

# PROPOSITION 8 AND DOMA

The United States Supreme Court recently struck down a provision of the Defense of Marriage Act (DOMA) that denies federal benefits to legally married same-sex couples. (*U.S. v. Windsor* (June 26, 2013) 570 U.S. \_\_\_)) The Court also dismissed *Hollingsworth v. Perry* (June 26, 2013) 570 U.S. \_\_\_), the case which sought to enforce Proposition 8, California's ban on same-sex marriages.

While it is clear these cases will have a dramatic impact on same-sex couples, there are still more questions than answers. The IRS has not issued any guidance on the DOMA issue, but California has allowed same-sex marriage since June 26, 2013.

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## PROPOSITION 8

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The implementation of court's dismissal of *Hollingsworth* has begun. Counties are granting licenses to same-sex couples.

If you have clients who marry in California this year, there will be no changes or adjustments in prior years as the marriage did not occur until this year.

The unresolved questions will revolve around the IRS guidance in filing for 2013 and later. We suggest you compute potential tax liability and withholding as a married couple.

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## THE *WINDSOR* CASE

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In the *Windsor* case, a District Court in New York found that DOMA was unconstitutional as it is applied to estate tax law. (*Windsor v. U.S.* (June 6, 2012) U.S. District Court, Southern District of New York, Case No. 1:10-cv-08435-BSJ-JCF) The court in *Windsor* found that a surviving same-sex spouse was entitled to a refund of estate tax on her deceased spouse's estate.

The Supreme Court has affirmed this decision. While this decision will certainly affect your same-sex married couple clients in many ways, it is not yet clear how the IRS will handle the decision.

The full text of this decision can be found in the appendix of these materials.

## WHAT DOES THIS MEAN?

In a 5-4 decision, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) which required same-sex spouses to be treated as unmarried for purposes of federal law. The court found the Act was an unconstitutional deprivation of equal protection.

The case leaves many questions unanswered, such as:

- Effective date - Although the case involved the refund of estate tax paid, it does not direct the IRS to accept amended returns for prior years.
- Employee benefits - When must employee benefit and pension plans be amended? It is not yet determined whether plans must be amended immediately or can "snap on" language be added now with plan amendments in 2014?
- Who must file as married - Would retroactive filing be elective? In other words, if the taxpayers would be due a refund they may file, but they could elect not to file if the result is a balance due?

- Registered domestic partners – RDPs in California are treated the same as married couples. Does the decision apply only if the couple was “married” or also if it applies to RDPs?
- Conflicting state laws – Does the decision apply where a couple was married in a state where same-sex marriages were legal but are now domiciled in a state that does not recognize (or did not recognize in the prior, open year) same-sex marriage?

**States that recognize same-sex marriages**

State	Date of recognized marriage
California	June 16, 2008 – November 4, 2008 and on or after June 26, 2013
Connecticut	November 12, 2008
Delaware	July 1, 2013
District of Columbia	March 9, 2010
Iowa	April 27, 2009
Maine	December 29, 2012
Massachusetts	May 17, 2004
Maryland	January 1, 2013
Minnesota	August 1, 2013
New Hampshire	January 1, 2010
New York	July 24, 2011
Rhode Island	August 1, 2013
Vermont	September 1, 2009
Washington	December 6, 2012

Here are some of the tax implications of the *Windsor* case:

- Filing as married rather than single taxpayers (rates, standard deductions, and possible marriage penalties). It seems clear that these taxpayers will file as married. However, we do not have any guidance from the IRS yet on this issue;
- Tax free employer health coverage for the same-sex spouse (California law already provides for this benefit);
- Requirement to include same-sex spouse in employer cafeteria plans (eg. medical and child care reimbursement plans);
- IRA or retirement plan issues such as distributions using spousal rules, contributions for nonworking spouses;
- ERISA rules regarding beneficiary designations and payouts;
- Deductibility and taxability of alimony;
- No tax due on property settlements or transfers of property between spouses
- Innocent spouse protections;

- Gifting and estate tax benefits for spouses such as:
  - No tax on gifts to spouses; and
  - Spousal estate tax exemption and portability elections;
- Working self-employed individual will pay and deduct self-employed health insurance premium;
- \$500,000 sale of residence exclusion, even if only one spouse is on title;
- Using joint AGI to compute phaseouts and other adjustments.

## CONSIDER FILING AN AMENDED RETURN

We recommend you discuss with your clients the advantage of filing amended returns, at least for a year where the statute is about to expire.

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### DOMA CLIENT LETTER

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Dear Tax Client,

As you know, the United States Supreme Court has ruled that the Defense of Marriage Act (DOMA) is unconstitutional. (*U.S. v. Windsor* (June 26, 2013) 570 U.S. \_\_\_) I know you have lots of questions about what this means for your tax returns and tax planning. While this decision will certainly affect you in many ways, it is not yet clear how the IRS will handle this issue.

President Obama released a statement supporting the decision, saying "I've directed the Attorney General to work with other members of my Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." Based on this statement I am hoping to hear from the IRS on this issue soon, and I will keep you posted as the issue develops.

In the meantime, I can review your file to consider filing amended returns for open years, claiming the right to file as married. At this point we would only file these returns if you would benefit from a married filing. These protective refund claims will prevent the statute of limitations from running on these returns while all of these issues are settled.

If you would like me to review your files, or answer any question you might have, please call me.

Sincerely,

Your Tax Advisor

 **Website**

[www.caltax.com/spidellweb/public/editorial/DOMAletter.doc](http://www.caltax.com/spidellweb/public/editorial/DOMAletter.doc)

We will provide additional information as it becomes available.

### Summer seminars

Renee Rodda, JD will discuss the issue further and be available for questions at Spidell's Summer Tax Seminars, taking place in eight locations throughout California beginning July 9.

San Jose	July 9
South San Francisco	July 10
Pleasanton	July 12
San Diego	July 15
Orange	July 16
Burbank	July 17
Culver City	July 18

For more information go to:

 **Website**

Click here or go to <http://www.caltax.com>

Spidell Publishing will present a two-hour webinar when we have answers to these questions. We are hoping to have answers late in September so you will have answers for filing 2012 returns for same-sex and RDP clients.

Spidell will also provide detailed update information in Spidell's California Taxletter® as it becomes available.

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**UNITED STATES *v.* WINDSOR, EXECUTOR OF THE  
ESTATE OF SPYER, ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

No. 12–307. Argued March 27, 2013—Decided June 26, 2013

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define “marriage” and “spouse” as excluding same-sex partners. Windsor paid \$363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend §3’s constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend §3’s constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding §3 unconstitutional and ordering the Treasury to refund Windsor’s tax with interest. The Second Circuit affirmed. The United States has not complied with the judgment.

*Held:*

1. This Court has jurisdiction to consider the merits of the case. This case clearly presented a concrete disagreement between opposing parties that was suitable for judicial resolution in the District Court, but the Executive’s decision not to defend §3’s constitutionality

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ty in court while continuing to deny refunds and assess deficiencies introduces a complication. Given the Government’s concession, *amicus* contends, once the District Court ordered the refund, the case should have ended and the appeal been dismissed. But this argument elides the distinction between Article III’s jurisdictional requirements and the prudential limits on its exercise, which are “essentially matters of judicial self-governance.” *Warth v. Seldin*, 422 U. S. 490, 500. Here, the United States retains a stake sufficient to support Article III jurisdiction on appeal and in this Court. The refund it was ordered to pay Windsor is “a real and immediate economic injury,” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599, even if the Executive disagrees with §3 of DOMA. Windsor’s ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. Cf. *INS v. Chadha*, 462 U. S. 919.

Prudential considerations, however, demand that there be “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U. S. 186, 204. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.” *Warth, supra*, at 500–501. One such consideration is the extent to which adversarial presentation of the issues is ensured by the participation of *amici curiae* prepared to defend with vigor the legislative act’s constitutionality. See *Chadha, supra*, at 940. Here, BLAG’s substantial adversarial argument for §3’s constitutionality satisfies prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. This conclusion does not mean that it is appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal. But this case is not routine, and BLAG’s capable defense ensures that the prudential issues do not cloud the merits question, which is of immediate importance to the Federal Government and to hundreds of thousands of persons. Pp. 5–13.

2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. Pp. 13–26.

(a) By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States. Congress has enacted discrete statutes to regulate the meaning of marriage in order to further federal policy, but DOMA, with a directive applicable to over 1,000 federal statutes and

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the whole realm of federal regulations, has a far greater reach. Its operation is also directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. Assessing the validity of that intervention requires discussing the historical and traditional extent of state power and authority over marriage.

Subject to certain constitutional guarantees, see, *e.g.*, *Loving v. Virginia*, 388 U. S. 1, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States,” *Sosna v. Iowa*, 419 U. S. 393, 404. The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States,” *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383–384. Marriage laws may vary from State to State, but they are consistent within each State.

DOMA rejects this long-established precept. The State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. But the Federal Government uses the state-defined class for the opposite purpose—to impose restrictions and disabilities. The question is whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment, since what New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect. New York’s actions were a proper exercise of its sovereign authority. They reflect both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality. Pp. 13–20.

(b) By seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles applicable to the Federal Government. The 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. *Department of Agriculture v. Moreno*, 413 U. S. 528, 534–535. DOMA cannot survive under these principles. Its unusual deviation from the tradition of recognizing and accepting state definitions of marriage operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA’s avowed purpose and practical effect 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

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of the States.

DOMA's history of enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. BLAG's arguments are just as candid about the congressional purpose. DOMA's operation in practice confirms this purpose. It frustrates New York's objective of eliminating inequality by writing inequality into the entire United States Code.

DOMA's principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. Pp. 20–26.

699 F. 3d 169, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to Part I. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts II and III.



Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 12–307

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UNITED STATES, PETITIONER *v.* EDITH SCHLAIN  
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE  
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor’s favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.*, *Baehr v. Lewin*, 74

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Haw. 530, 852 P.2d 44 (1993), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See 28 U. S. C. §1738C.

Section 3 is at issue here. It amends the Dictionary Act in Title 1, §7, of the United States Code to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“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 wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”  
1 U. S. C. §7.

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer’s health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside

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in New York City. The State of New York deems their Ontario marriage to be a valid one. See 699 F.3d 169, 177–178 (CA2 2012).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” 26 U. S. C. §2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s §3. Noting that “the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples,” App. 184, the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” *Id.*, at 191. The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse

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judgment. The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although “the President . . . instructed the Department not to defend the statute in *Windsor*,” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” *Id.*, at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.” *Id.*, at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG’s motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that §3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court’s judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had

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urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce §3 of DOMA.

In granting certiorari on the question of the constitutionality of §3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute. 568 U. S. \_\_\_\_ (2012). She has ably discharged her duties.

In an unrelated case, the United States Court of Appeals for the First Circuit has also held §3 of DOMA to be unconstitutional. A petition for certiorari has been filed in that case. Pet. for Cert. in *Bipartisan Legal Advisory Group v. Gill*, O. T. 2012, No. 12–13.

## II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. “[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599 (2007) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt

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but for the alleged invalidity of §3 of DOMA.

The decision of the Executive not to defend the constitutionality of §3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The *amicus*' position is that, given the Government's concession that §3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the *amicus* argues the Court of Appeals should have dismissed the appeal. The *amicus* submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See *Warth v.*

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*Seldin*, 422 U. S. 490, 498 (1975). The latter are “essentially matters of judicial self-governance.” *Id.*, at 500. The Court has kept these two strands separate: “Article III standing, which enforces the Constitution’s case-or-controversy requirement, see *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction,’ *Allen [v. Wright]*, 468 U. S. [737,] 751 [(1984)].” *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 11–12 (2004).

The requirements of Article III standing are familiar:

“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural or hypothetical.”’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan, supra*, at 560–561 (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible “rule[s] . . . of federal appellate practice,” *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from “decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Warth, supra*, at 500.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in pro-

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ceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is “a real and immediate economic injury,” *Hein*, 551 U. S., at 599, indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court’s order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with §3 of DOMA, which results in Windsor’s liability for the tax. Windsor’s ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s ruling.

This Court confronted a comparable case in *INS v. Chadha*, 462 U. S. 919 (1983). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and “the INS presented the Executive’s views on the constitutionality of the House action to the Court of Appeals.” *Id.*, at 930. The INS, however, continued to abide by the statute, and “the INS brief to the Court of Appeals did not alter the agency’s decision to comply with the House action ordering deportation of Chadha.” *Ibid.* This Court held “that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take,” *ibid.*, regardless of whether the agency welcomed the judgment. The necessity of a “case or controversy” to



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satisfy Article III was defined as a requirement that the Court’s “‘decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him.’” *Id.*, at 939–940 (quoting *Chadha v. INS*, 634 F.2d 408, 419 (CA9 1980)). This conclusion was not dictum. It was a necessary predicate to the Court’s holding that “prior to Congress’ intervention, there was adequate Art. III adverseness.” 462 U. S., at 939. The holdings of cases are instructive, and the words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where “the Government largely agree[s] with the opposing party on the merits of the controversy,” there is sufficient adverseness and an “adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.” *Id.*, at 940, n. 12.

It is true that “[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” *Roper, supra*, at 333, see also *Camreta v. Greene*, 563 U. S. \_\_\_\_, \_\_ (2011) (slip op., at 8) (“As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so”). But this rule “does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.” *Roper, supra*, at 333–334.

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems inherent in the Executive’s unusual position require some further discussion. The Executive’s agreement with Windsor’s legal argument raises the risk

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that instead of a “real, earnest and vital controversy,” the Court faces a “friendly, non-adversary, proceeding . . . [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’” *Ashwander v. TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U. S. 186, 204 (1962).

There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.” *Warth*, 422 U. S., at 500–501. One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act. With respect to this prudential aspect of standing as well, the *Chadha* Court encountered a similar situation. It noted that “there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of [this case] in the absence of any participant supporting the validity of [the statute]. The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress.” 462 U. S., at 940. *Chadha* was not an anomaly in this respect. The Court adopts the practice of entertaining arguments made by an *amicus* when the

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Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional. See, e.g., *Dickerson v. United States*, 530 U. S. 428 (2000).

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of §3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1 (CA1 2012). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circum-

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stances, the very term “prudential” counsels that it is a proper exercise of the Court’s responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.

The Court’s conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive’s failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government’s agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President’s. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, [i]t is emphatically the province and duty of the judicial department to say what the law is.” *Zivotofsky v. Clinton*, 566 U. S. \_\_\_, \_\_\_ (2012) (slip op., at 7) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.

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The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

## III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States

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concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N. Y. Laws 749 (codified at N. Y. Dom. Rel. Law Ann. §§10–a, 10–b, 13 (West 2013)).

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting dis-

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crete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. *Hillman v. Maretta*, 569 U. S. \_\_\_\_ (2013); see also *Ridgway v. Ridgway*, 454 U. S. 46 (1981); *Wissner v. Wissner*, 338 U. S. 655 (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen’s marriage is valid and proper for state-law purposes. 8 U. S. C. §1186a(b)(1) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, common-law marriages also should be recognized, regardless of any particular State’s view on these relationships. 42 U. S. C. §1382c(d)(2).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to

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over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09–13; *Varnum v. Brien*, 763 N. W. 2d 862 (Iowa 2009); Vt. Stat. Ann., Tit. 15, §8 (2010); N. H. Rev. Stat. Ann. §457:1–a (West Supp. 2012); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D. C. Reg. 27 (Dec. 18, 2009); N. Y. Dom. Rel. Law Ann. §10–a (West Supp. 2013); Wash. Rev. Code §26.04.010 (2012); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012) (results online at <http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html> (all Internet sources as visited June 18, 2013, and available in Clerk of Court’s case file)); Md. Fam. Law Code Ann. §2–201 (Lexis 2012); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations—Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.*, *Loving v. Virginia*, 388 U. S. 1 (1967); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U. S. 393,



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404 (1975).

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U. S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”). The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” *Ibid.* “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” *Haddock v. Haddock*, 201 U. S. 562, 575 (1906); see also *In re Burrus*, 136 U. S. 586, 593–594 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”).

Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U. S. 570 (1956), for example, the Court held that, “[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,” under the Copyright Act “requires a reference to the law of the State which created those legal relationships” because “there is no federal law of domestic relations.” *Id.*, at 580. In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U. S. 689, 703 (1992). Federal courts will not hear divorce and custody cases even if they arise in diversity because of “the virtually exclusive primacy . . . of the

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States in the regulation of domestic relations.” *Id.*, at 714 (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 383–384 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, §5142 (2012), with N. H. Rev. Stat. Ann. §457:4 (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see Iowa Code §595.19 (2009); Wash. Rev. Code §26.04.020 (2012)—prohibit the practice). But these rules are in every event consistent within each State.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of

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its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer v. Evans*, 517 U. S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 37–38 (1928)).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

In acting first to recognize and then to allow same-sex marriages, New York was responding “to the initiative of those who [sought] a voice in shaping the destiny of their own times.” *Bond v. United States*, 564 U. S. \_\_\_\_, \_\_ (2011) (slip op., at 9). These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” *Lawrence v. Texas*, 539 U. S. 558, 567 (2003). By its recognition of the validity of same-sex

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marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

## IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U. S. Const., Amdt. 5; *Bolling v. Sharpe*, 347 U. S. 497 (1954). The 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. *Department of Agriculture v. Moreno*, 413 U. S. 528, 534–535 (1973). In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. *Supra*, at 19 (quoting *Romer, supra*, at 633). DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a

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law having the purpose and effect of disapproval of that class. The 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.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H. R. Rep. No. 104-664, pp. 12-13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.*, at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was "to put a thumb on the scales and influence a

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state's decision as to how to shape its own marriage laws." *Massachusetts*, 682 F. 3d, at 12–13. The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples,

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and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U. S. C. §§8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U. S. C. §§101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U. S. C. §115(a)(1)(A), with the intent to influence or retaliate against that official, §115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate

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family,” §115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. See 26 U. S. C. §106; Treas. Reg. §1.106–1, 26 CFR §1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple’s child), online at <http://www.ssa.gov/pubs/EN-05-10084.pdf>.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse’s income in calculating a student’s federal financial aid eligibility. See 20 U. S. C. §1087nn(b). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from “participat[ing] personally and substantially” in matters as to which they or their spouses have a financial interest. 18 U. S. C. §208(a). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see 2 U. S. C. §31–2(a)(1), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U. S. C. App. §§102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.



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The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U. S., at 499–500; *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. 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 mar-

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riage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

*It is so ordered.*

ROBERTS, C. J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN  
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE  
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

CHIEF JUSTICE ROBERTS, dissenting.

I agree with JUSTICE SCALIA that this Court lacks jurisdiction to review the decisions of the courts below. On the merits of the constitutional dispute the Court decides to decide, I also agree with JUSTICE SCALIA that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. *Post*, at 19–20 (dissenting opinion).

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—“thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.” *Ante*, at 13. That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the “principal purpose,” *ante*, at 22, of the 342 Representa-

ROBERTS, C. J., dissenting

tives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation," *ante*, at 18, may continue to utilize the traditional definition of marriage.

The majority goes out of its way to make this explicit in the penultimate sentence of its opinion. It states that "[t]his opinion and its holding are confined to those lawful marriages," *ante*, at 26—referring to same-sex marriages that a State has already recognized as a result of the local "community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Ante*, at 20. JUSTICE SCALIA believes this is a "bald, unreasoned disclaime[r]." *Post*, at 22. In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt. The dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. *Ante*, at 17, 20. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State

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and Federal Governments, emphasizing that DOMA “rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.” *Ante*, at 18. But there is no such departure when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would “vary, subject to constitutional guarantees, from one State to the next.” *Ibid.* Thus, while “[t]he State’s power in defining the marital relation is of central relevance” to the majority’s decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA’s constitutionality in this case. See *ante*, at 19.

It is not just this central feature of the majority’s analysis that is unique to DOMA, but many considerations on the periphery as well. For example, the majority focuses on the legislative history and title of this particular Act, *ante*, at 21; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes. The majority emphasizes that DOMA was a “system-wide enactment with no identified connection to any particular area of federal law,” but a State’s definition of marriage “is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” *Ante*, at 22, 17. And the federal decision undermined (in the majority’s view) the “dignity [already] conferred by the States in the exercise of their sovereign power,” *ante*, at 21, whereas a State’s decision whether to expand the definition of marriage from its traditional contours involves no similar concern.

We may in the future have to resolve challenges to state

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marriage definitions affecting same-sex couples. That issue, however, is not before us in this case, and we hold today that we lack jurisdiction to consider it in the particular context of *Hollingsworth v. Perry*, *ante*, p. \_\_\_\_\_. I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.

SCALIA, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 12–307

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UNITED STATES, PETITIONER *v.* EDITH SCHLAIN  
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE  
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,  
and with whom THE CHIEF JUSTICE joins as to Part I,  
dissenting.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

I  
A

The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the “judicial Power,” a power to decide not abstract questions but real, concrete

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“Cases” and “Controversies.” Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?

The answer lies at the heart of the jurisdictional portion of today’s opinion, where a single sentence lays bare the majority’s vision of our role. The Court says that we have the power to decide this case because if we did not, then our “primary role in determining the constitutionality of a law” (at least one that “has inflicted real injury on a plaintiff”) would “become only secondary to the President’s.” *Ante*, at 12. But wait, the reader wonders—Windsor won below, and so *cured* her injury, and the President was glad to see it. True, says the majority, but judicial review must march on regardless, lest we “undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.” *Ibid.* (internal quotation marks and brackets omitted).

That is jaw-dropping. It is an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role.

This image of the Court would have been unrecognizable to those who wrote and ratified our national charter. They knew well the dangers of “primary” power, and so created branches of government that would be “perfectly coordinate by the terms of their common commission,” none of which branches could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.” *The Federalist*, No. 49, p. 314 (C. Rossiter ed. 1961) (J. Madison). The people did this to protect



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themselves. They did it to guard their right to self-rule against the black-robed supremacy that today's majority finds so attractive. So it was that Madison could confidently state, with no fear of contradiction, that there was nothing of "greater intrinsic value" or "stamped with the authority of more enlightened patrons of liberty" than a government of separate and coordinate powers. *Id.*, No. 47, at 301.

For this reason we are quite forbidden to say what the law is whenever (as today's opinion asserts) "an Act of Congress is alleged to conflict with the Constitution." *Ante*, at 12. We can do so only when that allegation will determine the outcome of a lawsuit, and is contradicted by the other party. The "judicial Power" is not, as the majority believes, the power "to say what the law is," *ibid.*, giving the Supreme Court the "primary role in determining the constitutionality of laws." The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit. See, e.g., Basic Law for the Federal Republic of Germany, Art. 93. The judicial power as Americans have understood it (and their English ancestors before them) is the power to adjudicate, with conclusive effect, disputed government claims (civil or criminal) against private persons, and disputed claims by private persons against the government or other private persons. Sometimes (though not always) the parties before the court disagree not with regard to the facts of their case (or not *only* with regard to the facts) but with regard to the applicable law—in which event (and *only* in which event) it becomes the "province and duty of the judicial department to say what the law is." *Ante*, at 12.

In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court, it is not a separate, free-

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standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us. Then, and only then, does it become “the province and duty of the judicial department to say what the law is.” That is why, in 1793, we politely declined the Washington Administration’s request to “say what the law is” on a particular treaty matter that was not the subject of a concrete legal controversy. 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed. 1893). And that is why, as our opinions have said, some questions of law will *never* be presented to this Court, because there will never be anyone with standing to bring a lawsuit. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974); *United States v. Richardson*, 418 U. S. 166, 179 (1974). As Justice Brandeis put it, we cannot “pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding”; absent a “real, earnest and vital controversy between individuals,” we have neither any work to do nor any power to do it. *Ashwander v. TVA*, 297 U. S. 288, 346 (1936) (concurring opinion) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345 (1892)). Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

That is completely absent here. Windsor’s injury was cured by the judgment in her favor. And while, in ordinary circumstances, the United States is injured by a directive to pay a tax refund, this suit is far from ordinary. Whatever injury the United States has suffered will surely not be redressed by the action that it, as a litigant, asks us to take. The final sentence of the Solicitor General’s brief on the merits reads: “For the foregoing reasons, the judgment of the court of appeals *should be affirmed*.” Brief for United States (merits) 54 (emphasis added). That will not cure the Government’s injury, but carve it into stone. One

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could spend many fruitless afternoons ransacking our library for any other petitioner’s brief seeking an affirmance of the judgment against it.<sup>1</sup> What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct. And the same was true in the Court of Appeals: Neither party sought to undo the judgment for Windsor, and so that court should have dismissed the appeal (just as we should dismiss) for lack of jurisdiction. Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there. The further proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States.

We have never before agreed to speak—to “say what the law is”—where there is no controversy before us. In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question’s answer. The United States reluctantly conceded that at oral argument. See Tr. of Oral Arg. 19–20.

The closest we have ever come to what the Court blesses today was our opinion in *INS v. Chadha*, 462 U. S. 919 (1983). But in that case, two parties to the litigation

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<sup>1</sup>For an even more advanced scavenger hunt, one might search the annals of Anglo-American law for another “Motion to Dismiss” like the one the United States filed in District Court: It argued that the court should agree “with Plaintiff and the United States” and “*not* dismiss” the complaint. (Emphasis mine.) Then, having gotten exactly what it asked for, the United States promptly appealed.

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disagreed with the position of the United States and with the court below: the House and Senate, which had intervened in the case. Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power,<sup>2</sup> we permitted the House and Senate to intervene. Nothing like that is present here.

To be sure, the Court in *Chadha* said that statutory aggrieved-party status was “not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional.” *Id.*, at 930–931. But in a footnote to that statement, the Court acknowledged Article III’s separate requirement of a “justiciable case or controversy,” and stated that *this* requirement was satisfied “because of the presence of the two Houses of Congress as adverse parties.” *Id.*, at 931, n. 6. Later in its opinion, the *Chadha* Court remarked that the United States’ announced intention to enforce the statute also sufficed to permit judicial review, even absent congressional participation. *Id.*, at 939. That remark is true, as a description of the judicial review conducted in the Court of Appeals, where the Houses of Congress had not inter-

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<sup>2</sup>There the Justice Department’s refusal to defend the legislation was in accord with its longstanding (and entirely reasonable) practice of declining to defend legislation that in its view infringes upon Presidential powers. There is no justification for the Justice Department’s abandoning the law in the present case. The majority opinion makes a point of scolding the President for his “failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions,” *ante*, at 12. But the rebuke is tongue-in-cheek, for the majority gladly gives the President what he wants. Contrary to all precedent, it decides this case (and even decides it the way the President wishes) *despite* his abandonment of the defense and the consequent absence of a case or controversy.

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vened. (The case originated in the Court of Appeals, since it sought review of agency action under 8 U. S. C. §1105a(a) (1976 ed.)) There, absent a judgment setting aside the INS order, Chadha faced deportation. This passage of our opinion seems to be addressing that initial standing in the Court of Appeals, as indicated by its quotation from the lower court’s opinion, 462 U. S., at 939–940. But if it was addressing standing to pursue the appeal, the remark was both the purest dictum (as congressional intervention at that point made the required adverseness “beyond doubt,” *id.*, at 939), and quite incorrect. When a private party has a judicial decree safely in hand to prevent his injury, additional judicial action requires that a party injured by the decree *seek to undo it*. In *Chadha*, the intervening House and Senate fulfilled that requirement. Here no one does.

The majority’s discussion of the requirements of Article III bears no resemblance to our jurisprudence. It accuses the *amicus* (appointed to argue against our jurisdiction) of “elid[ing] the distinction between . . . the jurisdictional requirements of Article III and the prudential limits on its exercise.” *Ante*, at 6. It then proceeds to call the requirement of adverseness a “prudential” aspect of standing. *Of standing*. That is incomprehensible. A plaintiff (or appellant) can have all the standing in the world—satisfying all three standing requirements of *Lujan* that the majority so carefully quotes, *ante*, at 7—and yet no Article III controversy may be before the court. Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint. It is not the *amicus* that has done the eliding of distinctions, but the majority, calling the quite separate Article III requirement of adverseness between the parties an element (which it then pronounces a “prudential” element) of standing. The question here is not whether, as the majority puts it, “the United States retains a stake

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sufficient to support Article III jurisdiction,” *ibid.* the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.

I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a “prudential” aspect of the sole Article III requirement of standing. (Relegating a jurisdictional requirement to “prudential” status is a wondrous device, enabling courts to ignore the requirement whenever they believe it “prudent”—which is to say, a good idea.) Half a century ago, a Court similarly bent upon announcing its view regarding the constitutionality of a federal statute achieved that goal by effecting a remarkably similar *but completely opposite* distortion of the principles limiting our jurisdiction. The Court’s notorious opinion in *Flast v. Cohen*, 392 U. S. 83, 98–101 (1968), held that *standing* was merely an element (which it pronounced to be a “prudential” element) of the sole Article III requirement of *adverseness*. We have been living with the chaos created by that power-grabbing decision ever since, see *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587 (2007), as we will have to live with the chaos created by this one.

The authorities the majority cites fall miles short of supporting the counterintuitive notion that an Article III “controversy” can exist without disagreement between the parties. In *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326 (1980), the District Court had entered judgment in the individual plaintiff’s favor based on the defendant bank’s offer to pay the full amount claimed. The plaintiff, however, sought to appeal the District Court’s denial of class certification under Federal Rule of Civil Procedure 23. There was a continuing dispute between the parties concerning the issue raised on appeal. The same is true of the other case cited by the majority, *Camreta v. Greene*,

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563 U. S. \_\_\_\_ (2011). There the District Court found that the defendant state officers had violated the Fourth Amendment, but rendered judgment in their favor because they were entitled to official immunity, application of the Fourth Amendment to their conduct not having been clear at the time of violation. The officers sought to appeal the holding of Fourth Amendment violation, which would circumscribe their future conduct; the plaintiff continued to insist that a Fourth Amendment violation had occurred. The “prudential” discretion to which both those cases refer was the discretion to *deny* an appeal even when a live controversy exists—not the discretion to *grant* one when it does not. The majority can cite no case in which this Court entertained an appeal in which both parties urged us to affirm the judgment below. And that is because the existence of a controversy is not a “prudential” requirement that we have invented, but an essential element of an Article III case or controversy. The majority’s notion that a case between friendly parties can be entertained so long as “adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor” the other side of the issue, *ante*, at 10, effects a breathtaking revolution in our Article III jurisprudence.

It may be argued that if what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional. Where the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement. This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce

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nor to defend the statute he believed to be unconstitutional, see Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994)—in which event Windsor would not have been injured, the District Court could not have refereed this friendly scrimmage, and the Executive’s determination of unconstitutionality would have escaped this Court’s desire to blurt out its view of the law. The matter would have been left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. Or the President could have evaded presentation of the constitutional issue to this Court simply by declining to appeal the District Court and Court of Appeals dispositions he agreed with. Be sure of this much: If a President wants to insulate his judgment of unconstitutionality from our review, he can. What the views urged in this dissent produce is not insulation from judicial review but insulation from Executive contrivance.

The majority brandishes the famous sentence from *Marbury v. Madison*, 1 Cranch 137, 177 (1803) that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Ante*, at 12 (internal quotation marks omitted). But that sentence neither says nor implies that it is *always* the province and duty of the Court to say what the law is—much less that its responsibility in that regard is a “primary” one. The very next sentence of Chief Justice Marshall’s opinion makes the crucial qualification that today’s majority ignores: “*Those who apply the rule to particular cases, must of necessity expound and interpret that rule.*” 1 Cranch, at 177 (emphasis added). Only when a “particular case” is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law. For the views of our early Court more



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precisely addressing the question before us here, the majority ought instead to have consulted the opinion of Chief Justice Taney in *Lord v. Veazie*, 8 How. 251 (1850):

“The objection in the case before us is . . . that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

“A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible . . . . A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed.” *Id.*, at 255–256.

There is, in the words of *Marbury*, no “necessity [to] expound and interpret” the law in this case; just a desire to place this Court at the center of the Nation’s life. 1 Cranch, at 177.

## B

A few words in response to the theory of jurisdiction set forth in JUSTICE ALITO’s dissent: Though less far reaching in its consequences than the majority’s conversion of constitutionally required adverseness into a discretionary element of standing, the theory of that dissent similarly elevates the Court to the “primary” determiner of constitutional questions involving the separation of powers, and, to boot, increases the power of the most dangerous branch: the “legislative department,” which by its nature “draw[s] all power into its impetuous vortex.” *The Federalist*, No. 48, at 309 (J. Madison). Heretofore in our national history, the President’s failure to “take Care that the Laws be faithfully executed,” U. S. Const., Art. II, §3, could only be

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brought before a judicial tribunal by someone whose concrete interests were harmed by that alleged failure. JUSTICE ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws.<sup>3</sup> This would lay to rest Tocqueville’s praise of our judicial system as one which “intimately bind[s] the case made for the law with the case made for one man,” one in which legislation is “no longer exposed to the daily aggression of the parties,” and in which “[t]he political question that [the judge] must resolve is linked to the interest” of private litigants. A. de Tocqueville, *Democracy in America* 97 (H. Mansfield

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<sup>3</sup>JUSTICE ALITO attempts to limit his argument by claiming that Congress is injured (and can therefore appeal) when its statute is held unconstitutional without Presidential defense, but is *not* injured when its statute is held unconstitutional *despite* Presidential defense. I do not understand that line. The injury to Congress is the same whether the President has defended the statute or not. And if the injury is threatened, why should Congress not be able to participate in the suit from the beginning, just as the President can? And if having a statute declared unconstitutional (and therefore inoperative) by a court is an injury, why is it not an injury when a statute is declared unconstitutional by the President and rendered inoperative by his consequent failure to enforce it? Or when the President simply declines to enforce it without opining on its constitutionality? If it is the *inoperativeness* that constitutes the injury—the “impairment of [the legislative] function,” as JUSTICE ALITO puts it, *post*, at 4—it should make no difference which of the other two branches inflicts it, and whether the Constitution is the pretext. A principled and predictable system of jurisprudence cannot rest upon a shifting concept of injury, designed to support standing when we would like it. If this Court agreed with JUSTICE ALITO’s distinction, its opinion in *Raines v. Byrd*, 521 U. S. 811 (1997), which involved an original suit by Members of Congress challenging an assertedly unconstitutional law, would have been written quite differently; and JUSTICE ALITO’s distinguishing of that case on grounds quite irrelevant to his theory of standing would have been unnecessary.

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& D. Winthrop eds. 2000). That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.

JUSTICE ALITO's notion of standing will likewise enormously shrink the area to which "judicial censure, exercised by the courts on legislation, cannot extend," *ibid.* For example, a bare majority of both Houses could bring into court the assertion that the Executive's implementation of welfare programs is too generous—a failure that no other litigant would have standing to complain about. Moreover, as we indicated in *Raines v. Byrd*, 521 U. S. 811, 828 (1997), if Congress can sue the Executive for the erroneous application of the law that "injures" its power to legislate, surely the Executive can sue Congress for its erroneous adoption of an unconstitutional law that "injures" the Executive's power to administer—or perhaps for its protracted failure to act on one of his nominations. The opportunities for dragging the courts into disputes hitherto left for political resolution are endless.

JUSTICE ALITO's dissent is correct that *Raines* did not formally decide this issue, but its reasoning does. The opinion spends three pages discussing famous, decades-long disputes between the President and Congress—regarding congressional power to forbid the Presidential removal of executive officers, regarding the legislative veto, regarding congressional appointment of executive officers, and regarding the pocket veto—that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation. But it does not, and never has; the "enormous power that the judiciary would acquire" from the ability to adjudicate such suits "would have made a mockery of [Hamilton's]

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quotation of Montesquieu to the effect that ‘of the three powers above mentioned . . . the JUDICIARY is next to nothing.’” *Barnes v. Kline*, 759 F.2d 21, 58 (CA DC 1985) (Bork, J., dissenting) (quoting *The Federalist* No. 78 (A. Hamilton)).

To be sure, if Congress cannot invoke our authority in the way that JUSTICE ALITO proposes, then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. That is what “[a]mbition . . . counteract[ing] ambition,” *The Federalist*, No. 51, at 322 (J. Madison), is all about. If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says “enforce the Act” quite like “. . . or you will have money for little else.”) But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution’s entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court’s decree, just as he did not faithfully implement Congress’s statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.

## II

For the reasons above, I think that this Court has, and the Court of Appeals had, no power to decide this suit. We should vacate the decision below and remand to the Court of Appeals for the Second Circuit, with instructions to dismiss the appeal. Given that the majority has volunteered its view of the merits, however, I proceed to discuss that as well.

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## A

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution,” and that “[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism” because “the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.” *Ante*, at 18. But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is? Even after the opinion has formally disclaimed reliance upon principles of federalism, mentions of “the usual tradition of recognizing and accepting state definitions of marriage” continue. See, *e.g.*, *ante*, at 20. What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of “marriage” in federal statutes is unsupported by any of the Federal Government's enumerated powers,<sup>4</sup> nonetheless needs some rhetorical basis to support its pretense that today's prohibition of

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<sup>4</sup>Such a suggestion would be impossible, given the Federal Government's long history of making pronouncements regarding marriage—for example, conditioning Utah's entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, §3, 28 Stat. 108 (“The constitution [of Utah]” must provide “perfect toleration of religious sentiment,” “*Provided*, That polygamous or plural marriages are forever prohibited”).

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laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Equally perplexing are the opinion's references to "the Constitution's guarantee of equality." *Ibid.* Near the end of the opinion, we are told that although the "equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved"—what can *that* mean?—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does." *Ante*, at 25. The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe*, 347 U. S. 497 (1954), *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973), and *Romer v. Evans*, 517 U. S. 620 (1996)—*all* of which are equal-protection cases.<sup>5</sup> And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution's meaning, except for its citation of *Lawrence v. Texas*, 539 U. S. 558 (2003) (not an equal-protection case) to support its passing assertion that the Constitution protects the "moral and sexual choices" of same-sex couples, *ante*, at 23.

Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the

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<sup>5</sup>Since the Equal Protection Clause technically applies only against the States, see U. S. Const., Amdt. 14, *Bolling* and *Moreno*, dealing with federal action, relied upon "the equal protection component of the Due Process Clause of the Fifth Amendment," *Moreno*, 413 U. S., at 533.

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central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below, compare Brief for Respondent Bipartisan Legal Advisory Group of U. S. House of Representatives (merits) 24–28 (no), with Brief for Respondent Windsor (merits) 17–31 and Brief for United States (merits) 18–36 (yes); and compare 699 F. 3d 169, 180–185 (CA2 2012) (yes), with *id.*, at 208–211 (Straub, J., dissenting in part and concurring in part) (no). In accord with my previously expressed skepticism about the Court’s “tiers of scrutiny” approach, I would review this classification only for its rationality. See *United States v. Virginia*, 518 U. S. 515, 567–570 (1996) (SCALIA, J., dissenting). As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework. See *Heller v. Doe*, 509 U. S. 312, 320 (1993) (a classification “must be upheld . . . if there is any reasonably conceivable state of facts” that could justify it).

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,” *ante*, at 25; that it violates “basic due process” principles, *ante*, at 20; and that it inflicts an “injury and indignity” of a kind that denies “an essential part of the liberty protected by the Fifth Amendment,” *ante*, at 19. The majority never utters the dread words “substantive due process,” perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is “deeply rooted in this Nation’s history and tradition,”

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*Washington v. Glucksberg*, 521 U. S. 702, 720–721 (1997), a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of “ordered liberty.” *Id.*, at 721 (quoting *Palko v. Connecticut*, 302 U. S. 319, 325 (1937)).

Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a “bare . . . desire to harm” couples in same-sex marriages. *Ante*, at 20. It is this proposition with which I will therefore engage.

## B

As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. See *Lawrence v. Texas*, 539 U. S. 558, 599 (2003) (SCALIA, J., dissenting). I will not swell the U. S. Reports with restatements of that point. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.

However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court’s conclusion that only those with hateful hearts could have voted “aye” on this Act. And more importantly, they serve to make the contents of the legis-



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lators' hearts quite irrelevant: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U. S. 367, 383 (1968). Or at least it *was* a familiar principle. By holding to the contrary, the majority has declared open season on any law that (in the opinion of the law's opponents and any panel of like-minded federal judges) can be characterized as mean-spirited.

The majority concludes that the only motive for this Act was the "bare . . . desire to harm a politically unpopular group." *Ante*, at 20. Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn, see, e.g., *Edwards v. Aguillard*, 482 U. S. 578 (1987)), but our respected coordinate branches, the Congress and Presidency of the United States. Laying such a charge against them should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute. The majority does the opposite—affirmatively concealing from the reader the arguments that exist in justification. It makes only a passing mention of the "arguments put forward" by the Act's defenders, and does not even trouble to paraphrase or describe them. See *ante*, at 21. I imagine that this is because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.

To choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. See, e.g., Baude, Beyond DOMA: Choice of State Law in Federal Statutes, 64 *Stan. L. Rev.* 1371 (2012). Imagine a pair of women who marry in Albany and then move to Alabama, which does not "recognize as valid any marriage of

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parties of the same sex.” Ala. Code §30–1–19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State’s law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State’s choice-of-law rules? If so, *which* State’s? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law? See *Godfrey v. Spano*, 13 N. Y. 3d 358, 920 N. E. 2d 328 (2009). DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision.

Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. When Congress provided (for example) that a special estate-tax exemption would exist for spouses, this exemption reached only *opposite-sex* spouses—those being the only sort that were recognized in *any* State at the time of DOMA’s passage. When it became clear that changes in state law might one day alter that balance, DOMA’s definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own. That is not animus—just stabilizing prudence. Congress has hardly demonstrated itself unwilling to make such further, revising judgments upon due deliberation. See, *e.g.*, Don’t Ask, Don’t Tell Repeal Act of 2010, 124 Stat. 3515.

The Court mentions none of this. Instead, it accuses the Congress that enacted this law and the President who signed it of something much worse than, for example, having acted in excess of enumerated federal powers—or

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even having drawn distinctions that prove to be irrational. Those legal errors may be made in good faith, errors though they are. But the majority says that the supporters of this Act acted with *malice*—with *the “purpose”* (*ante*, at 25) “to disparage and to injure” same-sex couples. It says that the motivation for DOMA was to “demean,” *ibid.*; to “impose inequality,” *ante*, at 22; to “impose . . . a stigma,” *ante*, at 21; to deny people “equal dignity,” *ibid.*; to brand gay people as “unworthy,” *ante*, at 23; and to “*humiliat[e]*” their children, *ibid.* (emphasis added).

I am sure these accusations are quite untrue. To be sure (as the majority points out), the legislation is called the Defense of Marriage Act. But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans *this institution*. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to “disparage,” “injure,” “degrade,” “demean,” and “humiliate” our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.

\* \* \*

The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are

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confined” to those couples “joined in same-sex marriages made lawful by the State.” *Ante*, at 26, 25. I have heard such “bald, unreasoned disclaimer[s]” before. *Lawrence*, 539 U. S., at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.*, at 578. Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” *ante*, at 23—with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.

I do not mean to suggest disagreement with THE CHIEF JUSTICE’s view, *ante*, p. 2–4 (dissenting opinion), that lower federal courts and state courts can distinguish today’s case when the issue before them is state denial of marital status to same-sex couples—or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. As I have said, the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by “bare . . . desire to harm”

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couples in same-sex marriages. *Supra*, at 18. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make the following substitutions in a passage from today’s opinion *ante*, at 22:

~~“DOMA’s~~ *This state law’s* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.”

Or try this passage, from *ante*, at 22–23:

~~“[DOMA]~~ *This state law* tells those couples, and all the world, that their otherwise valid ~~marriages~~ *relationships* are unworthy of ~~federal~~ *state* recognition. This places same-sex couples in an unstable position of being in a second-tier ~~marriage~~ *relationship*. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, . . . .”

Or this, from *ante*, at 23—which does not even require alteration, except as to the invented number:

“And it humiliates ~~tens of~~ thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”

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Similarly transposable passages—deliberately transposable, I think—abound. In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the “personhood and dignity” which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that “personhood and dignity” in the first place. *Ante*, at 26. 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.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court’s declaration that there is “no legitimate purpose” served by such a law, and will claim that the traditional definition has “the purpose and effect to disparage and to injure” the “personhood and dignity” of same-sex couples, see *ante*, at 25, 26. The majority’s limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there. The result will be a judicial distortion of our society’s debate over marriage—a debate that can seem in need of our clumsy “help” only to a member of this institution.

As to that debate: Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides. Few public controversies will ever demonstrate so vividly the beauty of what our Framers gave us, a gift the Court pawns today to buy its stolen moment in the spotlight: a system of government that permits us to rule *ourselves*. Since DOMA’s passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy. Victories in one place

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for some, see North Carolina Const., Amdt. 1 (providing that “[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State”) (approved by a popular vote, 61% to 39% on May 8, 2012),<sup>6</sup> are offset by victories in other places for others, see Maryland Question 6 (establishing “that Maryland’s civil marriage laws allow gay and lesbian couples to obtain a civil marriage license”) (approved by a popular vote, 52% to 48%, on November 6, 2012).<sup>7</sup> Even in a *single State*, the question has come out differently on different occasions. Compare Maine Question 1 (permitting “the State of Maine to issue marriage licenses to same-sex couples”) (approved by a popular vote, 53% to 47%, on November 6, 2012)<sup>8</sup> with Maine Question 1 (rejecting “the new law that lets same-sex couples marry”) (approved by a popular vote, 53% to 47%, on November 3, 2009).<sup>9</sup>

In the majority’s telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one’s political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today’s Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was

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<sup>6</sup>North Carolina State Board of Elections, Official Results: Primary Election of May 8, 2012, Constitutional Amendment.

<sup>7</sup>Maryland State Board of Elections, Official 2012 Presidential General Election Results for All State Questions, Question 06.

<sup>8</sup>Maine Bureau of Elections, Nov. 3, 2009, Referendum Tabulation (Question 1).

<sup>9</sup>Maine Bureau of Elections, Nov. 6, 2012, Referendum Election Tabulations (Question 1).

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theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.



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**SUPREME COURT OF THE UNITED STATES**

No. 12–307

UNITED STATES, PETITIONER *v.* EDITH SCHLAIN  
WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE  
ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[June 26, 2013]

JUSTICE ALITO, with whom JUSTICE THOMAS joins as to  
Parts II and III, dissenting.

Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels. I would therefore hold that Congress did not violate Windsor’s constitutional rights by enacting §3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, which defines the meaning of marriage under federal statutes that either confer upon married persons certain federal benefits or impose upon them certain federal obligations.

I

I turn first to the question of standing. In my view, the

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United States clearly is not a proper petitioner in this case. The United States does not ask us to overturn the judgment of the court below or to alter that judgment in any way. Quite to the contrary, the United States argues emphatically in favor of the correctness of that judgment. We have never before reviewed a decision at the sole behest of a party that took such a position, and to do so would be to render an advisory opinion, in violation of Article III's dictates. For the reasons given in JUSTICE SCALIA's dissent, I do not find the Court's arguments to the contrary to be persuasive.

Whether the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has standing to petition is a much more difficult question. It is also a significantly closer question than whether the intervenors in *Hollingsworth v. Perry*, *ante*, p. \_\_\_—which the Court also decides today—have standing to appeal. It is remarkable that the Court has simultaneously decided that the United States, which “receive[d] all that [it] ha[d] sought” below, *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not. In my view, both the *Hollingsworth* intervenors and BLAG have standing.<sup>1</sup>

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<sup>1</sup>Our precedents make clear that, in order to support our jurisdiction, BLAG must demonstrate that it had Article III standing in its own right, quite apart from its status as an intervenor. See *Diamond v. Charles*, 476 U. S. 54, 68 (1986) (“Although intervenors are considered parties entitled, among other things, to seek review by this Court, an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III” (citation omitted)); *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64 (1997) (“Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome” (internal quotation marks omitted)); *id.*,

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A party invoking the Court’s authority has a sufficient stake to permit it to appeal when it has “‘suffered an injury in fact’ that is caused by ‘the conduct complained of’ and that ‘will be redressed by a favorable decision.’” *Camreta v. Greene*, 563 U. S. \_\_\_\_, \_\_\_\_ (2011) (slip op., at 5) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). In the present case, the House of Representatives, which has authorized BLAG to represent its interests in this matter,<sup>2</sup> suffered just such an injury.

In *INS v. Chadha*, 462 U. S. 919 (1983), the Court held that the two Houses of Congress were “proper parties” to file a petition in defense of the constitutionality of the one-house veto statute, *id.*, at 930, n. 5 (internal quotation marks omitted). Accordingly, the Court granted and decided petitions by both the Senate and the House, in addition to the Executive’s petition. *Id.*, at 919, n. \*. That the two Houses had standing to petition is not surprising: The Court of Appeals’ decision in *Chadha*, by holding the one-house veto to be unconstitutional, had limited Congress’ power to legislate. In discussing Article III standing, the Court suggested that Congress suffered a similar injury whenever federal legislation it had passed was struck down, noting that it had “long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” *Id.*, at 940.

The United States attempts to distinguish *Chadha* on

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at 65 (“An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III” (internal quotation marks omitted)).

<sup>2</sup>H. Res. 5, 113th Cong., 1st Sess., §4(a)(1)(B) (2013) (“[BLAG] continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States*”).

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the ground that it “involved an unusual statute that vested the House and the Senate themselves each with special procedural rights—namely, the right effectively to veto Executive action.” Brief for United States (jurisdiction) 36. But that is a distinction without a difference: just as the Court of Appeals decision that the *Chadha* Court affirmed impaired Congress’ power by striking down the one-house veto, so the Second Circuit’s decision here impairs Congress’ legislative power by striking down an Act of Congress. The United States has not explained why the fact that the impairment at issue in *Chadha* was “special” or “procedural” has any relevance to whether Congress suffered an injury. Indeed, because legislating is Congress’ central function, any impairment of that function is a more grievous injury than the impairment of a procedural add-on.

The Court’s decision in *Coleman v. Miller*, 307 U. S. 433 (1939), bolsters this conclusion. In *Coleman*, we held that a group of state senators had standing to challenge a lower court decision approving the procedures used to ratify an amendment to the Federal Constitution. We reasoned that the senators’ votes—which would otherwise have carried the day—were nullified by that action. See *id.*, at 438 (“Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes”); *id.*, at 446 (“[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and

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deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision”). By striking down §3 of DOMA as unconstitutional, the Second Circuit effectively “held for naught” an Act of Congress. Just as the state-senator-petitioners in *Coleman* were necessary parties to the amendment’s ratification, the House of Representatives was a necessary party to DOMA’s passage; indeed, the House’s vote would have been sufficient to prevent DOMA’s repeal if the Court had not chosen to execute that repeal judicially.

Both the United States and the Court-appointed *amicus* err in arguing that *Raines v. Byrd*, 521 U. S. 811 (1997), is to the contrary. In that case, the Court held that Members of Congress who had voted “nay” to the Line Item Veto Act did not have standing to challenge that statute in federal court. *Raines* is inapposite for two reasons. First, *Raines* dealt with individual Members of Congress and specifically pointed to the individual Members’ lack of institutional endorsement as a sign of their standing problem: “We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.” *Id.*, at 829; see also *ibid.*, n. 10 (citing cases to the effect that “members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take” (internal quotation marks omitted)).

Second, the Members in *Raines*—unlike the state senators in *Coleman*—were not the pivotal figures whose votes would have caused the Act to fail absent some challenged action. Indeed, it is telling that *Raines* characterized *Coleman* as standing “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nulli-

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fied.” 521 U. S., at 823. Here, by contrast, passage by the House was needed for DOMA to become law. U. S. Const., Art. I, §7 (bicameralism and presentment requirements for legislation).

I appreciate the argument that the Constitution confers on the President alone the authority to defend federal law in litigation, but in my view, as I have explained, that argument is contrary to the Court’s holding in *Chadha*, and it is certainly contrary to the *Chadha* Court’s endorsement of the principle that “Congress is the proper party to defend the validity of a statute” when the Executive refuses to do so on constitutional grounds. 462 U. S., at 940. See also 2 U. S. C. §288h(7) (Senate Legal Counsel shall defend the constitutionality of Acts of Congress when placed in issue).<sup>3</sup> Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.

## II

Windsor and the United States argue that §3 of DOMA violates the equal protection principles that the Court has found in the Fifth Amendment’s Due Process Clause. See Brief for Respondent Windsor (merits) 17–62; Brief for United States (merits) 16–54; cf. *Bolling v. Sharpe*, 347 U. S. 497 (1954). The Court rests its holding on related arguments. See *ante*, at 24–25.

Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law. The Constitution does not

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<sup>3</sup>*Buckley v. Valeo*, 424 U. S. 1 (1976), is not to the contrary. The Court’s statements there concerned enforcement, not defense.

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guarantee the right to enter into a same-sex marriage. Indeed, no provision of the Constitution speaks to the issue.

The Court has sometimes found the Due Process Clauses to have a substantive component that guarantees liberties beyond the absence of physical restraint. And the Court's holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," *ante*, at 25, suggests that substantive due process may partially underlie the Court's decision today. But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 521 U. S. 702, 720–721 (1997); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg, supra*, at 721 (quoting *Palko v. Connecticut*, 302 U. S. 319, 325–326 (1937)).

It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.<sup>4</sup>

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<sup>4</sup>Curry-Sumner, *A Patchwork of Partnerships: Comparative Over-*

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What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.<sup>5</sup> There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e.g.*, S. Girgis, R. Anderson, & R. George, *What is Marriage? Man and Woman: A Defense* 53–58 (2012); Finnis, *Marriage: A Basic and Exigent Good*, 91 *The Monist* 388, 398

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view of Registration Schemes in Europe, in *Legal Recognition of Same-Sex Partnerships* 71, 72 (K. Boele-Woelki & A. Fuchs eds., rev. 2d ed., 2012).

<sup>5</sup>As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society. See generally J. Wallerstein, J. Lewis, & S. Blakeslee, *The Unexpected Legacy of Divorce: The 25 Year Landmark Study* (2000).



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(2008).<sup>6</sup> Others think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e.g.*, A. Sullivan, *Virtually Normal: An Argument About Homosexuality* 202–203 (1996); J. Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are

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<sup>6</sup>Among those holding that position, some deplore and some applaud this predicted development. Compare, *e.g.*, Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 *Harv. J. L. & Pub. Pol’y* 771, 799 (2001) (“Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of ‘anything goes’ in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility”) and Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 *U. St. Thomas L. J.* 33, 58 (2005) (“If the idea of marriage really does matter—if society really does need a social institution that manages opposite-sex attractions in the interests of children and society—then taking an already weakened social institution, subjecting it to radical new redefinitions, and hoping that there are no consequences is probably neither a wise nor a compassionate idea”), with Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?* in *I Do/I Don’t: Queers on Marriage* 53, 58–59 (G. Wharton & I. Phillips eds. 2004) (Former President George W. “Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been”) and Willis, *Can Marriage Be Saved? A Forum*, *The Nation*, p. 16 (2004) (celebrating the fact that “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart”).

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certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.

## III

Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. They argue that §3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of “heightened” scrutiny, and that §3 cannot survive such scrutiny. They further maintain that the governmental interests that §3 purports to serve are not sufficiently important and that it has not been adequately shown that §3 serves those interests very well. The Court’s holding, too, seems to rest on “the equal protection guarantee of the Fourteenth Amendment,” *ante*, at 25—although the Court is careful not to adopt most of Windsor’s and the United States’ argument.

In my view, the approach that Windsor and the United States advocate is misguided. Our equal protection framework, upon which Windsor and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on

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what marriage is.

Underlying our equal protection jurisprudence is the central notion that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” *Reed v. Reed*, 404 U. S. 71, 76 (1971) (quoting *F. S. Royter Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920)). The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that “fair and substantial relation to the object of the legislation.” *Reed, supra*, at 76.

So, for example, those classifications subject to strict scrutiny—*i.e.*, classifications that must be “narrowly tailored” to achieve a “compelling” government interest, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007) (internal quotation marks omitted)—are those that are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985); cf. *id.*, at 452–453 (Stevens, J., concurring) (“It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen’s willingness or ability to exercise that civil right”).

In contrast, those characteristics subject to so-called intermediate scrutiny—*i.e.*, those classifications that must be “‘substantially related’” to the achievement of “important governmental objective[s],” *United States v. Virginia*, 518 U. S. 515, 524 (1996); *id.*, at 567 (SCALIA, J., dissenting)—are those that are *sometimes* relevant considerations to be taken into account by legislators, but “generally provid[e] no sensible ground for different treat-

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ment,” *Cleburne, supra*, at 440. For example, the Court has held that statutory rape laws that criminalize sexual intercourse with a woman under the age of 18 years, but place no similar liability on partners of underage men, are grounded in the very real distinction that “young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse.” *Michael M. v. Superior Court, Sonoma Cty.*, 450 U. S. 464, 471 (1981) (plurality opinion). The plurality reasoned that “[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.” *Ibid.* In other contexts, however, the Court has found that classifications based on gender are “arbitrary,” *Reed, supra*, at 76, and based on “outmoded notions of the relative capabilities of men and women,” *Cleburne, supra*, at 441, as when a State provides that a man must always be preferred to an equally qualified woman when both seek to administer the estate of a deceased party, see *Reed, supra*, at 76–77.

Finally, so-called rational-basis review applies to classifications based on “distinguishing characteristics relevant to interests the State has the authority to implement.” *Cleburne, supra*, at 441. We have long recognized that “the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.” *Romer v. Evans*, 517 U. S. 620, 631 (1996). As a result, in rational-basis cases, where the court does not view the classification at issue as “inherently suspect,” *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 218 (1995) (internal quotation marks omitted), “the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should

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be pursued.” *Cleburne, supra*, at 441–442.

In asking the Court to determine that §3 of DOMA is subject to and violates heightened scrutiny, Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.

By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the “traditional” or “conjugal” view, sees marriage as an intrinsically opposite-sex institution. BLAG notes that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. Brief for Respondent BLAG (merits) 2 (citing *Hernandez v. Robles*, 7 N. Y. 3d 338, 361, 855 N. E. 2d 1, 8 (2006) (“Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex”). And BLAG attempts to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Brief for Respondent BLAG 44–46, 49. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, e.g., Girgis, Anderson, & George, *What is Marriage? Man and Woman:*

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A Defense, at 23–28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the “consent-based” vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore.<sup>7</sup> Because our consti-

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<sup>7</sup>The degree to which this question is intractable to typical judicial processes of decisionmaking was highlighted by the trial in *Hollingsworth v. Perry*, *ante*, p. \_\_\_\_\_. In that case, the trial judge, after

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tutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

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receiving testimony from some expert witnesses, purported to make “findings of fact” on such questions as why marriage came to be, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958 (ND Cal. 2010) (finding of fact no. 27) (“Marriage between a man and a woman was traditionally organized based on presumptions of division of labor along gender lines. Men were seen as suited for certain types of work and women for others. Women were seen as suited to raise children and men were seen as suited to provide for the family”), what marriage is, *id.*, at 961 (finding of fact no. 34) (“Marriage is the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents”), and the effect legalizing same-sex marriage would have on opposite-sex marriage, *id.*, at 972 (finding of fact no. 55) (“Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages”).

At times, the trial reached the heights of parody, as when the trial judge questioned his ability to take into account the views of great thinkers of the past because they were unavailable to testify in person in his courtroom. See 13 Tr. in No. C 09–2292 VRW (ND Cal.), pp. 3038–3039.

And, if this spectacle were not enough, some professors of constitutional law have argued that we are bound to accept the trial judge’s findings—including those on major philosophical questions and predictions about the future—unless they are “clearly erroneous.” See Brief for Constitutional Law and Civil Procedure Professors as *Amici Curiae* in *Hollingsworth v. Perry*, O. T. 2012, No. 12–144, pp. 2–3 (“[T]he district court’s factual findings are compelling and should be given significant weight”); *id.*, at 25 (“Under any standard of review, this Court should credit and adopt the trial court’s findings because they result from rigorous and exacting application of the Federal Rules of Evidence, and are supported by reliable research and by the unanimous consensus of mainstream social science experts”). Only an arrogant legal culture that has lost all appreciation of its own limitations could take such a suggestion seriously.

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Legislatures, however, have little choice but to decide between the two views. We have long made clear that neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution. See, e.g., *Rust v. Sullivan*, 500 U. S. 173, 192 (1991) (“[T]he government ‘may make a value judgment favoring childbirth over abortion’” (quoting *Maher v. Rue*, 432 U. S. 464, 474 (1977))). Accordingly, both Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage. And given the size of government and the degree to which it now regulates daily life, it seems unlikely that either Congress or the States could maintain complete neutrality even if they tried assiduously to do so.

Rather than fully embracing the arguments made by Windsor and the United States, the Court strikes down §3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that §3 encroaches upon the States’ sovereign prerogative to define marriage. See *ante*, at 21–22 (“As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws’” (quoting *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1, 12–13 (CA1 2012))). Indeed, the Court’s ultimate conclusion is that DOMA falls afoul of the Fifth Amendment because it “singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty” and “imposes a disability on the class by refusing to acknowledge a status *the State finds* to be dignified and



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proper.” *Ante*, at 25 (emphasis added).

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the today’s opinion of the Court will soon be scattered to the wind.

In any event, §3 of DOMA, in my view, does not encroach on the prerogatives of the States, assuming of course that the many federal statutes affected by DOMA have not already done so. Section 3 does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law. All that §3 does is to define a class of persons to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens. In these provisions, Congress used marital status as a way of defining this class—in part, I assume, because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment. Assuming that Congress has the power under the Constitution to enact the laws affected by §3, Congress has the power to define the category of persons to whom those laws apply.

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For these reasons, I would hold that §3 of DOMA does not violate the Fifth Amendment. I respectfully dissent.

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

HOLLINGSWORTH ET AL. *v.* PERRY ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 12–144. Argued March 26, 2013—Decided June 26, 2013

After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, state voters passed a ballot initiative known as Proposition 8, amending the State Constitution to define marriage as a union between a man and a woman. Respondents, same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California’s Governor and other state and local officials responsible for enforcing California’s marriage laws. The officials refused to defend the law, so the District Court allowed petitioners—the initiative’s official proponents—to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but petitioners did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the State’s interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8’s constitutionality. On the merits, the court affirmed the District Court’s order.

*Held:* Petitioners did not have standing to appeal the District Court’s order. Pp. 5–17.

(a) Article III of the Constitution confines the judicial power of federal courts to deciding actual “Cases” or “Controversies.” §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. In oth-

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er words, the litigant must seek a remedy for a personal and tangible harm. Although most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, Article III demands that an “actual controversy” persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. \_\_\_, \_\_\_. Standing “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64. The parties do not contest that respondents had standing to initiate this case against the California officials responsible for enforcing Proposition 8. But once the District Court issued its order, respondents no longer had any injury to redress, and the state officials chose not to appeal. The only individuals who sought to appeal were petitioners, who had intervened in the District Court, but they had not been ordered to do or refrain from doing anything. Their only interest was to vindicate the constitutional validity of a generally applicable California law. As this Court has repeatedly held, such a “generalized grievance”—no matter how sincere—is insufficient to confer standing. See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 573–574. Petitioners claim that the California Constitution and election laws give them a “‘unique,’ ‘special,’ and ‘distinct’ role in the initiative process,” Reply Brief 5, but that is only true during the process of enacting the law. Once Proposition 8 was approved, it became a duly enacted constitutional amendment. Petitioners have no role—special or otherwise—in its enforcement. They therefore have no “personal stake” in defending its enforcement that is distinguishable from the general interest of every California citizen. No matter how deeply committed petitioners may be to upholding Proposition 8, that is not a particularized interest sufficient to create a case or controversy under Article III. Pp. 5–9.

(b) Petitioners’ arguments to the contrary are unpersuasive. Pp. 9–16.

(1) They claim that they may assert the State’s interest on the State’s behalf, but it is a “fundamental restriction on our authority” that “[i]n the ordinary course, a litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*, 499 U. S. 400, 410. In *Diamond v. Charles*, 476 U. S. 54, for example, a pediatrician engaged in private practice was not permitted to defend the constitutionality of Illinois’ abortion law after the State chose not to appeal an adverse ruling. The state attorney general’s “letter of interest,” explaining that the State’s interest in the proceeding was “‘essentially co-terminous with’” Diamond’s position, *id.*, at 61, was insufficient, since Diamond was unable to assert an injury of his own, *id.*, at 65. Pp. 9–10.

(2) Petitioners contend the California Supreme Court’s determi-

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nation that they were authorized under California law to assert the State's interest in the validity of Proposition 8 means that they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72 (1987)." Reply Brief 6. But far from supporting petitioners' standing, *Karcher* is compelling precedent against it. In that case, after the New Jersey attorney general refused to defend the constitutionality of a state law, leaders of New Jersey's Legislature were permitted to appear, in their official capacities, in the District Court and Court of Appeals to defend the law. What is significant about *Karcher*, however, is what happened after the Court of Appeals decision. The legislators lost their leadership positions, but nevertheless sought to appeal to this Court. The Court held that they could not do so. Although they could participate in the lawsuit in their official capacities as presiding officers of the legislature, as soon as they lost that capacity, they lost standing. *Id.*, at 81. Petitioners here hold no office and have always participated in this litigation solely as private parties. Pp. 10–13.

(3) Nor is support found in dicta in *Arizonans for Official English v. Arizona*, *supra*. There, in expressing "grave doubts" about the standing of ballot initiative sponsors to defend the constitutionality of an Arizona initiative, the Court noted that it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id.*, at 65. Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act as "agents of the people of California." Brief for Petitioners 15. But that Court never described petitioners as "agents of the people." All the California Supreme Court's decision stands for is that, so far as California is concerned, petitioners may "assert legal arguments in defense of the state's interest in the validity of the initiative measure" in federal court. 628 F. 3d 1191, 1193. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under this Court's precedents. Petitioners are also plainly not agents of the State. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court, where they claimed to represent their *own* interests as official proponents. More to the point, the basic features of an agency relationship are missing here: Petitioners are not subject to the control of any principal, and they owe no fiduciary obligation to anyone. As one *amicus* puts it, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to

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whatever extent they choose to defend it.” Brief for Walter Dellinger 23. Pp. 13–16.

(c) The Court does not question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts. But standing in federal court is a question of federal law, not state law. No matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override this Court’s settled law to the contrary. Article III’s requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in the federal system of separated powers. States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse. Pp. 16–17.

671 F. 3d 1052, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, GINSBURG, BREYER, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS, ALITO, and SOTOMAYOR, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 12–144

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DENNIS HOLLINGSWORTH, ET AL., PETITIONERS *v.*  
KRISTIN M. PERRY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June 26, 2013]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause “prohibits the State of California from defining marriage as the union of a man and a woman.” Pet. for Cert. i. Respondents, same-sex couples who wish to marry, view the issue in somewhat different terms: For them, it is whether California—having previously recognized the right of same-sex couples to marry—may reverse that decision through a referendum.

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual “case” or “controversy.” As used in the Constitution, those words do not include every sort of dispute, but only those “historically viewed as capable of resolution through the judicial process.” *Flast v. Cohen*, 392 U. S. 83, 95 (1968). This is an essential

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limit on our power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives.

For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have “standing,” which requires, among other things, that it have suffered a concrete and particularized injury. Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.

## I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.” Cal. Const., Art. I, §7.5. Shortly thereafter, the California Supreme Court rejected a procedural challenge to the amendment, and held that the Proposition was properly enacted under California law. *Strauss v. Horton*, 46 Cal. 4th 364, 474–475, 207 P. 3d 48, 122 (2009).

According to the California Supreme Court, Proposition 8 created a “narrow and limited exception” to the state constitutional rights otherwise guaranteed to same-sex couples. *Id.*, at 388, 207 P. 3d, at 61. Under California law, same-sex couples have a right to enter into relationships recognized by the State as “domestic partnerships,” which carry “the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and

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imposed upon spouses.” Cal. Fam. Code Ann. §297.5(a) (West 2004). In *In re Marriage Cases*, the California Supreme Court concluded that the California Constitution further guarantees same-sex couples “all of the constitutionally based incidents of marriage,” including the right to have that marriage “officially recognized” as such by the State. 43 Cal. 4th, at 829, 183 P. 3d, at 433–434. Proposition 8, the court explained in *Strauss*, left those rights largely undisturbed, reserving only “the official *designation* of the term ‘marriage’ for the union of opposite-sex couples as a matter of state constitutional law.” 46 Cal. 4th, at 388, 207 P. 3d, at 61.

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California’s Governor, attorney general, and various other state and local officials responsible for enforcing California’s marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners—the official proponents of the initiative, see Cal. Elec. Code Ann. §342 (West 2003)—to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and “directing the official defendants that all persons under their control or supervision” shall not enforce it. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010).

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address “why this appeal should not be dismissed for lack of Article III standing.” *Perry v. Schwarzenegger*, Civ. No. 10–16696 (CA9, Aug. 16, 2010), p. 2. After brief-



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ing and argument, the Ninth Circuit certified a question to the California Supreme Court:

“Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.” *Perry v. Schwarzenegger*, 628 F. 3d 1191, 1193 (2011).

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative’s validity, the court concluded that “[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.” *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, “has standing to defend the constitutionality of its [laws],” and States have the “prerogative, as independent sovereigns, to decide for themselves who may assert their interests.” *Perry v. Brown*, 671 F. 3d 1052, 1070, 1071 (2012) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). “All a federal court need determine is that the

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state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.” 671 F. 3d, at 1072.

On the merits, the Ninth Circuit affirmed the District Court. The court held the Proposition unconstitutional under the rationale of our decision in *Romer v. Evans*, 517 U. S. 620 (1996). 671 F. 3d, at 1076, 1095. In the Ninth Circuit’s view, *Romer* stands for the proposition that “the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*, whether or not it was required to confer that right or benefit in the first place.” 671 F. 3d, at 1083–1084. The Ninth Circuit concluded that “taking away the official designation” of “marriage” from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage, did not further any legitimate interest of the State. *Id.*, at 1095. Proposition 8, in the court’s view, violated the Equal Protection Clause because it served no purpose “but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships.” *Ibid.*

We granted certiorari to review that determination, and directed that the parties also brief and argue “Whether petitioners have standing under Article III, §2, of the Constitution in this case.” 568 U. S. \_\_\_\_ (2012).

## II

Article III of the Constitution confines the judicial power of federal courts to deciding actual “Cases” or “Controversies.” §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial deci-

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sion. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. “The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.” *Diamond, supra*, at 62.

The doctrine of standing, we recently explained, “serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 9). In light of this “overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to ‘settle’ it for the sake of convenience and efficiency.” *Raines v. Byrd*, 521 U. S. 811, 820 (1997) (footnote omitted).

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an “actual controversy” persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 4) (internal quotation marks omitted). That means that standing “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64 (1997). We therefore must decide whether petitioners had standing to appeal the District Court’s order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain “official sanction” from the State, which was unavailable to them given the declaration in Proposition 8 that “marriage” in California is solely

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between a man and a woman. App. 59.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a “personal and individual way.” *Defenders of Wildlife, supra*, at 560, n. 1. He must possess a “direct stake in the outcome” of the case. *Arizonans for Official English, supra*, at 64 (internal quotation marks omitted). Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a “generalized grievance,” no matter how sincere, is insufficient to confer standing. A litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Defenders of Wildlife, supra*, at 573–574; see *Lance v. Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*) (“Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.”); *Allen v. Wright*, 468 U. S. 737, 754 (1984) (“an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court”); *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923) (“The party who invokes

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the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.”).

Petitioners argue that the California Constitution and its election laws give them a “‘unique,’ ‘special,’ and ‘distinct’ role in the initiative process—one ‘involving both authority and responsibilities that differ from other supporters of the measure.’” Reply Brief 5 (quoting 52 Cal. 4th, at 1126, 1142, 1160, 265 P. 3d, at 1006, 1017–1018, 1030). True enough—but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official “proponents” of Proposition 8. Cal. Elec. Code Ann. §342 (West 2003). As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. §§9607–9609. After those signatures were collected, the proponents alone had the right to file the measure with election officials to put it on the ballot. §9032. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California’s ballot pamphlets. §§9064, 9065, 9067, 9069.

But once Proposition 8 was approved by the voters, the measure became “a duly enacted constitutional amendment or statute.” 52 Cal. 4th, at 1147, 265 P. 3d, at 1021. Petitioners have no role—special or otherwise—in the enforcement of Proposition 8. See *id.*, at 1159, 265 P. 3d, at 1029 (petitioners do not “possess any official authority . . . to directly enforce the initiative measure in question”). They therefore have no “personal stake” in defending its enforcement that is distinguishable from the general interest of every citizen of California. *Defenders of Wildlife, supra*, at 560–561.

Article III standing “is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests.’” *Diamond*, 476

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U. S., at 62. No matter how deeply committed petitioners may be to upholding Proposition 8 or how “zealous [their] advocacy,” *post*, at 4 (KENNEDY, J., dissenting), that is not a “particularized” interest sufficient to create a case or controversy under Article III. *Defenders of Wildlife*, 504 U. S., at 560, and n. 1; see *Arizonans for Official English*, 520 U. S., at 65 (“Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.”); *Don’t Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U. S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional).

## III

## A

Without a judicially cognizable interest of their own, petitioners attempt to invoke that of someone else. They assert that even if *they* have no cognizable interest in appealing the District Court’s judgment, the State of California does, and they may assert that interest on the State’s behalf. It is, however, a “fundamental restriction on our authority” that “[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*, 499 U. S. 400, 410 (1991). There are “certain, limited exceptions” to that rule. *Ibid.* But even when we have allowed litigants to assert the interests of others, the litigants themselves still “must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.” *Id.*, at 411 (internal quotation marks omitted).

In *Diamond v. Charles*, for example, we refused to allow Diamond, a pediatrician engaged in private practice in Illinois, to defend the constitutionality of the State’s abortion law. In that case, a group of physicians filed a con-

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stitutional challenge to the Illinois statute in federal court. The State initially defended the law, and Diamond, a professed “conscientious object[or] to abortions,” intervened to defend it alongside the State. 476 U. S., at 57–58.

After the Seventh Circuit affirmed a permanent injunction against enforcing several provisions of the law, the State chose not to pursue an appeal to this Court. But when Diamond did, the state attorney general filed a “letter of interest,” explaining that the State’s interest in the proceeding was “essentially co-terminous with the position on the issues set forth by [Diamond].” *Id.*, at 61. That was not enough, we held, to allow the appeal to proceed. As the Court explained, “[e]ven if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this [was] not one of them,” because Diamond was not able to assert an injury in fact of his own. *Id.*, at 65 (footnote omitted). And without “any judicially cognizable interest,” Diamond could not “maintain the litigation abandoned by the State.” *Id.*, at 71.

For the reasons we have explained, petitioners have likewise not suffered an injury in fact, and therefore would ordinarily have no standing to assert the State’s interests.

## B

Petitioners contend that this case is different, because the California Supreme Court has determined that they are “authorized under California law to appear and assert the state’s interest” in the validity of Proposition 8. 52 Cal. 4th, at 1127, 265 P. 3d, at 1007. The court below agreed: “All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.” 671 F. 3d, at 1072. As petitioners

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put it, they “need no more show a personal injury, separate from the State’s indisputable interest in the validity of its law, than would California’s Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72 (1987).” Reply Brief 6.

In *Karcher*, we held that two New Jersey state legislators—Speaker of the General Assembly Alan Karcher and President of the Senate Carmen Orechio—could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so. 484 U. S., at 75, 81–82. “Since the New Jersey Legislature had authority under state law to represent the State’s interests in both the District Court and the Court of Appeals,” we held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature’s behalf. *Id.*, at 82.

Far from supporting petitioners’ standing, however, *Karcher* is compelling precedent against it. The legislators in that case intervened in their official capacities as Speaker and President of the legislature. No one doubts that a State has a cognizable interest “in the continued enforceability” of its laws that is harmed by a judicial decision declaring a state law unconstitutional. *Maine v. Taylor*, 477 U. S. 131, 137 (1986). To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. See *Poindexter v. Greenhow*, 114 U. S. 270, 288 (1885) (“The State is a political corporate body [that] can act only through agents”). That agent is typically the State’s attorney general. But state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State’s presiding legislative officers in *Karcher*. See 484 U. S., at 81–82.

What is significant about *Karcher* is what happened after the Court of Appeals decision in that case. Karcher and Orechio lost their positions as Speaker and President,



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but nevertheless sought to appeal to this Court. We held that they could not do so. We explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, “since they no longer hold those offices, they lack authority to pursue this appeal.” *Id.*, at 81.

The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; *Karcher* and *Orechio* were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing. Petitioners here hold no office and have always participated in this litigation solely as private parties.

The cases relied upon by the dissent, see *post*, at 11–12, provide petitioners no more support. The dissent’s primary authorities, in fact, do not discuss standing at all. See *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987); *United States v. Providence Journal Co.*, 485 U. S. 693 (1988). And none comes close to establishing that mere authorization to represent a third party’s interests is sufficient to confer Article III standing on private parties with no injury of their own.

The dissent highlights the discretion exercised by special prosecutors appointed by federal courts to pursue contempt charges. See *post*, at 11 (citing *Young, supra*, at 807). Such prosecutors do enjoy a degree of independence in carrying out their appointed role, but no one would suppose that they are not subject to the ultimate authority of the court that appointed them. See also *Providence Journal, supra*, at 698–707 (recognizing further control exercised by the Solicitor General over special prosecutors).

The dissent’s remaining cases, which at least consider standing, are readily distinguishable. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 771–778 (2000) (justifying *qui tam* actions

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based on a partial assignment of the Government’s damages claim and a “well nigh conclusive” tradition of such actions in English and American courts dating back to the 13th century); *Whitmore v. Arkansas*, 495 U. S. 149, 162–164 (1989) (justifying “next friend” standing based on a similar history dating back to the 17th century, requiring the next friend to prove a disability of the real party in interest and a “significant relationship” with that party); *Gollust v. Mendell*, 501 U. S. 115, 124–125 (1990) (requiring plaintiff in shareholder-derivative suit to maintain a financial stake in the outcome of the litigation, to avoid “serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III’s case-or-controversy limitation”).

## C

Both petitioners and respondents seek support from dicta in *Arizonans for Official English v. Arizona*, 520 U. S. 43. The plaintiff in *Arizonans for Official English* filed a constitutional challenge to an Arizona ballot initiative declaring English “the official language of the State of Arizona.” *Id.*, at 48. After the District Court declared the initiative unconstitutional, Arizona’s Governor announced that she would not pursue an appeal. Instead, the principal sponsor of the ballot initiative—the Arizonans for Official English Committee—sought to defend the measure in the Ninth Circuit. *Id.*, at 55–56, 58. Analogizing the sponsors to the Arizona Legislature, the Ninth Circuit held that the Committee was “qualified to defend [the initiative] on appeal,” and affirmed the District Court. *Id.*, at 58, 61.

Before finding the case mooted by other events, this Court expressed “grave doubts” about the Ninth Circuit’s standing analysis. *Id.*, at 66. We reiterated that “[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess ‘a direct

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stake in the outcome.’” *Id.*, at 64 (quoting *Diamond*, 476 U. S., at 62). We recognized that a legislator authorized by state law to represent the State’s interest may satisfy standing requirements, as in *Karcher*, *supra*, at 82, but noted that the Arizona committee and its members were “not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.” *Arizonans for Official English*, *supra*, at 65.

Petitioners argue that, by virtue of the California Supreme Court’s decision, they *are* authorized to act “as agents of the people’ of California.” Brief for Petitioners 15 (quoting *Arizonans for Official English*, *supra*, at 65). But that Court never described petitioners as “agents of the people,” or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had “the authority to assert the State’s interest in the initiative’s validity.” 628 F. 3d, at 1193; 52 Cal. 4th, at 1124, 265 P. 3d, at 1005. All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This “does not mean that the proponents become de facto public officials”; the authority they enjoy is “simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state’s interest in the validity of the initiative measure.” *Id.*, at 1159, 265 P. 3d, at 1029. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.

And petitioners are plainly not agents of the State—“formal” or otherwise, see *post*, at 7. As an initial matter, petitioners’ newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not

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purport to be agents of California. They argued instead that “no other party in this case w[ould] adequately represent *their interests as official proponents*.” Motion to Intervene in No. 09–2292 (ND Cal.), p. 6 (emphasis added). It was their “unique legal status” as official proponents—not an agency relationship with the people of California—that petitioners claimed “endow[ed] them with a significantly protectable interest” in ensuring that the District Court not “undo[ ] all that they ha[d] done in obtaining . . . enactment” of Proposition 8. *Id.*, at 10, 11.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. “An essential element of agency is the principal’s right to control the agent’s actions.” 1 Restatement (Third) of Agency §1.01, Comment *f* (2005) (hereinafter Restatement). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals—or elected at all. See Cal. Const., Art. V, §11. No provision provides for their removal. As one *amicus* explains, “the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.” Brief for Walter Dellinger 23.

“If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal.” 1 Restatement §1.01, Comment *e*. But petitioners owe nothing of the sort to the people of California. Unlike California’s elected officials, they have taken no oath of office. *E.g.*, Cal. Const., Art. XX, §3 (prescribing the oath for “all public officers and employees, executive, legislative, and judicial”). As the California Supreme Court explained, petitioners are bound simply by “the same ethical constraints that apply to all other parties in a legal

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proceeding.” 52 Cal. 4th, at 1159, 265 P. 3d, at 1029. They are free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.

Finally, the California Supreme Court stated that “[t]he question of who should bear responsibility for any attorney fee award . . . is *entirely distinct* from the question” before it. *Id.*, at 1161, 265 P. 3d, at 1031. (emphasis added). But it is hornbook law that “a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party’s suit.” 2 Restatement §8.14, Comment *d*. If the issue of fees is entirely distinct from the authority question, then authority cannot be based on agency.

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

## IV

The dissent eloquently recounts the California Supreme Court’s reasons for deciding that state law authorizes petitioners to defend Proposition 8. See *post*, at 3–5. We do not “disrespect[.]” or “disparage[.]” those reasons. *Post*, at 12. Nor do we question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply. But as the dissent acknowledges, see *post*, at 1, standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.

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The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. “Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature,” *Lance*, 549 U. S., at 441, and ensures that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society,” *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 341 (2006) (internal quotation marks omitted). States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

\* \* \*

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.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

*It is so ordered.*

KENNEDY, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 12–144

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DENNIS HOLLINGSWORTH, ET AL., PETITIONERS *v.*  
KRISTIN M. PERRY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June 26, 2013]

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

The Court’s opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a proponent’s standing to defend an initiative in federal court is a question of federal law. Proper resolution of the justiciability question requires, in this case, a threshold determination of state law. The state-law question is how California defines and elaborates the status and authority of an initiative’s proponents who seek to intervene in court to defend the initiative after its adoption by the electorate. Those state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California.

Under California law, a proponent has the authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court’s definition of proponents’ powers is bind-

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ing on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court's decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation. See M. Waters, *Initiative and Referendum Almanac* 12 (2003). In my submission, the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court.

These are the premises for this respectful dissent.

## I

As the Court explains, the State of California sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution. See *ante*, at 11 (citing *Maine v. Taylor*, 477 U. S. 131, 137 (1986)). To determine whether justiciability continues in appellate proceedings after the State Executive acquiesced in the District Court's adverse judgment, it is necessary to ascertain what persons, if any, have “authority under state law to represent the State's interests” in federal court. *Karcher v. May*, 484



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U. S. 72, 82 (1987); see also *Arizonans for Official English v. Arizona*, 520 U. S. 43, 65 (1997).

As the Court notes, the California Elections Code does not on its face prescribe in express terms the duties or rights of proponents once the initiative becomes law. *Ante*, at 8. If that were the end of the matter, the Court's analysis would have somewhat more force. But it is not the end of the matter. It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two. See *Sweezy v. New Hampshire*, 354 U. S. 234, 255 (1957) (plurality opinion); *Dreyer v. Illinois*, 187 U. S. 71, 84 (1902). That, too, is for the State to decide.

This Court, in determining the substance of state law, is "bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U. S. 476, 483 (1993). And the Supreme Court of California, in response to the certified question submitted to it in this case, has determined that State Elections Code provisions directed to initiative proponents do inform and instruct state law respecting the rights and status of proponents in postelection judicial proceedings. Here, in reliance on these statutes and the California Constitution, the State Supreme Court has held that proponents do have authority "under California law to appear and assert the state's interest in the initiative's validity and appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P. 3d 1002, 1007 (2011).

The reasons the Supreme Court of California gave for its

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holding have special relevance in the context of determining whether proponents have the authority to seek a federal-court remedy for the State's concrete, substantial, and continuing injury. As a class, official proponents are a small, identifiable group. See Cal. Elec. Code Ann. §9001(a) (West Cum. Supp. 2013). Because many of their decisions must be unanimous, see §§9001(b)(1), 9002(b), they are necessarily few in number. Their identities are public. §9001(b)(2). Their commitment is substantial. See §§9607–9609 (West Cum. Supp. 2013) (obtaining petition signatures); §9001(c) (monetary fee); §§9065(d), 9067, 9069 (West 2003) (drafting arguments for official ballot pamphlet). They know and understand the purpose and operation of the proposed law, an important requisite in defending initiatives on complex matters such as taxation and insurance. Having gone to great lengths to convince voters to enact an initiative, they have a stake in the outcome and the necessary commitment to provide zealous advocacy.

Thus, in California, proponents play a “unique role . . . in the initiative process.” 52 Cal. 4th, at 1152, 265 P. 3d, at 1024. They “have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative’s enactment into law.” *Ibid.*; see also *id.*, at 1160, 265 P. 3d, at 1030 (because of “their special relationship to the initiative measure,” proponents are “the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law”). Proponents’ authority under state law is not a contrivance. It is not a fictional construct. It is the product of the California Constitution and the California Elections Code. There is no basis for this Court to set aside the California Supreme Court’s determination of state

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law.

The Supreme Court of California explained that its holding was consistent with recent decisions from other States. *Id.*, at 1161–1165, 265 P. 3d, at 1031–1033. In *Sportsmen for I-143 v. Fifteenth Jud. Ct.*, 2002 MT 18, 308 Mont. 189, 40 P. 3d 400, the Montana Supreme Court unanimously held that because initiative sponsors “may be in the best position to defend their interpretation” of the initiative and had a “direct, substantial, legally protectable interest in” the lawsuit challenging that interpretation, they were “entitled to intervene as a matter of right.” *Id.*, at 194–195, 40 P. 3d, at 403. The Alaska Supreme Court reached a similar unanimous result in *Alaskans for a Common Language Inc. v. Kritz*, 3 P. 3d 906 (2000). It noted that, except in extraordinary cases, “a sponsor’s direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of [a conflict of interest] will ordinarily preclude courts from denying intervention as of right to a sponsoring group.” *Id.*, at 914.

For these and other reasons, the Supreme Court of California held that the California Elections Code and Article II, §8, of the California Constitution afford proponents “the authority . . . to assert the state’s interest in the validity of the initiative” when State officials decline to do so. 52 Cal. 4th, at 1152, 265 P. 3d, at 1024. The court repeated this unanimous holding more than a half-dozen times and in no uncertain terms. See *id.*, at 1126, 1127, 1139, 1149, 1151, 1152, 1165, 256 P. 3d, at 1006, 1007, 1015, 1022, 1024, 1025, 1033; see also *id.*, at 1169–1170, 265 P. 3d, at 1036–1037 (Kennard, J., concurring). That should suffice to resolve the central issue on which the federal question turns.

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## II

## A

The Court concludes that proponents lack sufficient ties to the state government. It notes that they “are not elected,” “answer to no one,” and lack “a fiduciary obligation” to the State. *Ante*, at 15 (quoting 1 Restatement (Third) of Agency §1.01, Comments *e, f* (2005)). But what the Court deems deficiencies in the proponents’ connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system. The very object of the initiative system is to establish a law-making process that does not depend upon state officials. In California, the popular initiative is necessary to implement “the theory that all power of government ultimately resides in the people.” 52 Cal. 4th, at 1140, 265 P. 3d, at 1016 (internal quotation marks omitted). The right to adopt initiatives has been described by the California courts as “one of the most precious rights of [the State’s] democratic process.” *Ibid.* (internal quotation marks omitted). That historic role for the initiative system “grew out of dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process.” *Ibid.* The initiative’s “primary purpose,” then, “was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt.” *Ibid.*

The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding. See *id.*, at 1160, 265 P. 3d, at 1030; cf. *Alaskans for a Common Language, supra*, at 914 (noting that proponents must be allowed to defend an enacted initiative in order to avoid the perception, correct or not, “that the interests of [the proponents] were not being

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defended vigorously by the executive branch”). Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State’s governmental structure. See 52 Cal. 4th, at 1126–1128, 265 P. 3d, at 1006–1007. And in light of the frequency with which initiatives’ opponents resort to litigation, the impact of that veto could be substantial. K. Miller, *Direct Democracy and the Courts* 106 (2009) (185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court). As a consequence, California finds it necessary to vest the responsibility and right to defend a voter-approved initiative in the initiative’s proponents when the State Executive declines to do so.

Yet today the Court demands that the State follow the Restatement of Agency. See *ante*, at 15–16. There are reasons, however, why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The State may not wish to associate itself with proponents or their views outside of the “extremely narrow and limited” context of this litigation, 52 Cal. 4th, at 1159, 265 P. 3d, at 1029, or to bear the cost of proponents’ legal fees. The State may also wish to avoid the odd conflict of having a formal agent of the State (the initiative’s proponent) arguing in favor of a law’s validity while state officials (*e.g.*, the attorney general) contend in the same proceeding that it should be found invalid.

Furthermore, it is not clear who the principal in an agency relationship would be. It would make little sense if it were the Governor or attorney general, for that would frustrate the initiative system’s purpose of circumventing elected officials who fail or refuse to effect the public will. *Id.*, at 1139–1140, 265 P. 3d, at 1016. If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State. See *ibid.*, 265 P. 3d, at

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1015–1016 (quoting Cal. Const., Art. II, §1) (“All political power is inherent in the people”). But the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State. Cf. 1 Restatement (Second) of Agency, p. 2, Scope Note (1957) (noting that the Restatement “does not state the special rules applicable to public officers”); 1 Restatement (First) of Agency, p. 4, Scope Note (1933) (same).

And if the Court’s concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court. It must be remembered that both elected officials and initiative proponents receive their authority to speak for the State of California directly from the people. The Court apparently believes that elected officials are acceptable “agents” of the State, see *ante*, at 11–12, but they are no more subject to ongoing supervision of their principal—*i.e.*, the people of the State—than are initiative proponents. At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure. Finally, proponents and their attorneys, like all other litigants and counsel who appear before a federal court, are subject to duties of candor, decorum, and respect for the tribunal and co-parties alike, all of which guard against the possibility that initiative proponents will somehow fall short of the appropriate standards for federal litigation.

## B

Contrary to the Court’s suggestion, this Court’s precedents do not indicate that a formal agency relationship is necessary. In *Karcher v. May*, 484 U. S. 72 (1987), the Speaker of the New Jersey Assembly (Karcher) and President of the New Jersey Senate (Orechio) intervened in

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support of a school moment-of-silence law that the State's Governor and attorney general declined to defend in court. In considering the question of standing, the Court looked to New Jersey law to determine whether Karcher and Orechio "had authority under state law to represent the State's interest in both the District Court and Court of Appeals." *Id.*, at 82. The Court concluded that they did. Because the "New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment," the *Karcher* Court held that standing had been proper in the District Court and Court of Appeals. *Ibid.* By the time the case arrived in this Court, Karcher and Orechio had lost their presiding legislative offices, without which they lacked the authority to represent the State under New Jersey law. This, the Court held, deprived them of standing. *Id.*, at 81. Here, by contrast, proponents' authority under California law is not contingent on officeholder status, so their standing is unaffected by the fact that they "hold no office" in California's Government. *Ante*, at 12.

*Arizonans for Official English v. Arizona*, 520 U. S. 43 (1997), is consistent with the premises of this dissent, not with the rationale of the Court's opinion. See *ante*, at 13–14. There, the Court noted its serious doubts as to the aspiring defenders' standing because there was "no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." 520 U. S., at 65. The Court did use the word "agents"; but, read in context, it is evident that the Court's intention was not to demand a formal agency relationship in compliance with the Restatement. Rather, the Court used the term as shorthand for a party whom "state law authorizes" to "represent the State's interests" in court. *Ibid.*

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Both the Court of Appeals and the Supreme Court of California were mindful of these precedents and sought to comply with them. The state court, noting the importance of *Arizonans for Official English*, expressed its understanding that “the high court’s doubts as to the official initiative proponents’ standing in that case were based, at least in substantial part, on the fact that the court was not aware of any ‘Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives made law of the State.’” 52 Cal. 4th, at 1136–1137, 265 P. 3d, at 1013–1014 (quoting 520 U. S., at 65). Based on this passage, it concluded that “nothing in [*Arizonans for Official English*] indicates that if a state’s law does authorize the official proponents of an initiative to assert the state’s interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state’s interest in the initiative’s validity in a federal lawsuit.” *Id.*, at 1137, 265 P. 3d, at 1014.

The Court of Appeals, too, was mindful of this requirement. *Perry v. Brown*, 671 F. 3d 1052, 1072–1073 (CA9 2012). Although that panel divided on the proper resolution of the merits of this case, it was unanimous in concluding that proponents satisfy the requirements of Article III. Compare *id.*, at 1070–1075 (majority opinion), with *id.*, at 1096–1097 (N. R. Smith, J., concurring in part and dissenting in part). Its central premise, ignored by the Court today, was that the “State’s highest court [had] held that California law provides precisely what the *Arizonans* Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State’s interests in defending the constitutionality of that initiative, where state officials who would ordinarily assume that responsibility choose not to do so.” *Id.*, at 1072 (majority opinion). The Court of Appeals and the



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State Supreme Court did not ignore *Arizonans for Official English*; they were faithful to it.

## C

The Court’s approach in this case is also in tension with other cases in which the Court has permitted individuals to assert claims on behalf of the government or others. For instance, Federal Rule of Criminal Procedure 42(a)(2) allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt. Under the Rule, this special prosecutor is not the agent of the appointing judge; indeed, the prosecutor’s “determination of which persons should be targets of the investigation, what methods of investigation should be used, what information will be sought as evidence,” whom to charge, and other “decisions . . . critical to the conduct of a prosecution, are all made outside the supervision of the court.” *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 807 (1987). Also, just as proponents have been authorized to represent the State of California, “[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States,” *United States v. Providence Journal Co.*, 485 U. S. 693, 700 (1988). They are “appointed solely to pursue the public interest in vindication of the court’s authority,” *Young, supra*, at 804, an interest that—like California’s interest in the validity of its laws—is “unique to the sovereign,” *Providence Journal Co., supra*, at 700. And, although the Court dismisses the proponents’ standing claim because initiative proponents “are not elected” and “decide for themselves, with no review, what arguments to make and how to make them” in defense of the enacted initiative, *ante*, at 15, those same charges could be leveled with equal if not greater force at the special prosecutors just discussed. See *Young, supra*, at 807.

Similar questions might also arise regarding *qui tam*

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actions, see, *e.g.*, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 771–778 (2000); suits involving “next friends” litigating on behalf of a real party in interest, see, *e.g.*, *Whitmore v. Arkansas*, 495 U. S. 149, 161–166 (1990); or shareholder-derivative suits, see, *e.g.*, *Gollust v. Mendell*, 501 U. S. 115, 125–126 (1991). There is no more of an agency relationship in any of these settings than in the instant case, yet the Court has nonetheless permitted a party to assert the interests of another. That *qui tam* actions and “next friend” litigation may have a longer historical pedigree than the initiative process, see *ante*, at 12–13, is no basis for finding Article III’s standing requirement met in those cases but lacking here. In short, the Court today unsettles its longtime understanding of the basis for jurisdiction in representative-party litigation, leaving the law unclear and the District Court’s judgment, and its accompanying statewide injunction, effectively immune from appellate review.

### III

There is much irony in the Court’s approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court’s opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, see, *e.g.*, *Allen v. Wright*, 468 U. S. 737, 750–752 (1984), here the Court refuses to allow a State’s authorized representatives to defend the outcome of a democratic election.

The Court’s opinion disrespects and disparages both the

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political process in California and the well-stated opinion of the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court's opinion reflects a better understanding of the dynamics and principles of Article III than does this Court's opinion.

Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject. As the California Supreme Court recognized, "the question before us involves a fundamental procedural issue that may arise with respect to *any* initiative measure, without regard to its subject matter." 52 Cal. 4th, at 1124, 265 P. 3d, at 1005 (emphasis in original). If a federal court must rule on a constitutional point that either confirms or rejects the will of the people expressed in an initiative, that is when it is most necessary, not least necessary, to insist on rules that ensure the most committed and vigorous adversary arguments to inform the rulings of the courts.

\* \* \*

In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over

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a century. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign.” *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991). 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, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative’s proponents to defend the law if and when the State’s usual legal advocates decline to do so. The Court’s opinion fails to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.