in *Geiger v. Kitzhaber*, 2014 WL 2054264 (D. Or. May 19, 2014), likewise dispatched *Baker* in a footnote, quoting *Kitchen*'s conclusion on this point and merely citing *DeBoer*, *Bishop*, *De Leon*, and *Bostic*. *Id.* at *1 n.1.

¹¹⁹ ___ F. Supp. 2d ___, 2014 WL 1909999 (D. Idaho 2013).

¹²⁰ *Id.* at *8.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at *9.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ ___ F.3d ___, 2014 WL 2058105, at *4-6, *16 (M.D. Pa. May 20, 2014). Judge Jones had earlier rejected the *Baker* argument when he rejected the defendants' motion to dismiss. *Whitewood v. Wolf*, No. 1:13-cv-01861-JEJ, Memorandum and Order, at 4-6 (M.D. Pa. Nov. 15, 2013), available at <http://www.scribd.com/doc/184748982/Whitewood-et-al-v-Corbett-et-al-order-denying-motion-to-dismiss>. His May 20, 2014 opinion reiterated his arguments from his November 15 order. 2014 WL 2058105, at *4.

the Supreme Court's decision in *Windsor* as part of a "sea change" in the Supreme Court's equal protection and substantive due process doctrine.¹²⁷

Senior (former Chief) District Judge Barbara Crabb conducted an extensive analysis of *Windsor's* relevance to the *Baker* issue in her opinion holding Wisconsin's marriage law unconstitutional in *Wolf v. Walker* on June 6, 2014.¹²⁸ After explaining why "[i]t would be an understatement to say that the Supreme Court's jurisprudence on issues similar to those raised in *Baker* has developed substantially since 1972[.]"¹²⁹ Judge Crabb turned to *Windsor*. She observed that *Baker's* bindingness was hotly contested, with the "no longer binding" camp prevailing in *Windsor* in the Second Circuit and the marriage exclusionists¹³⁰ renewing their arguments before the Supreme Court.¹³¹ Judge Crabb noted that Justice Ginsburg cut off counsel in *Hollingsworth v. Perry* when he tried to address *Baker* at oral argument.¹³² (Though this may well bear on the predictive question whether a majority of the Justices would conclude that a state marriage ban, such as California's Proposition 8 at issue in *Perry*, is constitutional, a single Justice's views about doctrinal developments¹³³ would not themselves seem to *be* a "doctrinal development" in the sense relevant to the vitality vel non of a summary dismissal.) *Windsor* itself did not address *Baker*, and for Judge Crabb, "[t]he Court's silence is telling."¹³⁴ In her view, "the Court's failure to even acknowledge *Baker* as relevant in a case involving a restriction on marriage between same-sex persons supports a view that the Court sees *Baker* as a dead letter."¹³⁵ And, like the *Kitchen* and *Bishop* courts, Judge Crabb also apparently deemed it relevant that the *Windsor* dissenters' advice to lower court judges did not even bother to suggest that *Baker* could provide a basis for ruling against marriage equality plaintiffs.¹³⁶

Returning to the *Kitchen* litigation against Utah's marriage exclusions, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's constitutional rulings

¹²⁷ *Whitewood v. Wolf*, 2014 WL 2058105, at *5.

¹²⁸ 986 F.Supp.2d 982 (W.D. Wisc. 2014).

¹²⁹ *Id.* at 990.

¹³⁰ See David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1078 (2002) (defining "marriage exclusionists" as "those people who would continue to exclude same-sex couples" from civil marriage).

¹³¹ *Wolf*, 986 F. Supp. 2d at 990.

¹³² *Id.*

¹³³ *Id.* ("Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.") (quoting Justice Ginsburg).

¹³⁴ *Id.*

¹³⁵ *Id.* at 990-91.

¹³⁶ *Id.* at 991. Senior District Judge John G. Heyburn, II cited *Wolf* and echoed many of its arguments about *Windsor* in his opinion holding unconstitutional Kentucky's laws barring same-sex couples from marrying. *Love v. Beshear*, 989 F. Supp. 2d 536, 541-42 (W.D. Ky. July 1, 2014) (concluding that "a virtual tidal wave of pertinent doctrinal developments has swept across the constitutional landscape" and making *Wolf's* argument about *Windsor's* silence regarding *Baker*).

one day shy of a year after the Supreme Court's decision in *Windsor*.¹³⁷ Like virtually all courts to examine *Baker* in the wake of *Windsor*, the court of appeals concluded emphatically that "it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial."¹³⁸ The court of appeals agreed with the district court that *Baker* had been superseded by subsequent doctrinal developments,¹³⁹ but it relied on "[t]wo landmark decisions by the Supreme Court,"¹⁴⁰ *Lawrence v. Texas*¹⁴¹ and *United States v. Windsor*.¹⁴² The disposition in *Windsor* allowed the court of appeals to distinguish the views of "several courts" that found *Baker* binding pre-*Windsor* from those of "nearly every federal court to have considered the issue" following *Windsor*.¹⁴³ Recognizing that *Windsor* addressed the constitutionality of a federal marriage exclusion, as distinguished from the state marriage exclusions at issue in *Kitchen*, the court of appeals properly noted that "the Court's description of the issue [in *Windsor*] indicates that its holding was not solely based on the scope of federal versus state powers."¹⁴⁴ The court of appeals concluded that "the similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case cannot be ignored"; some of the plaintiffs sought recognition of their valid marriages from marriage equality states, as had Edie Windsor sought from the federal government, and all of the plaintiffs argued in *Windsorian* terms "that the state's differential treatment of them as compared to opposite-sex couples demeans and undermines their relationships and their personal autonomy."¹⁴⁵ Thus *Baker*'s holding that marriage equality plaintiffs presented no substantial federal question was no longer good law after *Windsor*.¹⁴⁶

¹³⁷ *Kitchen v. Herbert*, ___ F.3d ___, 2014 WL 2868044, at *32 (10th Cir. June 25, 2013).

¹³⁸ *Id.* at *10. The same panel of the same court reached the same decision in *Bishop v. Smith*, ___ F.3d ___, 2014 WL 3537847, at *6-7 (10th Cir. July 18, 2014), treating the litigation against Oklahoma's marriage exclusions "largely controlled by our decision in *Kitchen*".

¹³⁹ *Id.* at *8.

¹⁴⁰ *Id.*

¹⁴¹ 539 U.S. 558 (2003).

¹⁴² 133 S. Ct. 2675 (2013).

¹⁴³ *Kitchen*, 2014 WL 2868044, at *8. The court of appeals noted at the close of a string cite that the sole case at that time to have ruled differently on *Baker* after *Windsor* failed to consider whether doctrinal developments had deprived *Baker* of precedential force. *Id.* (citing *Merritt v. Att'y Gen.*, No. 13-215-BAJ-SCR, 2013 U.S. Dist. LEXIS 163235, at *2 (M.D.La. Oct. 2, 2013), magistrate judge report adopted by 2013 U.S. Dist. LEXIS 162583 (M.D.La. Nov. 13, 2013)).

¹⁴⁴ *Id.* at *9.

¹⁴⁵ *Id.* at *10.

¹⁴⁶ Judge Kelly in dissent purportedly rejected the conclusion that subsequent doctrinal developments had deprived *Baker v. Nelson* of binding force. *Id.* at *33, *35. Somewhat inconsistently, however, he went on to address the merits of the plaintiffs' constitutional claims ostensibly "[b]ecause [he] ha[d] not persuaded the panel." *Id.* at *35. Presumably

The same day the Tenth Circuit Court of Appeals ruled in *Kitchen*, Chief Judge Richard L. Young of the Southern District of Indiana also held in *Baskin v. Bogan* that *Baker v. Nelson* was stripped of its binding character by subsequent doctrinal developments.¹⁴⁷ After retreading ground covered by prior opinions,¹⁴⁸ Judge Young concluded confidently that “in the last year even more has changed in the Supreme Court’s jurisprudence shedding any doubt regarding the effect of *Baker*.”¹⁴⁹ Besides questionably relying on *Hollingsworth v. Perry*’s dismissal of the appeal for want of standing rather than for want of a substantial federal question,¹⁵⁰ the court referred to the substantive, dignity- and equality-based reasoning of *United States v. Windsor*.¹⁵¹

Subsequently, the U.S. Court of Appeals for the Fourth Circuit joined the cavalcade of courts considering *Baker* no longer binding when it affirmed *Bostic v. Rainey* and held Virginia’s marriage exclusions unconstitutional in *Bostic v. Schaefer* on July 28, 2014.¹⁵² After remarking upon the unanimity of post-*Windsor* federal courts examining whether *Baker* remained bindings or had been displaced by doctrinal developments,¹⁵³ the court of appeal in *Bostic* turned immediately to *Windsor* itself. Like Judge Crabb in the *Wolf* case, the *Bostic* majority flagged the contestation over *Baker* in the Second Circuit in *Windsor* and opined that “The Supreme Court’s willingness to decide *Windsor* without mentioning *Baker* speaks volumes regarding whether *Baker* remains good law.”¹⁵⁴ Whether or not *Bostic* overread that silence, the court of appeals wisely continued, reasoning that “The Court’s development of its due process and equal protection jurisprudence in the four decades following *Baker* is even more instructive.”¹⁵⁵ Regarding developments on the due process side, the court emphasized the Supreme Court’s decisions in *Lawrence v. Texas* and – no surprise by this point – *Windsor*.¹⁵⁶ In the *Bostic* court’s view, “These cases firmly position same-sex relationships within the

the point of this was to show that if he were to find himself free to reach the merits of the plaintiffs’ claims, though he is not, he would reject them.

¹⁴⁷ *Baskin v. Bogan*, ___ F. Supp. 2d ___, 2014 WL 2884868, at *6 (S.D. Ind. June 25, 2013).

¹⁴⁸ *See id.* at *4-5 (addressing *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff’d*, 409 U.S. 810 (1972); *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975); *Romer v. Evans*, 517 U.S. 620, 635 (1996); and *Lawrence v. Texas*, 539 U.S. 558, 582 (2003)).

¹⁴⁹ *Id.* at *6.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* (noting that *Windsor* reasoned that DOMA’s non-recognition of couples validly married by a state “demeans the couple, whose moral and sexual choices the Constitution protects” and impugned DOMA’s purpose as “to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages.”) (internal quotation marks omitted).

¹⁵² *Bostic v. Schaefer*, ___ F. 3d ___, 2014 WL 3702493 (4th Cir. July 28, 2014).

¹⁵³ *Id.* at *6.

¹⁵⁴ *Id.* at *7.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

ambit of the Due Process Clauses' protection."¹⁵⁷ Concerning equal protection, *Bostic* flagged some of the by now familiar developments (intermediate scrutiny, *Romer v. Evans*, and, again, *Windsor*); its view, "These cases demonstrate that, since *Baker*, the Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens."¹⁵⁸

As of the time this Article was written, only once since the Supreme Court decided *United States v. Windsor* has a court squarely held that the Court's summary affirmance in *Baker v. Nelson* has not been deprived of binding force by doctrinal developments since *Baker* was rendered in 1972. This outlier decision was rendered not by a federal judge but by Tennessee trial court judge Russell E. Simmons, Jr. in *Borman v. Pyles-Borman* on August 5, 2014.¹⁵⁹ However, *Borman's* factual context was distinctive, its reasoning was illogical, and the court's opinion suggested that the judge could not be troubled to engage with the doctrine governing the weight of force of summary affirmance like that in *Baker*.

As for the factual context, unlike almost all post-*Windsor* suits challenging state non-recognition laws, *Borman* involved a same-sex couple seeking to divorce. Thus, they only wanted to be treated as married by Tennessee so that the state would dissolve that marriage. (They could not divorce in Iowa, where they were married, because they were Tennessee residents and Iowa requires a year's residency to grant a divorce.¹⁶⁰) This probably does not make a doctrinal difference from a case in which a same-sex couple may want to live and be recognized as married in the forum state, but it could color a judge's perception of what is at stake and, correspondingly, could affect the seriousness with which the judge analyzes the plaintiff's constitutional claims.

The court's reasoning was also logically deficient. Its express basis for concluding that *Baker* was still binding was that "[a]lthough the United States Supreme Court has had opportunities to overrule the *Baker* decision, it has refused to take that

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Like Judge Crabb in *Wolf*, the *Bostic* majority also pointed to Justice Ginsburg's seeming rejection of *Baker* at oral argument in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). *Bostic*, 2014 WL 3702493, at *7 n.5. Even Judge Niemeyer, who dissented on the merits in *Bostic*, did not contend that *Baker* flatly precluded the majority from ruling in the plaintiffs' favor. Rather, he somewhat more narrowly claimed only that *Baker* "fortified" his reading of *Loving v. Virginia*, 388 U.S. 1 (1967), as protecting only a fundamental right to marry heterosexually. *Bostic*, 2014 WL 3702493, at *24 (Niemeyer, J., dissenting). Niemeyer's dissent is infected by his view, itself unconstitutional in light of the Supreme Court's repeated condemnation of sex-based generalizations under the Equal Protection Clause, that "there exist deep, fundamental differences between traditional and same-sex marriage." *Id.*

¹⁵⁹ <AAA> *Borman v. Pyles-Borman*, No. 2014CV36 (Cir. Ct. Roane County, Tenn. Aug. 5, 2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/complete-copy-Tennessee-ruling.pdf>.

¹⁶⁰ *Id.* at 1 (facts of residency); Iowa State Bar Ass'n, *Divorce or Dissolution of Marriage*, <http://www.iowabar.org/?page=Divorce> (one-year residency requirement for divorce plaintiff where defendant spouse is not Iowa resident).

position even in the decision on which the Plaintiff relies which is *United States v. Windsor*.¹⁶¹ Yet the whole point of subsequent-doctrinal-developments is to determine whether or not a summary decision *that the Supreme Court has not overruled* is nonetheless no longer binding on lower courts. If the Court *has* overruled a summary decision, then it is clearly no longer binding and one need not fret about whether it has been undermined by subsequent precedents.

Judge Simmons's opinion in *Borman* did go on briefly to distinguish Section 3 of DOMA, invalidated in *Windsor*, from a state law excluding same-sex couples from civil marriage.¹⁶² But that did not really seem to be the basis for Simmons's ruling. Rather, he seemed highly critical of the subsequent doctrinal developments rule itself: "The premise that 'doctrinal developments indicate otherwise' gives a Court [sic] discretion to formulate new law by predicting what appellate decisions will say other than what they have already said."¹⁶³ Even were that an accurate characterization of the rule, it remains a rule established by the Supreme Court. It is thus the responsibility of every lower court confronted with a claim that one of the Court's summary decisions has been rendered nonbinding pursuant to the rule to examine the relevant precedents and determine whether or not that is so.

Yet Judge Simmons appears to have been unwilling to analyze whether in fact subsequent doctrinal developments stripped *Baker v. Nelson* of its binding force:

The decision of this Trial Court [sic] will only be binding on this case and on this Court. It would be more productive for an appellate court whose opinions would have more precedential authority to delve into this analysis. For purposes of passing this issue to the appellate courts *without discussion*, this Court will find that the doctrinal development of the question whether or not Tennessee must accept another States [sic] same-sex marriage to be valid [sic] has not developed sufficiently to overrule precedent cases [sic].¹⁶⁴

In effect, Judge Simmons said, "this is above my pay grade. In order to avoid applying the rule, I am" – somewhat arbitrarily – "going to assume without analysis one particular conclusion under the rule." This is gross dereliction of judicial duty. In light of it and the other deficiencies of the *Borman* opinion, this case ought be dismissed as aberrational in the post-*Windsor* judicial landscape of cases addressing *Baker v. Nelson*, which clearly shows that *Windsor* has swept *Baker* away in its wake.

* * * *

As the foregoing analysis shows, one aspect of some district courts' reasoning – the reliance on the Court's failure to dismiss *Perry v. Hollingsworth* for want of a substantial federal question – in *Kitchen v. Herbert*, *De Leon*, *DeBoer*, and *Baskin*, that

¹⁶¹ *Id.* at 2 (citing *U.S. v. Windsor*, 133 S. Ct. 2675 (2013)). The *Borman* opinion follows the sentence quoted in the main text with "[t]he Court *therefore* holds that a state's law on same-sex marriage do [sic] not violate the equal protection or substantive due process rights [sic] under the United States Constitution." *Id.* (emphasis added).

¹⁶² *Id.* at 2-3.

¹⁶³ *Id.* at 3.

¹⁶⁴ <BBB>*Id.* at 3 (emphasis added).

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“*Baker v. Nelson* is no longer controlling precedent”¹⁶⁵ is flawed. But those cases and the others canvassed above show that as a descriptive matter, *Baker*’s vitality has been washed (further) away in *Windsor*’s wake. If one agrees with me that developments in constitutional law have in fact stripped *Baker v. Nelson* of its binding character, the widespread agreement of lower court judges on this position and their citation of the same developments urged in these cases by parties and amici should not be surprising. Although the Supreme Court’s *Windsor* decision addressed neither *Baker* nor a state law excluding same-sex couples from civil marriage, it has appropriately and noteworthily been taken by so many courts as sweeping away *Baker v. Nelson* and leaving them free to adjudicate same-sex couples’ and surviving members’ thereof constitutional justice claims.

IV. *WINDSOR* AS DOCTRINAL DEVELOPMENT

As noted in Part III, lower courts have widely regarded *United States v. Windsor* as itself helping develop constitutional doctrine in such a fashion as to leave *Baker v. Nelson* bereft of force. *Windsor*’s jurisgenerative force, however, lies less in its holding that the federal definition section of DOMA violates the Fifth Amendment than in its reasoning. Seeing precisely how *Windsor* has this developmental force may require some inferential reasoning on the part of interpreters.

Justice Kennedy’s opinion for the Court in *Windsor* stated that “the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.”¹⁶⁶ Equal protection doctrine has long treated discriminatory purpose as relevant to the level of scrutiny to which a facially neutral law might be subjected, so the Court’s attention to “the design” and “purpose” of the Defense of Marriage Act signals need not signal anything new.¹⁶⁷

¹⁶⁵ *Kitchen*, 961 F. Supp. 2d at 1195.

¹⁶⁶ 133 S.Ct. at 2689.

¹⁶⁷ Although *Washington v. Davis* held that discriminatory impact alone does not warrant heightened equal protection scrutiny, it has remained clear that evidence of a law’s effect can be some evidence of its purpose, so that factor as well breaks no new ground.

The Court did not rely on the blunt argument that the federal definition section of DOMA is unconstitutional because the federal government has no authority to legislate with respect to marriage. Rather, the Court stated that “it is ... established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.” *Windsor*, 133 S.Ct. at 2690. The Court surveyed various statutes and concluded that “these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy.” *Id.* Even if one puts emphasis on the notion that the Court was sanctioning only *discrete* federal statutes bearing on marriage, rather than across-the-board blunderbusses like DOMA, that would not, without more, establish that *states* could not enact sweeping laws regarding marriage.

For purposes of challenges to state refusals to let same-sex couples marry or to recognize the validity of marriages same-sex couples entered in other jurisdictions, more

The other main moving part of the *Windsor* decision was the proposition that “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”¹⁶⁸ That proposition, also quoted in the Supreme Court’s 1996 sexual orientation equal protection decision in *Romer v. Evans*, was first articulated by the Court in *Department of Agriculture v. Moreno* in 1973.¹⁶⁹

Windsor stated that “[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”¹⁷⁰ The Supreme Court concluded that: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”¹⁷¹ This might represent some doctrinal innovation, because the Court provided no elaborate discussion of any legitimate purposes that DOMA might have been argued to serve.

So, perhaps the Court did develop doctrine here. It may have treated as *sham* potential statutory purposes that are swamped by a dominant statutory purpose. Or it might be read, in line with Justice Scalia’s dissent in *Romer*, as holding that the *presence* of an illegitimate statutory purpose to harm a group of people (here, the class of same-sex couples married in state eyes) is *sufficient* to establish unconstitutionality regardless of any other purposes.

Another possible way in which the Supreme Court may have developed doctrine can be seen in one post-*Windsor* decision. In *SmithKline Beecham Corp. v. Abbott Laboratories*, decided January 21, but currently under consideration for possible rehearing en banc, the U.S. Court of Appeals for the Ninth Circuit held that sexual orientation discrimination is subject to heightened scrutiny under the Equal Protection Clause. This case, concerning the use of a peremptory strike to exclude a juror because he was gay (or bisexual, though the court does not note that possibility), presented the Court of Appeals with the issue of the proper level of scrutiny in light of *Windsor*, which did not specify one. “When the Supreme Court has refrained from identifying its method of analysis,” the court wrote, “we have analyzed the Supreme Court precedent ‘by

promising is *Windsor*’s observation that state marriage “rules” on such subjects as minimum ages or consanguinity “are in every event consistent within each State.” *Windsor*, 133 S.Ct. at 2692. Although not a holding that marriage laws must be consistent within a state, a principle which if adopted would condemn targeted state exemption of same-sex couples from rules that recognize marriages that were valid in the jurisdiction where celebrated, this language in *Windsor* could be conjoined with *Windsor*’s emphasis on the “unusual” character of the discrimination wrought by DOMA to support challenges to state non-recognition rules. The latter, however, is not new, and *Windsor* quotes the 1996 ‘gay rights’ decision *Romer v. Evans* (in turn quoting a 1928 Supreme Court decision) for it.

¹⁶⁸ *Windsor*, 133 S.Ct. at 2693.

¹⁶⁹ 413 U.S. 528, 534–535.

¹⁷⁰ *Windsor*, 133 S.Ct. at 2693.

¹⁷¹ *Id.* at 2696.

considering what the Court actually did, rather than by dissecting isolated pieces of text.”¹⁷² The Court of Appeals noted that the Supreme Court in *Windsor* “did not consider the possible rational bases for the law in question as is required for rational basis review.”¹⁷³ “Unlike in rational basis review, hypothetical reasons for DOMA’s enactment were not a basis of the Court’s inquiry” into DOMA’s purposes, the Court of Appeals observed.¹⁷⁴ “*Windsor*’s ‘careful consideration’ of DOMA’s actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review.”¹⁷⁵

Second, the Court of Appeals pointed out that “the critical part of *Windsor* begins by demanding that Congress’s purpose ‘justify’ disparate treatment of the group.”¹⁷⁶ As the Court of Appeals properly reasoned, however, “[w]ere the Court applying rational basis review, it would not identify a legitimate state interest to ‘justify’....’ the disparate treatment of the group.”¹⁷⁷ Hence, the Court of Appeals concluded, “*Windsor* requires heightened scrutiny.”¹⁷⁸ So, although *Windsor* did not expressly specify a level of scrutiny for sexual orientation discrimination, *SmithKline Beecham* shows how the Supreme Court may have advanced equal protection doctrine nonetheless.

The litigation proliferation is unlikely all to be a matter of doctrinal evolution, though, as proponents of LGBT equality have for years and years believed that extant doctrine contained ample resources for our claims. In broad outline the arguments were there when Richard Baker and James McConnell sued Minnesota for the right to marry after being denied a license in 1970. A note in the Yale Law Journal in 1973 concluded that “[a] credible case can be made for the contention that the denial of marriage licenses to all homosexual couples violates the Equal Protection Clause of the Fourteenth Amendment.”¹⁷⁹ The Harvard Law Review editors concurred in 1989. In 1992 Professor Bill Eskridge concluded that “the constitutional arguments are (when viewed without anti-gay bias) quite powerful.”¹⁸⁰ In 1994, Professor Andrew Koppelman concluded, in an article I should admit I edited: “reason and constitutional law demand that same-sex marriages be recognized. This is, however, far from being a prediction of the rule of decision that will ultimately prevail.... Scholarly argument, of the kind presented here, is impotent without political struggle.”¹⁸¹

¹⁷² *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480 (9th Cir. 2014), quoting *Witt v. Department of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 482.

¹⁷⁶ *Id.* at 482 (quoting *Windsor*, 133 S.Ct. at 2693).

¹⁷⁷ *Id.* (quoting *Witt*, 527 F.3d at 817).

¹⁷⁸ *Id.*

¹⁷⁹ Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 573 (1973).

¹⁸⁰ William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward A Gaylegal Agenda*, 102 YALE L.J. 333, 347 (1992) (citing in n.73 *Loving v. Virginia*, 388 U.S. 1 (1967), and *Turner v. Safley*, 482 U.S. 78 (1987)).

¹⁸¹ Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 214 (1994).

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And it was thus that we did not see any U.S. state lawfully marry recognized same-sex couples until a decade later, with Massachusetts in 2004. The political struggle and multi-front efforts took another decade to bring us to this point when about one third of U.S. states let same-sex couples marry. The cultural transformation that has occurred has been indispensable to creating the conditions for the judiciary to accept the principled constitutional arguments that same-sex couples have been making for decades. This has been a function of many factors, including the coming out of lesbian, gay, and bisexual persons; the emergence of more sympathetic media depictions of us and our lives; the educational efforts of countless activists and allies. We are now at a point where national polling shows 59% of voters supporting marriage equality, with majority support in every region in the country, and majority support even in the group of states that do not let same-sex couples marry. And in the November 2012 elections we saw the defeat of a proposed state constitutional amendment in Minnesota and the passage of marriage equality measures by the statewide electorates in three other states. It is developments such as these that are likely to lead to the U.S. Supreme Court's eventually, and sooner rather than later it appears, recognizing what the Vermont Supreme Court called "our common humanity" and fully embracing what the *Windsor* decision called "a new insight," that "[t]he limitation of lawful marriage to heterosexual couples" is "an unjust exclusion" and unconstitutional.